

## Chapter 1

### **Outline of an alternative research agenda on disability justice**

**Abstract:** This chapter outlines the central research question, justifications and main argument of the book. It introduces and defines the concept of disability justice and highlights how it is a neglected subject in the literature on African philosophy and African legal philosophy. After introducing the conventional lines along which the debate on disability justice proceeds in the literature on human rights and legal and political philosophy, the chapter outlines the problems that have given rise to the argument of this book resulting from African philosophy: the omission of people with disabilities from the literature on persons and community. This not only clarifies why African philosophy provides an appropriate context in which to explore these issues, but also justifies why the question of disability justice should be addressed through an African legal philosophy, even though questions about its meaning and existence remain unsettled. The chapter concludes by outlining the argument of the book.

**Keywords:** Disability justice; Human rights; Capabilities; Community; African philosophy; People with disabilities.

## 1.1. Introduction

Take a walk through the main streets of Jos (the Nigerian city where I was raised) and you are likely to encounter a range of people, who are either unable to see, hear or walk, begging to pedestrians and motorists for their daily needs. It is also not uncommon to come across people with mental disorders also wandering across the main streets, with pedestrians and motorists doing their best to avoid them. Others with similar or different mental disorders are simply locked away either at home or in some type of institution, where they are often subjected to the most de-humanising forms of treatment. Many people with disabilities in Jos have been born with their condition, while in others it has emerged at later stages in life, either caused by physical injury, traffic or industrial accidents, civil conflict, through the process of ageing or through sickness or disease, to name just a few reasons. For most such people, it is the physical and social world – especially the cultural attitudes of the people around them – that is both a source and a consequence of their condition, especially the resultant exclusion from family, community and society life. It should come as no surprise that these people – commonly described as people with disabilities (a human condition with a diverse and unsettled range of meanings that stretch across the biomedical, psychological, social and cultural domains) – rank among the poorest, marginalised and excluded in Jos in terms of access to food, healthcare, shelter, employment opportunities and other public goods and services. Social stigma and resentment contribute to their life of marginalisation and isolation, with begging as the only means for them to survive. For many people with disabilities begging is not an option; it's the only choice they have. But begging is not simply an economic activity; it is one of the profound effects of the social stigma, which contributes to the internalisation of a societal constructed role and perception of people with disabilities (Groce et al. 2014, p. 5).

In reflecting on these images, I have pondered, as I am sure many residents of Jos have, about how and what these people eat, where they live and under what conditions, or whether they have any family or friends. Although many residents of Jos often respond to the dehumanising experiences of people with disabilities in the best way they can (whether it is motivated by compassion or religious conviction),

most disabled people are the recipients of unwitting silence and derision by a clear majority of people. Many residents of Jos want nothing to do with them or fail to see them, or to even recognise that people with disabilities exist. Attitudes towards people with disabilities are analogous to the fear of contagion. It is as if acknowledging that they exist or even gazing at them will lead to some type of contamination. This has made impairments or disabilities a taboo subject, one hardly discussed in public and private circles.

Although the central thrust of this book emerged from my intention of writing about the exclusions or injustices suffered by people with disabilities in Jos, and especially what could be done about it through the language of human rights, it became obvious to me, after I began my research, that the image of Jos above tells a common story of villages and cities across Africa. From Ethiopia (Groce et al. 2014), Egypt (McGrath 2010), Ghana (Morgan 2016; Baffoe 2013; Human Rights Watch 2012a), Senegal (Jolley et al. 2017; Kumar 2010), Sudan (Human Rights Watch 2012b), Mali (Jolley et al. 2017), Uganda (Human Rights Watch 2010a), Kenya (Human Rights Watch 2010b), Malawi (Amnesty International 2018, p. 248) to South Africa (Black and de Matos-Ala 2016), people with disabilities across Africa are confronted with similar, if not worse, experiences of the type found in Jos, Nigeria. I have only listed these countries to provide an anecdote; it has not been an attempt to empirically describe the totality of the injustices or experiences of people with disabilities in Africa's 54 countries. Africa is indeed too vast and diverse to draw such conclusion or to give an exhaustive account of the range of experiences people with disabilities have or of the most common types of disabilities. Africa's size, diversity and pluralism not only make it difficult to draw general conclusions, but also imply that the injustices and society or community experiences of people with disabilities are unlikely to be the same. Their experiences are likely to be better or worse depending on the country involved.

It is true that not all people with disabilities in Africa must resort to begging, as highlighted above. A certain number of people with disabilities have certainly been able to excel in their careers, either working for their government or involved in politics, business, academia, the arts, media or other walks of life. The absence of precise and comprehensive data on disabilities in the continent is one of the biggest

obstacles facing disability justice (Eide and Loeb 2016, pp. 63–64) and symptomatic of the neglect of and difficulty in responding to the needs of people with disabilities by government officials, public policy and law-makers. From available statistics, however, 80 million out of one billion people with disabilities across the world are African (World Health Organisation (WHO) and World Bank 2011). While the figure provides an approximate number of people with disabilities in Africa, it gives no indication of the nature of disabilities, how they are distributed or the demographic most affected. Without a doubt, the figure obscures the faces (i.e. young and old, men and women, girls and boys) behind the statistics, as well as fails to convey the nature of their dehumanising community and societal experiences. Since people with disabilities tend to be the worse-off in populations across Africa (and indeed the world), the figure gives some indication of the potential scale of the exclusions. Without attempting to unfairly categorise all people with disabilities in Africa (or suggest that all impairments or disabilities are negative or unfortunate), it is uncontentious that they rank amongst the poorest and most marginalised people on the continent who suffer the most heart-wrenching kinds of exclusion. Indeed, immersing myself in the literature and in some of the most horrific stories of the injustices or experiences of people with disabilities in Africa in media news reports, documentary films and photographs in newspapers and magazines has made this book very difficult to write. This has not been made easy by the term *disability*, the frequent way of defining the lack of a basic physical, mental or sensory human functional capacity, which masks its great diversity and the degree of sensitivity it elicits. Disability is certainly not a straightforward concept as it often appears in common usage. Not only do the distinctive features between the range of disabilities or people with disabilities in various places require careful or delicate consideration, the unconscious choice of language or terminology may easily or surreptitiously reflect and reinforce pejorative attitudes towards people affected by this human condition. It is precisely for these reasons that terms like *the handicapped*, *the cripple*, *the retarded*, even the often-used notion of *the impaired* and many others, including their linguistic and cultural equivalents across the world, are slowly disappearing from use in contemporary discourses on disability. Although the preferred term *people with disabilities* used in this book may itself be

subjected to criticism for failing to appreciate the important conceptual distinction between *impairments* and *disabilities*, the book is nevertheless not unmindful of that distinction and the complex and interactive nature of *impairments* and *disabilities* (WHO and World Bank 2011, p. 4). While the subject of disability invokes a wide variety of issues, ranging from questions of abortion to end of life, my analysis in this book does not cover those topics, but rather focuses on questions of societal exclusion and marginalisation; the ones typically found in the literature on justice, which I outline next.

## 1.2. Disability Justice

Disability justice has emerged as an attractive conceptual frame of reference for describing the range of struggles for the inclusion of people with disabilities in countries across the world. Although disability injustices are of immense variety and carry a complexity of meanings, disability justice can be reduced to two broad categories. Disability justice is predominantly a human rights-based phenomenon with antecedents in older agitations for disability rights by the disability rights movement (Zames and Fleischer 2011; Bagenstos 2009; Hurst 2003) in the United States of America (USA). Agitations and forms of activism of the disability rights movement challenged conventional understandings of disability in a variety of fields, including (as demonstrated below) the Western tradition of legal and political philosophy. Despite being a diverse movement composed of diverse groups sometimes with conflicting goals and aspirations, the value of independence has been a unifying ideal to be protected by the disability rights movement in contrast to and against the paternalism, charity and pity of parents, professionals and bureaucrats (Bagenstos 2009, p. 73). Independence was not simply defined as a physical attribute, but referred to the ability to exercise agency, freedom, self-help, self-discipline, personal responsibility and to exercise a range of lifestyle choices open to a person with a disability, including what type of services they would require to integrate and fully participate in community life.

The emergence of the United Nations Convention on the Rights of Persons with Disabilities 2006<sup>4</sup> (the Convention) signified, amongst other things, a conceptual shift from a disability civil and political rights-based to a universal human rights conception of disability justice. With representatives of the international disability rights movements involved in the drafting process of the Convention, the human rights treaty culminated three decades of activism for a global instrument (Della et al. 2017; Meekosha and Soldatic 2011, p. 1386). Despite being closely aligned with and influenced by the social model of disability, which marks a shift from individualistic and medically determined solutions to environmentally focused ones for people with disabilities, the Convention still retains individualistic attributes in the form of values of independence, autonomy and self-sufficiency. Because it is influenced by the social model of disability, the human rights-based approach to disability justice is neutral about how impairments are produced or caused (Soldatic and Grech 2014). Nevertheless, the Convention is still an important instrument for the pursuit of disability justice across the globe.

Although as many as 48 out of 54 African countries have signed and ratified the Convention since its inception, while 49 African countries have signed and ratified the Optional Protocol, people with disabilities in Africa have not experienced the type of social change anticipated by these international instruments. In chapter two of this book, I argue that it is not the absence of laws and policies that has been the obstacle to disability justice in Africa, but the inability of existing human rights laws and policies to challenge negative cultural beliefs and social perceptions of disability (Mostert 2016, p. 7; Devilieger 1995, p. 87; Talle 1995, p. 67). Underexplored in the human rights literature is how African ethical and moral values can contribute to remedying cultural beliefs and perceptions of disability. What is striking is that cultural perceptions of disability have contributed to much societal exclusion, including attitudes of government officials, law and policy-makers, who have the primary responsibility to address the exclusions experienced by people with disabilities. Cultural perceptions of disability are more common in the

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<sup>4</sup> The United Nations Convention on the Rights of Persons with Disabilities came into force on 3rd May 2008.

anthropological literature on Africa, which has ranged from medical approaches on illness and disease to cross-cultural conceptions of disability and impairment. In this body of work, a disability is defined as a cultural phenomenon, which can be conceived in different ways according to the culture, group or societal practice concerned. Culture is conceived in relative terms emphasising that the treatment of people with disabilities will vary in different communities across the world. Along the lines of the social model, a disability is treated as a socially constructed phenomenon, which results from societal perceptions, prejudices, aesthetic and normative bodily standards and behaviour as opposed to a functional loss or biomedical impairment (Etieyibo and Omiegebe 2017; Reid-Cunningham 2009, p. 104; Shuttleworth and Kasnitz 2006; Helander 1995; Ingstad and Whyte 1995).

While there is some consensus that cultural responses to disabilities are not always negative, as some people with disabilities may be accorded with certain privileges, enjoy a supernatural status or a valued societal role, it is, however, mostly a negative experience, one that accounts for the stigmatisation as well as the social and cultural exclusion of such individuals. Culture is central to how impairments and functional limitations are defined, as well as the inclusionary and exclusionary social responses to them. Although negative cultural perceptions of disability are difficult to alter, the human rights literature on social change operates at a distant terrain that fails to encourage the engagement with local factors, such as the perceptions and beliefs that contribute to the exclusion and violation of the rights of people with disabilities. Previous studies in this area attribute social change to external factors and fail to engage with internal factors, which may or may not contribute to human rights violations.<sup>5</sup> By the same token, the human rights literature on social change, especially the practical approaches influenced by it, leaves little room to engage with other ethical and moral values that may be compatible with it, for instance, the extent to which attractive African ethical and moral values can contribute to remedying the range of exclusions suffered by people with disabilities. Most of the focus is, rightly, on the

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<sup>5</sup> My focus is on the literature on human rights and social change, which treats change largely as an external product of the norms of the international human rights system and its institutions. In doing so, the literature does not pay sufficient attention to internal factors in obstructing or contributing to social change.

normative power of human rights. However, this overlooks the potential of a human rights discourse enriched by attractive African ethical and moral values. Human rights and anti-discrimination law are important. But it is also important to examine how African ethics and morality can serve as an agent for social and cultural change. It is not enough to show the dangers of negative cultural perceptions of disability – it is also important to identify and show, especially where they exist, how attractive ethical and moral values can contribute to challenging these negative perceptions. Negative cultural perceptions of disability should not be left unchallenged, especially from the perspective of attractive ethical and moral standards internal to Africans. At present, the cultural terrain appears to have been abandoned by the failure to challenge and counter those negative perceptions of disability. Although I remain sceptical carrying out this objective exclusively in human rights terms, I nevertheless consider in chapter two the prospect of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018 (the Protocol) to provide an alternative path to disability justice through the promotion of positive African values.

The second approach to disability justice can be deciphered from a variety of writings on the concept of justice in the Western tradition of legal and political philosophy. This approach rarely features in the African literature on disability studies or in law and policy initiatives, perhaps because it lacks the kind of institutional framework available through international human rights law, even though the gradual awareness of questions of disability in international development discourse may alter things in the future. In this context, the literature on disability justice emerges as a response to the omission of disability in foundational or classical writings within this field. Indeed, disability justice is more accurately understood as an umbrella term for the diverse attempts to expand the scope of various theories of justice to include people with disabilities. This implies that disability justice is really a vehicle for achieving a conception of justice. For instance, disability justice may be a criterion for establishing anything from egalitarian, utilitarian to feminist conceptions of justice. As such, there is still no consensus on what disability justice means or the type of response it requires. Some theories have formulated responses along the lines of the medical conception of disability, which



prioritises the redistribution of resources to correct and compensate individuals for having impairments, while others, following the social model of disability, focus on a range of measures, from structural changes to the design of society, reasonable accommodations to anti-discrimination laws.

Because the literature proceeds from an abstract and universal standpoint regarding both disability and justice, it is unclear how it takes account of the particularities of non-Western political societies, or how – unlike the human rights-based approach – it influences concrete national laws, institutions, policies, practices and forms of activism in non-Western societies. Regardless of the conception, justice refers to a set of abstract and universally shared values and principles applicable to all societies in the world, including African societies. As rich and diverse as the literature may be, a common tendency is not only the absence of considerations about justice and disability from African intellectual traditions (or other traditions in the Global South), but also the implications this may have on dominant conceptions of both the former and latter. Not only are theories of justice developed from Western experiences and cultural reference points, a substantial proportion of the literature is ‘specifically related to Western forms of social order’ (Woodman 1996, p. 153). There seems to be little appreciation towards the diverse range of injustices across the globe, including injustices experienced by people with disabilities, which have (among other reasons) persisted not only because of the inadequacy of dominant legal and political concepts in responding to them, but also the parochial nature of these leading concepts and institutions. What has not been sufficiently understood and analysed is how these injustices and prospects for redress across the world today depend not only on the possibility of re-thinking the premises of dominant legal and political concepts, but also making them reflective of the intellectual diversity of the world. By seeking to broaden the disability justice canon, the book not only seeks to remedy some of the limitations of dominant legal and political concepts integral to it, but also to broaden their vistas to embrace perspectives of communities whose voices and intellectual viewpoints have been marginalised in the most decisive debates about disability and justice.

It would be misleading to suggest that the neglect of African conceptions of justice and disability in the literature on African

philosophy can be attributed to the parochial nature of the Western legal and philosophical tradition. As I demonstrate below, African philosophers and African legal, moral and political philosophers, whose primary responsibility it is to shed light on African conceptions of justice and disability, have not taken up this challenge. However, the neglect of disability and justice by African philosophers is equally a consequence of the historic prejudice surrounding the existence of African knowledge that dates back to the Enlightenment and colonialism, as well as implicit in the academia today. Constantly confronted with prejudice and doubts about the existence of African philosophy, African philosophers (Hountondji 1983) have given overwhelming priority to questions about its identity, existence and meaning over its relevance to historic and contemporary problems, such as the exclusions suffered by people with disabilities. It seems logical to respond to prejudice by showing the uniqueness and the strength of the African intellectual tradition. An emphasis on uniqueness and strength, however, cannot easily admit to weakness, insufficiency and vulnerability, noteworthy features of what a disability implies. There is indeed a plausible argument that the neglect of disability in the literature on African philosophy is a legacy of colonialism in particular, which has had the effect of stigmatising and defining as inferior all aspects of the lives of the colonised, including their cultures, languages and bodies (Appiah 1992, p. 7). Notions of personhood in African philosophy, which are discussed in section 1.3 below, are very much products of this colonial encounter. It is only logical that the response to the legacy of colonial exclusions has been to demonstrate what is attractive and unique about African identity, which has led to an essentialist notion of person that understates human vulnerability, weakness, fragility and frailty by giving prominence to a strong and unblemished (but compassionate) person.

Martha Nussbaum's (Nussbaum 2006) capabilities approach – adapted from Amartya Sen's (Sen 2001) version of the concept – constitutes an important exception and it is the most significant contribution to disability justice today. Nussbaum's approach is predicated on a threshold of capabilities for every citizen across the world, including disabled persons, and specifies the institutional arrangements and responses to those who fall below it. Although Nussbaum's approach is avowedly universal, it is sensitive to local

differences and embraces cross-cultural perspectives. A detailed critique of the capabilities approach in terms of its applicability to African societies would certainly make an important contribution to knowledge, but this would need far more detailed discussion than is intended in this book. In chapter three, I restrict my analysis to the extent to which Nussbaum's capabilities theory pays sufficient attention to the concept of community to justify and highlight the significance of the approach in this book. Although Nussbaum's emphasis on the Aristotelian notion of personhood and the capability of affiliation implies the appreciation of the relational nature of human beings and the value of community, these elements stand in tension with the individualism of the political liberalism from which the capabilities approach emerges. In contrast to scholars that have attempted to refine the capabilities approach along relational or collective lines, I argue that the reasons that have made it necessary to modify Nussbaum's approach point to the absence of and the need for a robust and coherent alternative framework that systematically explains the advantages as well as the law and policy implications of considering disability justice from a community ideal.

### **1.3. Is a Disabled Person a Person through Other Persons?**

*Ubuntu* is difficult to render into a Western language. It speaks of the very essence of being human. [...] This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life. We say, 'a person is a person through other people'. It is not 'I think therefore I am'. It says rather: 'I am human because I belong.' I participate. I share.

(Tutu 1999, pp. 34–35).

This book is about the possibility of an African legal philosophy of disability justice that mirrors the type of relational community ideal depicted in the epigraph above. It proposes a legal philosophy of disability justice comprised of African ethical ideals of community, human relationships and asymmetrical obligations, which, in turn, will serve as a criterion for evaluating existing laws, practices, legal and political institutions, as well as creating new ones to ensure they are inclusive to people with disabilities. Since this is an entirely different perspective from the human rights and capabilities approaches introduced in the previous section, as well as covering new ground in the literature on African philosophy, it will be important to spend some time sketching out a picture of the problems that give rise to and justify the argument of this book.

Despite the extremely unbearable and dehumanising conditions many people with disabilities in Africa currently find themselves facing, I have been struck by how this seems to have been taken for granted in the most attractive literature on African philosophy, which has articulated some of the most appealing ideas on what it means to be a person.<sup>6</sup> The attractiveness of the concept of the person is that it implies being a person in relation to other persons in contrast to the abstract, ahistorical and autonomous individual found in the dominant liberal strand of Western legal and political philosophy. As commonly discussed in the literature, a person cannot sufficiently be appreciated outside his or her enviroing community, even though there are differences in what the community means, its foundational value, its constitutive role in defining the person, as well as whether it is metaphysical (Bujo 2001, 1998; Magesa 1997), normative, instrumental

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<sup>6</sup> There are some references to disability in the literature, but there is no comprehensive treatment of the subject, see: Manzini (2018); Metz (2018); Maybee (2017); Bujo (2001); and Tangwa (2000). Manzini (2018) offers a critique of Menkiti's conception of personhood and African communitarianism for being ableist, gendered and anti-queer. The subject receives more detailed treatment in Maybee's (2017, pp. 311) work than the others, who relies on the significance of the body in certain strands of African philosophy as a critique of the social model of disability. In an analogy for his conception of distributive justice, Metz (2018, pp. 19–20) refers to a child with a physical disability while Bujo (2001, p. 91) uses a fairytale of a hen with a disability to underscore the moral educational value of the oral African philosophical tradition. Tangwa (2000, p. 42) refers to mentally impaired persons in relation to his conception of personhood, which I discuss in more detail below.

(Gyekye 1997) or intrinsic in nature (Metz 2012, 2007; Tutu 1999). Despite these differences, it is important to point out from the outset that the African philosophical communitarian tradition and various African conceptions of community are distinctly relational in diverse ways and at various levels. African philosophical communitarianism is non-binary, non-dichotomous or non-Cartesian and conceives of relationships and complex interactions, such as between the mind and body, the living, ancestors and the unborn, the spiritual and the material world, between immanence and transcendence, as well as between individuals and community, the environment, the public and private, among other things (du Toit and Coetzee 2017, p. 341).

### 1.3.1 Group-Based Conception of Community

Although relationality can be conceived in diverse ways, my focus in this book is on the African conception of community that prioritises intrinsic and horizontal relationships between people as its highest value. This can be contrasted with the most dominant conception of community, which treats the idea of community as the property of a group or a relationship between individuals and their groups, which defines the person either in metaphysical or normative terms. This refers to the group-based conception of community, which is best illustrated by the work of Ifeanyi Menkiti (Menkiti 2017, 2004b, 1984). Menkiti's *Person and community in traditional African thought* (Menkiti 1984) is considered as the *locus classicus* of the group-based conception of community (Ikuenobi 2017; Molefe 2016; Behrens 2013a). Menkiti argues that the community – defined as a thoroughly fused, organic whole and metaphysical independent collective entity – is responsible for transforming human beings (i.e. typically infants defined by the absence of moral function) into persons through the attainment of excellence derived from processes or rituals of social incorporation (Matolino 2011, pp. 28–33). For Menkiti, the African concept of community is unique because it 'is a collective in the truest sense' (Menkiti 1984, p. 180), a thoroughly organic, relational, 'and superior to and different from other constituted human groups' (Menkiti 1984, p. 180), most especially associations. Apart from being an ontological independent entity, which assumes primacy over individuals, the group-based conception of community, according to

Menkiti, is ‘organized around the requirement of duty’ and not ‘the postulation of individual rights, which are antecedent to the organization of society’ (Menkiti 1984, p. 180). Although Menkiti’s discussions on duties or obligations (and his suggestion that personhood does not depend on the existence of consciousness, memory, will, soul, rationality or mental function) is arguably an attractive feature of his work with potential implications for the recognition of a person with a disability, it is, however, on the subject of the path to personhood that initial anxieties may be raised about the inclusion of such persons within the community framework. While personhood must be earned ‘in direct proportion as one participates in communal life through the discharge of the various obligations defined by one’s stations’ (Menkiti 1984, p. 176), it can also be denied due to the inability to perform one’s obligations typically understood as virtues and human excellences (Menkiti 1984, p. 171). Therefore, the power to grant or withhold the status of a person is exclusively vested in the community (Flikschuh 2016, p. 5). An infant, defined by the absence of moral function, can only be transformed into a person, with an ethical sense of maturity, exclusively through the performance of duties (Menkiti 1984, p. 176). To illustrate this point, Menkiti draws parallels between the ethical sense of personhood and John Rawls’ adaptation of Hume’s idea of the sense of justice, which implies that only an individual capable of a sense of justice is owed duties of justice. The capacity or at least the potential for moral personality is the sufficient condition for equal justice (Menkiti 1984, p. 176). Like Rawls, ‘the capacity for moral personality, to understand and perform one’s obligations’, is an essential attribute for Menkiti’s African conception of personhood (Menkiti 1984, p. 176). In following Rawls (Rawls 1993, p. 302), Menkiti’s concept of personhood is guilty of repeating exclusionary features of his framework, which relegates people with disabilities to the background as is highlighted through Nussbaum’s work in chapter three of this book.

What is more problematic is that by making the performance of duties the exclusive criteria for becoming a person, it provides plausible grounds to be anxious about the negative implications this may have on people with disabilities, like anxieties about Menkiti’s treatment of children or infants (Matolino 2011; Gyekye 1992). Without, in any way, equating people with disabilities with children, it is only

logical to see how the inability of Menkiti to assign personhood to children or infants because of their lack of ethical maturity might have similar implications on certain persons with disabilities. Regardless of how attractive this intense sense of duty or obligation to community might be, it leaves persons, particularly those with cognitive or behavioural conditions, on very unstable foundations. There is a further difficulty (which I return to below because it does not only apply to Menkiti's account) which is that the emphasis on duties or obligations demand a high standard of mutual reciprocity that takes for granted the uniqueness and dependency of certain, but not all, people with disabilities (Manzini 2018, pp. 23–29). The difficulty in recognising people with disabilities as equal persons because of their inability or limited capacity for reciprocation constitutes a fundamental obstacle to the extension of the much-needed obligations to them.

### **1.3.2. Relational Conception of Community**

The group-based conception can be contrasted with the distinctively horizontally relational one, which I not only find more attractive, but also rely upon as a foundation or meta-ethical principle that grounds the proposed legal philosophy of disability justice. In this context, the idea of community is an ethical and relational ideal founded upon intrinsic and horizontal obligations between members comprising it. It is through relationships between people that a community is formed and derives its meaning and essential properties. The attractiveness of this idea of community is its directness, as it neither exists as a metaphysical entity, nor has an existence that is either separate or takes precedence over or supersedes the existence of its members. A few notable examples from the literature underscore this point. Benezet Bujo alludes to a relational community ideal when he argues that 'The person is not defined as an ontological act by means of self-realization, but by means of "relations"' (Bujo 2001, p. 88). Drucilla Cornell eloquently describes the relational ideal as an ethical community, which '... is inseparable from how we are both embedded in and supported by a community that is not outside us, something "over there", but is inscribed in us' (Cornell 2014, p. 161). To reiterate this point, Cornell argues in a different context that *Ubuntu* is 'an interactive ethic, or an ontic orientation in which who and

how we can be as human beings is always been shaped in our interaction with each other' (Cornell 2005, p. 205). Not only are relationships the constitutive feature of the idea of community, but they also define its moral or ethical quality, since it comprises of people directly connected to, projected to and obliged to each other as extensions of themselves.

The relational conception of community offers a similar notion of person as the group-based conception, which attaches the same level of significance to obligations, often in the form of virtues and human excellence. In the literature, the maxim associated with the Southern African concept of *Ubuntu*, 'a person is a person through other persons' (Tutu 1999, pp. 34–35), is arguably the most attractive way of understanding the relational ideal of community and the type of ethical obligations it entails. *Ubuntu* has no settled or agreed meaning and writers are keen to point out that it has no equivalent in the English language. However, it appears to refer to a relational community ideal, which implies that, as Desmond Tutu describes in the epigraph of this section, '... my humanity is caught up, is inextricably bound up, in [yours]. We belong in a bundle of life'.<sup>7</sup> (Tutu 1999, pp. 34–35.) Thaddaeus Metz, who is one of the leading advocates of the relational conception of community,<sup>8</sup> describes *Ubuntu* as a normative principle (although it sometimes refers to metaphysical ideas about the interdependence of beings in the universe) that undergirds an ethical path to personhood, which is exclusively achieved through a community, comprised of harmonious relationships, which entails sharing identity and exhibiting solidarity with others (Metz 2014, 2011, 2007). Like the group-based conception, a person is not only different, but also ethically and morally superior to a human being. To grasp the full implications of this point it is helpful to quote Metz, 'a person is a person' which means 'that someone who is a person, in the sense of deliberate agent such as a normal human being, ought to strive to become a real or genuine person, that is, someone who exhibits moral value' (Metz 2015, p. 187). The ability to display ethical traits or human excellence is an accomplishment that can only be

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<sup>7</sup> Word substitution is the author's own.

<sup>8</sup> Metz argues that the relational conception of community is more widespread than acknowledged in the literature.



achieved by persons through mutually reciprocal obligations. It also follows that those who are unable to or are yet to display these ethical traits or are only human beings, but not persons, which demands a higher standard of moral value and moral consideration. Metz argues that ‘sub-Saharan morality is a “self-realisation” or “perfectionist” ethic, akin to Aristotelianism’ (Metz and Gaie 2010, p. 275), even though it is distinct because it is thoroughly relational as well as ‘defines relationships with others, namely, in strictly communal terms’ (Metz and Gaie 2010, p. 275).

Some readers might question my categorisation of the African concept of community into relational and group-based conceptions. Indeed, it would be misleading to suggest that the relational and group-based conceptions of community are mutually exclusive, since African philosophical communitarianism eschews dichotomies. Except for contemporary place-based communities, such as local communities in neighbourhoods in certain African cities, it is difficult to provide an empirical example of the African conception of community that is not some type of ethnic, kinship or religious group. Similarly, it is not that group-based considerations are unimportant to the relational conception, it is that they are not central to it (Okeja 2018, p. 216). Human relationships and not the group entity, even if it is that group entity or identity that makes such relationships possible, is the most important consideration. It is also the case that a person’s social relationships are nourished by different communal relationships, which are not constituted by a specific group. Both conceptions of community not only attach a paramount role to the ability, capacity or potential of performing ethical obligations, but also (ability, capacity or potential for) reciprocation to the attainment (or otherwise) of personhood. However, because the conceptions of community differ, the type and directions of obligations would also be different. Since the group-based conception via Menkiti refers to an organic, thoroughly fused and metaphysical independent collective, a person’s obligations are likely to be vertical, proceeding from the individual to the community and to others in the community. Although a person’s obligations are also directed to other persons based on this conception, the difference between it and the relational conception is that it is mediated through and primarily determined by the group identity. In Metz’s version of the relational conception of community, a person

deserves moral consideration regardless of whether he or she is a member of the group.

In contrast, the obligations anticipated by the relational conception of community (for instance, Metz's account) are decidedly horizontal, since the community is constituted by the relationships between members that comprise it. Despite differences, both conceptions of community are united on the significance they attach to the role of mutual and reciprocal obligations in becoming a person, something that leads to a moral distinction and hierarchy between persons and human beings. Only persons can act ethically and morally as well as become the primary subjects of moral consideration. Obligations may be regarded as the ultimate yardstick for measuring equality in the African communitarian tradition in the same way rights are to the liberal legal and political philosophy.

As attractive as the relational ideal of community might be, the literature on the subject hardly demonstrates awareness of or sensitivity to people with disabilities, a feature that is also typical of the group-based conception of community. The distinction above between persons and human beings, especially the hierarchy attributed to the former over the latter, presents the most fundamental obstacle for the moral consideration of people with disabilities. Since the moral value or worth of a person cannot be understood inexplicably apart from the capacity to take part in a circle of reciprocal ethical obligations, it logically follows that this might have negative implications on certain people with disabilities, especially people with severe cognitive, psychological and behavioural disabilities. This requirement will also have implications on those with extreme physical disabilities as a result of their inability to exhibit these moral attributes of mutual reciprocation. It is this specific feature of African conceptions of community that presents challenges for people with disabilities. However, it may not necessarily lead to the denial of their status as human beings but lead to their inferior status and make them less worthy of moral consideration. Apart from being articulated in able-bodied terms, the literature on personhood is also problematic in the sense that it is unable to draw an equivalent level of significance between the moral worth of people without disabilities and people with disabilities. Responding to some of the emerging literature (Chataika and McKenzie 2013; Kathard and Pillay 2013, p. 86; Mji et al. 2011)

proposing the concept of *Ubuntu* as a model for disability studies, Goodley and Swartz (Goodley and Swartz 2016) pose questions about its inclusiveness in relation to people with disabilities. Citing Van Zyl's (Van Zyl 2011) criticisms of *Ubuntu* approvingly, Goodley and Swartz (Goodley and Swartz 2016, p. 78) question its capacity for inclusion, suggesting that 'it promotes inclusion for those already considered to be part of a circumscribed community' (Goodley and Swartz 2016, p. 78) [and] 'It is by no means clear, in this view, that disabled people would automatically be seen to be included' (Goodley and Swartz 2016, p. 78). Of course, Van Zyl's point is also that *Ubuntu* is based on a kinship system, which except for women, is only inclusive to those who are part of it. Since the same criticism is also made about the relational conception of community I will revisit it in chapter four, but for present purposes it is pertinent to say it is not always understood in such relativist and parochial terms.

Goodley and Swartz do not reject the prospect of *Ubuntu* in disability studies but point to the need for the critical engagement with it and the implications it may have for people with disabilities (Goodley and Swartz 2016, p. 78). I share the same anxiety with Goodley and Swartz, not only that there has been little comprehensive engagement with *Ubuntu* in relation to people with disabilities, but also that the literature that exists has assumed its inclusiveness (Kanga 2013, pp. 234–235). Indeed, my anxiety is expressed through the title of this section 'Is a disabled person a person through other persons?' While my focus is not on *Ubuntu* per se, but since it's an ethical ideal that stems from the relational conception of community that I am relying upon in developing my account of disability justice, I am on the whole responding to questions about its inclusiveness.

Of course, not only is there a wide variety of disabilities, they are also so diverse that it makes generalisations difficult. On the surface, there is no obvious reason a person with a disability should not be held to the same standard of reciprocal obligations as people without disabilities, since the obligations often imply the acquisition of virtues or human excellences – typically compassion, care, charity, generosity, benevolence, kindness, help, respect and hospitality, among others. It is possible that my anxieties about people with disabilities may be misplaced since the failure to realise personhood is exclusively defined as a form of unethical, morally objectionable

conduct or a vice (i.e. cruelty, wickedness or egotism), rather than a rare lapse or failure of moral commitment (Gyekye 1997, p. 49). Significantly, individuals who by choice live in isolation or in detachment from their community also fall into the category labelled as not being persons (Gyekye 1997, p. 49). Although a detached individual may not be a person, he or she is still a human being and the object of moral consideration (Gyekye 1997, p. 49), even though it might not be to the same degree as persons. However, the ability or capacity to perform an ethical obligation or the ability or capacity for reciprocity would be subject to the kind of disability concerned, especially if this is contingent on social or environmental factors. It can also be presumed that the rate of poverty among people with disabilities in Africa would constitute a huge obstacle to their ability or capacity for obligations. Cultural responses to bodily, cognitive and behavioural impairments will also add a further complexity to the nature of exclusionary experiences by people with disabilities, as the anthropological literature on disability cited in the previous section illustrates.

The ability or capacity to perform ethical obligations is more difficult to anticipate in regards to people with extreme physical disabilities, ranging from those with spinal cord injuries, cerebral palsy, cystic fibrosis and multiple sclerosis, to people with severe cognitive impairments, mental illness and brain damage, among other conditions. Apart from mobility, if speech and sight are preconditions for carrying out certain obligations to others, this would constitute an obstacle to people with such disabilities. Regardless of the type of disability, the ability or capacity to perform an obligation would also be contingent on the way in which it manifests in concrete or institutional terms. For instance, if the obligation manifests as an active or performative civic duty, such as compulsory military service, community service or some type of physical activity,<sup>9</sup> this would clearly take for granted the idiosyncrasies of some of the most vulnerable people with disabilities.

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<sup>9</sup> See, for example, The Banjul Charter, Article 29(2).

### 1.3.3. Symmetrical or Asymmetrical Obligations

Since the nature of obligations anticipated in regards to both conceptions of community imply the development of moral virtues and forms of human excellence (Gyekye 1997, p. 50), they certainly offer a framework to recognise and respond to the particularities of people with disabilities. This is especially the case, a point that I return to in chapter four, because obligations are treated as compulsory and non-supererogatory acts. In other words, it can be shown that they impose a strong obligation on people without disabilities to respond to the needs of people with disabilities. Although there is a benefit in thinking of obligations along these lines, as it can draw attention to the importance of the kind of obligations people without disabilities owe to people with disabilities, it nevertheless demands a standard of mutual reciprocity that takes for granted the uniqueness of certain, but not all, people with disabilities. The point I am trying to make is that the possibility of responding to the needs of or extending obligations to people with disabilities is contingent on recognising their equal humanity as persons. This is further contingent on whether obligations can be articulated in a way that emphasise asymmetry and not symmetry (i.e. 'mutual' recognition, respect, reciprocity or cooperation) that tends to dominate the literature. Mutual reciprocity is a strong undercurrent implicit in African conceptions of community. Mutual reciprocity is, of course, a prominent feature of Menkiti's group-based conception of community, which suggests 'personhood is the sort of thing which has to be attained, and is attained in direct proportion as one participates in communal life through the discharge of the various obligations defined by one's stations' (Menkiti 1984, p. 176). A similar conclusion is reached by Segun Gbadegesin, who argues that all members of a community are expected '... to play an appropriate role towards achieving the good of all' (Gbadegesin 1991, p. 65). Masolo says African communitarianism entails 'living a life of mutual concern for the welfare of others ...' (Masolo 2010, p. 240). A similar reference to mutual reciprocity is articulated by Gyekye, who nevertheless recognises how it is mediated by altruism when he writes:

Living in relation to others directly involves an individual in social and moral roles, obligations, commitments, and responsibilities, which the individual must fulfil. The natural relationality of the person thus immediately plunges her into a moral universe. Social life itself, thus, prescribes or mandates a morality that, clearly, should be weighted on responsibility for others and for the community, a morality that should orient the individual to an appreciation of shared, and not only individual, ends. Social reciprocities that are (or, should be) an essential feature of communitarian morality mandate concern for the interests of others, including recognizing the rights of other individuals. The communitarian morality should therefore be an altruistically freighted morality.

(Gyekye 1997, p. 67)

Mutual reciprocity is equally a feature of the relational conception of community as can be illustrated from a broad spectrum of views about *Ubuntu*. In his reflections on the impact of the concept of *Ubuntu* on South Africa's Truth and Reconciliation Commission (TRC), Tutu suggests that it, among other things, grounded a type of reciprocity between victims and perpetrators (Tutu 1999, p. 35). While Sanders defines *Ubuntu* as a type of radical reciprocity that makes 'no opposition, strictly speaking, between altruism – living for the other (*autrui*) – and self-interest' (Sanders 2007, p. 96), Stuit suggests that 'the role of reciprocity is crucial but contingent in ubuntu and might possibly not occur' (Stuit 2016, p. 50). Barbara Nussbaum (Nussbaum 2013) defines *Ubuntu* as the capacity to express reciprocity and mutual care among other values (Nussbaum 2013, p. 21). Also referring to *Ubuntu*, Mkhize argues 'A sense of community exists if people are mutually responsive to one another's needs ...' (Mkhize 2008, p. 39–40). Justice Ncobo is more explicit about the significance of mutual reciprocity required by *Ubuntu* in his dissenting judgment in the famous Southern African case of *Bhe and others v Magistrate, Khayelista and others*<sup>10</sup>

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<sup>10</sup> 2005 (1) BCLR 1 (CC) and 2004 (1) BCLR 27 (C).

A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among family members....It is a system of reciprocal duties and obligations that ensured that every family member had access to basic necessities of life such as food, clothing, shelter and healthcare.

(Justice Ngcobo in *Bhe* para. 163).

Although not at the core of his argument, mutual reciprocity is implicit in Metz account of solidarity entailed by his relational conception of community, which implies, among other things, acting in ‘mutual aid resulting from sympathetic altruism’ (Metz 2014, p. 139; 2011, p. 393; 2007, p. 337).<sup>11</sup> When writers appeal to human interdependence (Hoffman and Metz 2017, pp. 153, 156, 158 and 162; Waghid 2015; Waghid and Smeyers 2012) to describe *Ubuntu* or the nature of community relationships, or refer to cooperation (Masolo 2010, p. 240) as an important virtue to be cultivated, they arrive at the same conclusion about the significance of mutual reciprocity. The emphasis on mutual reciprocity is more vivid in Cornell’s work on *Ubuntu*, who argues the nature of obligations prerequisite to becoming a person is not altruistic in character. This is a conclusion that can be drawn from the following passage:

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

(Cornell 2014, p. 69).

The problem is that without some form of altruism or sacrifice, it is not clear how certain people with disabilities will be fully-fledged

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<sup>11</sup> I return to the question of altruism below to show how it can be used to offer a more inclusive account of community.

members of the community. Obligations in this case seem to have a degree of stringency that might prove too difficult for certain people with disabilities. My anxiety is further increased when considering the following passage, where Cornell specifies what it means to be an ethical human being:

We are required to take the first ethical action without waiting for the other person to reciprocate. uBuntu is not a contractual ethic. It is up to me. Thus, If I relate to another person in a manner that lives up to uBuntu, then there is at least an ethical relationship between us...The temporality of uBuntu is important here, for since we ‘are required to go first’ it may not be in my immediate to act ethically. For example, if I give a bottle of water to someone who is brutally thirsty I may get nothing back from that person, besides, possibly, a ‘thank you’. But twenty years down the line my daughter may find herself thirsty and without water, and someone will give her water she so desperately needs because I have helped build a community that lives by the demanding ethic which provides support for all the members of the community in the long run...

(Cornell 2014, p. 112).

In the passage above, Cornell seems to locate the attractiveness of *Ubuntu* in a system of indirect as opposed to direct mutual reciprocal obligations (Tullberg 2004).<sup>12</sup> Without in any way being critical of Cornell’s important contribution, I do however think altruism and asymmetry offer more plausible ways of explaining the nature of obligations required by the relational conception of community. It may seem unproblematic to describe the ethic as ‘the closest we have in Anglo-American terms is what you give out, you get back tenfold’ (Cornell 2014, p. 112), but what about those who are not able to give anything at all? What about people who are incapable of ‘acting first’ not out of a question of interests, but rather because of some type of bodily, cognitive or behavioural limitation or impairment? While they

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<sup>12</sup> Cornell’s argument is similar to Putman’s (2000) idea of generalised obligations.



may fall within the scope of the complex and indirect nature of obligations (i.e. being a beneficiary to the obligation of someone else's benevolent act) that Cornell speaks about, the peculiarities of people with disabilities seem at best secondary in this account of the African relational community ethic. It is for this reason that I argue that asymmetry and not reciprocity, regardless of how indirect it may be, is a better way of understanding the needs of people with disabilities among other vulnerable people. A similar point to the one I am making, although not in relation to people with disabilities, is made by Stuit, which can be used to highlight the limits of mutual reciprocity:

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

(Stuit 2016, p. 31)

Stuit's interpretation of *Ubuntu* (or more broadly the relational ideal of community) is not only attractive, but also points to the asymmetrical obligations it entails. It is difficult to generalise across the vast and diverse range of people with disabilities. I am certainly not suggesting that people with disabilities cannot contribute to or be recipients of mutually reciprocal relationships. While the ability or capacity to contribute to or benefit from mutual relations is contingent on the type of disability concerned, there is certainly a category of people whose disabilities prevent them from being able to take part or benefit from such mutual reciprocal notions of obligations. In this instance (even if this is not a typical case), what happens when the object of our obligations cannot reciprocate, recognise or simply acknowledge? Is such person held to the same standard of moral consideration as a person who can reciprocate or at least recognise or acknowledge the obligations? In other words, is a person who falls short of the ability, or has no potential or capacity to take part in a circle of obligations, a person?

Answers to these questions are not clear or obvious in the literature on African communitarian philosophy, even though there are some clues. These are comparable questions to that which have been raised about infants and children, especially in Menkiti's account of persons and community, even though my aim is not to draw a comparison between people with disabilities and children. To recall, for Menkiti, infants and children are not persons because of their absence of moral function, something which can only be attained at a later stage of maturity through the acquisition of excellences and rituals of social incorporation. Menkiti is not by any means suggesting that infants or children do not have a special place in the life of a community. Indeed, he stresses a community's responsibility to satisfy the biological needs of infants as well as to acquire the excellences necessary to become persons. However, because infants are at a stage of maturity that prevents them from taking an active part in the community, infants are not yet persons (Flikschuh 2016, p. 5). Although Kwame Gyekye questions Menkiti's characterisation of the concept of community, as well as the ethical qualities attached to rituals of incorporation as a precondition to personhood and why adults should have a superior predisposition for moral virtues, he does accept the distinction between persons and human beings. He attempts to appease the concerns about the status of infants and children by proposing an understanding of personhood as a complex interaction between its potentiality and actuality. For Gyekye, 'children are persons only potentially and will achieve this status of personhood in the fullness of time when they are able to exercise their moral capacity' (Gyekye 1997, p. 50). As attractive as this might be (and although similar conceptions of infancy or childhood can be found across the world), conceiving personhood in terms of its potentiality neither assures infants or children, nor people with disabilities of moral consideration, since there are possible negative consequences of failing to reach one's potential. In chapter four, I return to this question and discuss Metz's modal conception of capacity for moral status as a useful way to avoid these problems. Metz's modal perspective suggests that it 'is neither that a communal relationship itself has moral status, nor that only those who are in such a relationship have it but is rather that those who could be part of it have it' (Metz 2012, p. 394). All human beings have the capacity of being subjects and objects of community relationships,

even though human beings that are capable of being subjects or subjects and objects have a higher status than those that are merely objects. Interestingly, and although this is not only a feature of Metz's work, there is an overemphasis on subjectivity (i.e. perhaps because of the importance attached to perfectionism, virtues and human excellence) and a neglect of the object (or the moral patient) of community relationships in the literature. Although writers (Metz 2013, p. 13; Masolo 2010; Bell 2002, p. 66; Tutu 1999; Gyekye 1997) that appeal to the altruistic dimension of community relationships implicitly address this question, there is a limited understanding of who the object of community relationships is and the type or stringency of obligations that should be owed to her or him.

As attractive as Metz's modal perspective might be, since it does not imply that the lack of moral status should exclude moral consideration (Metz 2017, p. 280), it however may negatively impact on disabled persons because it maintains the hierarchy between human beings and persons, as well as ranking human beings according to degree of importance and measured by their moral status. Since certain disabled persons, especially those with cognitive and behavioural disabilities, or infants, the elderly or the temporarily or permanently ill, are the types of people that might only be objects of community relationships or even completely fail in this respect, they are not fully accounted for in the picture of moral life in Metz's relational theory of community.<sup>13</sup>

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<sup>13</sup> It is helpful to note that the work on African relational environmentalism (Bujo 2001, pp. 22–23; Tangwa 2004, pp. 387–395; Behrens 2010, pp. 470–480; 2013, pp. 55–72) may also be a way to better understand the nature of our obligations to people with disabilities, since it refers to non-reciprocal obligations to the environment, future generations and animals. However, because they tend to, but not always arise from metaphysical doctrines (Menkiti 2004a) or the ancestral realm, which I am generally trying to avoid as well as the conclusion that the only way to extend obligations to people with disabilities is by treating them as equivalent to the environment or animals.