

EAST AFRICAN LAW JOURNAL

SPECIAL ISSUE ON DISABILITY RIGHTS

(2016/2017)

ISSN 0070-797X

© University of Nairobi. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the University of Nairobi.

To place a subscription, contact:

School of Law
University of Nairobi
P.O. box 30197-00100
Nairobi
Tel: +254 20 2314371
Email: ealj@uonbi.ac.ke or privatelaw@uonbi.ac.ke
www.law-school.uonbi.ac.ke

Cover and Layout design:

Joyce Gichia
P.O. Box 45230-00100, Nairobi
Email: joyce.kabgi@gmail.com

Printed and bound by:

Colourprint Limited
P.O. Box 44466-00100
Nairobi
Tel: +254 20 2101740
Email: hallmark@colourprint.co.ke
www.colourprint.co.ke

EDITORIAL TEAM

EDITORS-IN CHIEF

Dr. Agnes Meroka
Dr. Juliet Amenge

MANAGING EDITOR

Prof. Winifred Kamau

ASSOCIATE EDITORS

Dr. Sarah Kinyanjui
Dr. Peter Onyango
Njaramba Gichuki
Leonard Aloo

SPECIAL EDITOR

Lawrence Mute

EDITORIAL ASSISTANTS

Dennis Nkaricha
Grace Wendo
Nduta Waweru
Leah Kanyangi
Esther Kanyangi

TABLE OF CONTENTS

Acknowledgements.....	V
Foreward.....	VI
Editorial.....	VII
The Right to Own and Manage Property and Finances by Persons with Psychosocial Disabilities in Kenya <i>Elizabeth Kamundia</i>	1
Western Liberalism, African Communalism and the Quest for Adequate Ideological Foundation for the Recognition and the Protection of the Rights of Persons with Disabilities in Kenya <i>Reginald M.J. Oduor</i>	29
Promotion, Protection and Monitoring: Implementing Article 33 (2) of the United Nations Convention on the Rights of Persons with Disabilities in Kenya <i>Miriam Nthenge</i>	50
An Appraisal of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa <i>Lawrence Mute and Elizabeth Kalekye</i>	68
Book Review: Arlene Kanter - The Development of Disability Rights under International Law: From Charity to Human Rights <i>William Oluchina</i>	91
Case Review: Criminal Appeal No. 17 of 2014 on the Capacity of Persons with Mental or Psychosocial Disabilities to Consent to Sex <i>Manyara Reginald Mworia</i>	98

ACKNOWLEDGEMENTS

The Editorial Board of the East African Law Journal acknowledges all the persons who contributed towards the successful publication of this Special Issue. These include all the individuals who contributed articles for the Journal, the panel of reviewers who ensured the content integrity of the articles, and the technical editors of the Special Issue. We are also particularly thankful to the Open Society of Eastern Africa for supporting publication of this issue. Finally, we thank the Research, Library and Publications Committee for providing overall guidance on this issue, and the immediate past Dean of the School of Law, Professor Patricia Kameri-Mbote, for her unstinting support and advice on the preparation of a disability rights special issue of the Journal. To you all, thank you so very much.

FOREWORD

As a member of the United Nations Committee on the Rights of Persons with Disabilities, it is a great privilege that I have been asked to write the foreword to this Special Issue of the East African Law Journal whose theme is disability rights. The production of this Issue coincides with the celebrations of ten years since the adoption of the United Nations Convention on the rights of Persons with Disabilities (CRPD). The Convention has no doubt influenced disability legislation and general discourse on the rights of persons with disabilities world over. Persons with disabilities are one of the last 'vulnerable' social groups to be protected by a specific human rights convention. While women, racial groups, children and migrant workers had already been protected by specific human rights instruments, persons with disabilities had to wait until the 21st century for this to happen.

Following its adoption in 2006, the CRPD became a major milestone in the effort to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of persons with disabilities, and to promote respect for their inherent dignity. It is the first legally binding instrument to clearly set out the obligations on states to avoid discrimination against persons with disabilities in all its forms, and to create a society in which they can fully participate. For example, the CRPD requires states to take measures to ensure accessibility, personal mobility and independent living. It asserts the rights of people with disabilities to education, health, work, adequate standards of living, freedom of movement, freedom from exploitation, self-representation, participation in the political and governance processes as well as equal recognition before the law and access to justice.

Although Kenya offered significant leadership during the CRPD negotiations, and signed and ratified it earlier than some more resource-endowed countries, it has not offered significant leadership in its implementation. Eliminating discrimination against persons with disabilities means not only combating prejudice but also adapting buildings, redesigning public transport and investing in social care - all of which require resources that developing countries simply claim not to have.

I welcome the articles in this Special Issue of the Journal as an important opportunity for initiating discourse among lawyers, policy-makers and implementers as well as among students in relation to challenging questions on disability rights as well as the arising complex legal issues. Discourse must be encouraged around delicate dilemmas such as how to balance scarcity of resource arguments against political willingness to ensure the rights of persons with disabilities. Another notable dilemma is how the legal as indeed other professions should respond to critical (or even disruptive) propositions established in the CRPD asserting the humanity and equality of persons with disabilities in respect of matters such as their legal capacity.

Finally, as a long-standing leader within the disability movement, I welcome the ongoing partnerships between the School of Law of the University of Nairobi and the movement.

Dr. Samuel Kabue,
Member, UN Committee on the Rights of Persons with Disabilities

EDITORIAL

This special issue of the East African Law Journal sets out to celebrate the remarkable progress which disability law has made during the last decade both globally and in Kenya. Persons with disabilities had for far too long remained footnotes in academic scholarship as well as in policy and law making. The world made a landmark acclamation when, on 13 December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities. The revolutionary tenor of the first global human rights instrument of the 21st century made it clear that where before persons with disabilities had been deemed objects of rights and had been diagnosed as ‘problems’ which required ‘healing’, from then onwards persons with disabilities would be deemed full human beings who are subjects with rights and dignity.

Since it was first published in the 1960s, and more recently following its revival, the East African Law Journal has established for itself the objective of providing a forum for scholars in the region and the world to publish their academic papers on diverse topical and legal issues of relevance to East Africa. It seeks to encourage the process of research by publishing cutting-edge research on specific areas of law in East Africa.

The aims of this special issue of the Journal are threefold. First, it seeks to initiate and offer its considered contribution to scholarly discourse on disability law in Kenya and in the diaspora. It responds to the recognition that more academic scholarship on disability law is needed to provide innovative ideas on how to sustain and enhance the disability rights revolution. Old ways and notions have to be replaced with new ideas and strategies while the academic, state and non-state sectors have to be retooled to respond appropriately to new norms and concepts such as the guarantees to legal capacity, community living and indeed inclusive education for persons with disabilities.

Second, this issue of the Journal seeks to provide a veritable opportunity to introduce and nurture the skills and talents of the students from the University of Nairobi and further afield towards the project of anchoring and entrenching the new rights positioning for persons with disabilities. In this sense, it supports the academic programme of the School of Law which now includes a specific under-graduate course on disability law and which as well continues to facilitate under-graduate as well as post-graduate research on disability law. This issue of the Journal recognises that the mainstreaming of disability issues into all teaching at the School of Law is indeed key for supporting the full inclusion of persons with disabilities into society.

Finally, this issue also aims to address individuals with disabilities and their organisations directly by discussing issues pertinent to their lives.

This issue of the Journal presents opportunities for multi-disciplinary explorations of disability law and rights.

Elizabeth Kamundia examines the right to own and manage property and finances by persons with psychosocial disabilities in Kenya using the lens of Article 12 (5) of the Convention on the Right of

Persons with Disability (CRPD). She argues that the legal framework on property does not provide an adequately enabling basis for persons with psychosocial disabilities to own property and control their financial affairs. She explores this subject by examining Kenyan case laws on instances where persons with psychosocial disabilities have been denied the right to make property or financial decisions pursuant to formal guardianship laws. Kamundia concludes that the supported decision-making paradigm will be realised fully only once guardianship provisions in mental health legislation are repealed. In the meantime, courts should put the individual against whom guardianship orders are sought at the centre of decision-making.

Dr. Reginald Oduor takes a philosophical approach in his exploration of how the rights of persons with disabilities may be assured in an African context. He begins from the premise that the human rights discourse has for centuries been dominated by a Western liberal conceptual framing, making it easy for critics to dismiss it as a manifestation of Western hegemony. He argues that both Western liberalism and indigenous African communalism have strengths and weaknesses. He concludes that the emphasis of liberalism on the rights of the individual should be deployed to discourage Kenyan society from treating persons with disabilities in a paternalistic manner; to cease from acting towards such persons on the basis of stereotypes or intolerance; and to engage with them as equals who happen to have a set of challenges different from those faced by most people. At the same time though, the communalist emphasis on collective responsibility should be deployed to temper the excesses of the Western liberal/capitalist orientation, and to convince members of the Kenyan public that respect for the rights of persons with disabilities is part of their collective responsibility arising from a shared humanity of persons with disabilities and persons without them.

Miriam Nthenge examines what the operationalisation of Article 33 (2) of the CRPD entails and the extent to which Kenya's legislative and institutional framework provide a means for realising Article 33 (2) of the CRPD. She concludes that Kenya's Article 33 monitoring framework must comply with the Paris Principles and, towards this end, a monitoring framework should be constituted, tooled appropriately and accorded necessary political will.

Lawrence Mute and Elizabeth Kalekye offer an appraisal of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. They interrogate the need and prudence of preparing a regional disability rights instrument. They assess how Africa's present human rights system protects and promotes the rights of persons with disabilities. Their premise is that the Disability Rights Protocol will play an eminent role in providing a regional anchor for the protection and promotion of the rights of persons with disabilities in Africa.

William Oluchina reviews Arlene Kanter's book on disability rights: *The Development of Disability Rights under International Law: from Charity to Human Rights*. He explains that the core message in the book is that 'disability rights are human rights'. Oluchina notes that although the book may arguably not have covered Africa adequately, it is an essential reference book for cross-cultural studies on disability rights.

Finally, Manyara Reginald Mworira reviews the 2014 High Court case of *Wilson Morara Siringi*

v. Republic. This review explores the positive and welcome ways in which Kenyan courts have begun to apply provisions of the CRPD to determine cases involving persons with disabilities. In the instant case, the High Court quashed the conviction on counts of rape of the appellant since the magistrate's court had simply assumed that an adult with psychosocial disability did not have capacity to consent to sexual intercourse.

THE RIGHT TO OWN AND MANAGE PROPERTY AND FINANCES BY PERSONS WITH PSYCHOSOCIAL DISABILITIES IN KENYA

*Elizabeth Kamundia**

I: INTRODUCTION

The right to own property is a core right recognised in international instruments,¹ and by the domestic laws of the majority of countries in the world. However, this right has and continues to be denied to persons with disabilities in Kenya² and in many parts of the world.³ Throughout history, the right to own property has been prejudicially denied to persons with disabilities as well as to many other groups, including women (particularly upon marriage) and ethnic minorities.⁴ In part, this denial arises from the fact that members of these groups have not been considered as ‘full’ legal persons, and therefore they have not been found capable of exercising legal capacity.

This article examines the right to own and manage property and finances by persons with psychosocial disabilities in Kenya using Article 12 (5) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) as a lens. The article’s premise is that the legal framework on property does not provide an adequate enabling basis for persons with psychosocial disabilities to own property and control their financial affairs and that this is due in no small part to formal and informal guardianship protocols which deny persons with psychosocial disabilities their legal capacity.

Legal capacity is ‘the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency)’.⁵ Legal capacity is the key to meaningful participation in society, and it is a human right.⁶ The exercise of legal capacity by persons with disabilities continues to be commonly

* Doctoral candidate, Department of Public Law, University of Pretoria, with the research assistance of Linda NjeriWachira.

1 International and regional legal instruments that make provision for the right to own property include the Universal Declaration on Human Rights, the Convention Relating to the Status of Refugees, the Convention Relating to the Status of Stateless Persons, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination against Women, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights.

2 United Nations Human Rights Office of the High Commissioner. ‘Initial State Reports of State Parties Due in 2010: Kenya’ para 130 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29> (accessed on 9 May 2016).

3 United Nations Human Rights Office of the High Commissioner for Human Rights. CRPD/C/GC/1 para 23<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en> (accessed on 9 May 2016).

4 Ibid.

5 Ibid, para 13.

6 Article 12 of the UN Convention on the Rights of Persons with Disabilities and Article 15 of the Convention on the Elimination of all Forms of Discrimination against Women.

denied in legal systems worldwide in diverse areas of life including in ownership of property and control of financial affairs.⁷

The term ‘persons with psychosocial disabilities’ has been broadly adopted by the international disability movement involved in drafting and negotiating the CRPD.⁸ ‘Psychosocial disability’ refers to the interaction between psychological and social/cultural components of disability. The psychological component refers to ways of thinking and processing experiences and perceptions of the world. The social/cultural component refers to societal and cultural limits for behaviour that interact with those psychological differences as well as the stigma that society attaches to the label of disabled.⁹ This paper considers mental health through the lens of human rights and disability, and therefore uses the terminology ‘person(s) with psychosocial disabilities’ to describe people diagnosed with mental illness, as well as those who identify as mental health care users,¹⁰ survivors of psychiatry, ‘mad’ and so on.¹¹

Kenya ratified the CRPD in 2008; and the CRPD forms part of the law of Kenya by dint of Article 2 (6) of the Constitution of Kenya (2010), which provides that:

‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’.

Article 12 (5) of the CRPD is on equal recognition before the law, and in particular addresses the right to own and control financial affairs by persons with disabilities. It provides that:

Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own and inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Following this introduction, the second section of the article will examine the relationship between the right to own property and the right to legal capacity. This part will also focus on the meaning of support to exercise legal capacity with regard to financial affairs. The third part of the article will examine the legal framework on property in Kenya; generally, in relation to whether the law provides an enabling framework for the ownership of property and control of finances by persons with psychosocial disabilities. This part will consider international and regional law on the right to own property and domestic law covering the property rights of persons with psychosocial disabilities.

7 CRPD/C/GC/1 (n4).

8 P. Gooding. ‘Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law’ (2012) *Psychiatry, Psychology & L*, 1. (accessed 20 November 2016).

9 World Network of Users and Survivors of Psychiatry. ‘Implementation Manual for the UN Convention on the Rights of Persons with Disabilities’ (2008) <http://wnusp.rafus.dk/documents/WNUSP_CRPD_Manual.pdf> (accessed 20 November 2016).

10 Section 1(xix) of South Africa’s Mental Health Care Act defines a ‘mental health care user’ to mean ‘a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user (...)’.

11 World Network of Users and Survivors of Psychiatry (n9) p.2.

The fourth part of the article will assess the current situation of persons with psychosocial disabilities in Kenya vis a vis property ownership and control of financial affairs. This part will detail case law to assess instances where persons with psychosocial disabilities have been denied the right to make property decisions under formal guardianship laws. The fifth section of the article will highlight the dilemmas on implementing Article 12 (5) of the CRPD in the Kenyan context. The last two sections of the article will draw conclusions and make recommendations.

II: THE RELATIONSHIP BETWEEN THE RIGHT TO OWN PROPERTY AND THE RIGHT TO LEGAL CAPACITY

It is well recognised in international law that the right to own property is closely related to other rights such as the right to housing¹² and the right to social security^{13,14}. The right to own property is also related to the right to legal capacity as established in the CRPD which provides for property rights under Article 12 (5). Article 12 addresses equal recognition before the law, recognises persons with disabilities as legal agents, and places an obligation on States Parties to provide persons with disabilities with the support they may require in exercising their legal agency.¹⁵

The right to own property and control financial affairs has been denied to persons with psychosocial disabilities for many reasons. Using Israel to illustrate this, three main types of concerns about harm in financial affairs are raised by persons with disabilities, their families and service providers.¹⁶

The first is 'fear of exploitation', and includes concerns that a person may have 'their bank account emptied out by others'.¹⁷ Second, is the 'fear of actual harm' and includes 'concern that people may make decisions that will cause them serious harm, such as a decision to spend all their money

12 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR) 2001.

13 *Stec and Others v the United Kingdom* [2006] All ER (D) 215 (Apr).

14 C Golay and I Cismus. 'Legal Opinion: The Right to Property from a Human Rights Perspective', Social Science Research Network (2010) p23-26.

15 Article 12 of the CRPD states that: 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.'

16 Bizchut. The Israel Human Rights Centre for Persons with Disabilities. 'Alternatives to Guardianship in Financial Affairs' <<http://bizchut.org.il/en/wp-content/uploads/2016/04/alternative-to-guardianship-report.pdf>> (accessed on 9 May 2016).

17 *Ibid*, p.16.

and savings¹⁸ among others. Third, is the 'fear of harm by omission', which includes 'concern that people will cause themselves harm by not tending to their affairs', including through 'failing to repay debts'.¹⁹

The concerns identified within the Israeli setting arguably also apply in the Kenyan context. Furthermore, in the African context, prejudice and negative societal attitudes towards persons with disabilities play a key role in the violation of their right to own property and control financial affairs.²⁰ As well, exclusion from owning property, particularly property acquired through inheritance, is often linked to societies that place significant importance on communal ancestral property, particularly in instances where resources are generally limited.²¹ As has been noted: 'where there are limited resources it may be seen as economically irresponsible to give an equal share of resources to a disabled child who is perceived as unlikely to be able to provide for the family in the future'.²²

As a result of these concerns and prejudices, the right to own property and to make financial decisions has been taken away from persons with disabilities, including through guardianship laws. This approach conflates 'legal capacity' with 'mental capacity' with the effect that the law assumes a lack of legal capacity where mental capacity is deemed to be impaired.²³

The CRPD Committee,²⁴ in its General Comment on equal recognition before the law²⁵ has provided guidance to States Parties on the meaning and essence of Article 12 of the CRPD in various spheres of life. The General Comment recommends that the approach of denying persons with disabilities legal capacity with regard to financial matters, for example through guardianship, conservatorship or other substitute decision-making regimes, must be replaced with an approach of supported decision-making in order to enable persons with disabilities to exercise legal capacity on an equal basis with others. The General Comment is clear that 'legal capacity is a universal attribute inherent in all persons by virtue of their humanity'²⁶ and that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.²⁷

18 Ibid.

19 Ibid.

20 NE Groce, J London & MA Stein. 'Inheritance, Poverty and Disability', [29] *Disability and Society* (2014) 10.

21 Ibid.

22 R Yeo. 'Chronic Poverty and Disability' Working Paper 4, Manchester: Chronic Poverty Research Centre, University of Manchester as cited in NE Groce, J London & MA Stein.

23 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 para. 15 (n3).

24 The Committee on the Rights of Persons with Disabilities is established under Article 34 of the Convention on the Rights of Persons with Disabilities. <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>> (accessed on 9 May 2016).

25 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 (n3).

26 Ibid, para 8.

27 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 (n3).

Rather than deny the right to legal capacity to individuals whose mental capacity is questioned, the CRPD requires States Parties to provide to people with disabilities the support they may require in order to exercise their right to legal capacity on an equal basis with others. The General Comment on Article 12 explains that:

“Support’ is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. Measures relating to universal design and accessibility, for example a measure requiring private and public actors such as banks and financial institutions to provide understandable information, in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions are recognised as support measures.’²⁸

There exists a spectrum of supported decision-making options with regard to financial decision-making that may be used by persons with psychosocial disabilities. These include powers-of-attorney, advance directives, representative payee regimes and direct bank deposit systems.²⁹

In addition to providing support, states are also required to provide reasonable accommodation.³⁰ The right to reasonable accommodation in the exercise of legal capacity is separate from and complementary to the right to support in the exercise of legal capacity and the right to accessible services.³¹ States are required to make any modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless to do so would occasion a disproportionate or undue burden. Such modifications or adjustments may include access to essential buildings such as banks; accessible information regarding decisions that have legal effect; and personal assistance.³²

III: THE LEGAL FRAMEWORK ON PROPERTY IN KENYA

The legal framework on property rights in Kenya is drawn from international law, regional law and domestic law. Kenya is a monist state and international instruments which it has ratified now form part of the law by dint of Article 2 (6) of the Constitution. In the 2015 Court of Appeal case of *Karen Njeri Kandie vs Alssane & another*,³³ Ouko, Kiage and M’Inoti JJA stated that:

‘There can be no doubt therefore that by constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention

28 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 para 17 (n3).

29 R Dinerstein. ‘Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making’, [19:2] Human Rights Brief (2012)1, 2.

30 Reasonable accommodation is defined in Article 2 of the CRPD to mean, ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

31 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 para 34 (n3).

32 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 para 33-34 (n3).

33 *Karen Njeri Kandie v Alssane & Another*, Civil Appeal No. 20 of 2013 [2015] eKLR.

once ratified is adopted or automatically incorporated into our laws without the necessity of a domesticating statute'.³⁴

1: International and Regional Law on the Right to Own Property and the Nature of State Obligations with Regard to Property Rights

A: International law

Kenya has ratified or acceded to international instruments that make provisions on the right to own property. With regard to the *Universal Declaration of Human Rights* (UDHR), parts of which have been ascertained as having attained the status of customary international law norms,³⁵ Article 17 provides that 'everyone has the right to own property alone as well as in association with others' and that 'no one shall be arbitrarily deprived of his property'.³⁶

The International Convention on the Elimination of All Forms of Racial Discrimination stipulates a general undertaking of States Parties to eliminate racial discrimination and guarantee 'the right to own property alone as well as in association with others'.³⁷ Kenya acceded to this Convention in 2001. Kenya is also a party to the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which proclaims in Articles 15 (2) and 16 (1) (h) the equal treatment of women and men in respect to ownership of property. As already stated, Kenya has also ratified the CRPD which in Article 12 (5) provides for the equal right of persons with disabilities to own property.

B: Regional law on the right to own property

The African Charter on Human and Peoples' Rights provides that:

'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.³⁸

Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) requires States Parties to enact appropriate national legislative measures to guarantee that 'during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely'.³⁹ Article 19 of the Protocol addresses the right to sustainable development, requiring States Parties to take all appropriate measures to 'promote women's access to and control over productive resources such as land, and guarantee their right to

34 Ibid, 8.

35 H Hannum. 'The Status of the Universal Declaration of Human Rights in National and International Law', [25] *The Georgia Journal of International and Comparative Law* (1995/96)287.

36 C Golay & I Cismus (n14).

37 Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination.

38 Article 14 of the African Charter on Human and Peoples' Rights.

39 Article 6 (j) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

property'.⁴⁰

The African Commission on Human and Peoples' Rights has typified the right to own property as an economic, social and cultural right.⁴¹ With regard to marginalised groups and the right to own property, the African Commission has stated that States have an obligation:

'To ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women. This includes the obligation to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land'.⁴²

In the African context and with regard to property ownership, persons with disabilities generally, and women with disabilities in particular, are a disadvantaged group.

Under international and regional law, states have obligations to respect, protect, promote and fulfil human rights.⁴³ These obligations may encompass negative as well as positive state duties.⁴⁴ Kenya is, as a party to relevant human rights instruments, obligated to respect, protect and promote the rights of persons with psychosocial disabilities to own property.

C: Domestic law

Three broad levels of analysis are relevant to an understanding of Kenya's domestic law on the right to own property for persons with psychosocial disabilities. On the first level, Kenya has an enabling legal framework for the protection of the property rights of persons with disabilities. Enabling laws include the Constitution, the CRPD and the Land Act (No. 6 of 2012) whose values and principles include non-discrimination and protection of the marginalised.⁴⁵ At a second level, Kenya has laws that may be argued to discriminate against persons with disabilities with regard to property ownership. These include laws that allow for guardianship and for the appointment of a manager to manage property on behalf of a person with disability, for example, the Mental Health Act (Cap. 248) and the Children Act (Cap. 141). The third level is an informal level: the social mores, customs and practices that violate property rights of persons with disabilities. Under this category are cases where family members dispossess their siblings with disability of property,

40 Ibid, Article 19 (c).

41 African Commission on Human and Peoples' Rights. 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf> (accessed on 9 May 2016).

42 Ibid, para 55 (h).

43 United Nations Office of the High Commissioner for Human Rights. 'International Human Rights Law' <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> (accessed on 9 May 2016).

44 F Coomans. 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' para 5 <<http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>> (accessed on 9 May 2016).

45 Section 4 (2) k of the Land Act (No 6 of 2012).

especially where inheritance is concerned.⁴⁶ This is arguably the situation facing most persons with psychosocial disabilities in Kenya who are disinherited of property even while not being under legal guardianship.⁴⁷ In its concluding observations to Kenya, the CRPD Committee expressed concern about 'the de facto guardianship in families of persons with disabilities that deprive [them] of their ability to make choices in aspects such as buying food, renting a house or inheritance'.⁴⁸ The Committee recommended that Kenya 'eliminate all forms of formal and informal substituted decision-making regimes and replace them with a system of supported decision-making'.⁴⁹

Underlying the three levels above is a context of poverty; widespread joblessness in the population, especially among persons with disabilities; lack of individualised state funded support services;⁵⁰ and the multiple types of discrimination faced by women with psychosocial disabilities on account of gender and disability.⁵¹

Article 40 of the Constitution provides for protection of the right to acquire and own property in the following terms: 'every person has the right, either individually or in association with others, to acquire and own property'. Despite this provision, the state has acknowledged that persons with disabilities still face major challenges in exercising this right, especially as it pertains to inheritance of land.⁵² In its state report to the CRPD Committee, Kenya pledged to address the violation of property rights of persons with disabilities while reviewing the Law of Succession Act (Cap. 160),⁵³ but the review process is yet to be finalised.

Section 107 of the Children Act makes exception to the provision for the appointment of a guardian to end upon a child attaining the age of eighteen years. Where persons suffer from mental or physical disability or from illness that renders them incapable of maintaining themselves or of managing their own affairs and their property without the assistance of a guardian, the guardianship can be extended to the adulthood of such persons.⁵⁴ The General Comment on Article 12 of the CRPD is explicit that regimes of substituted decision-making such as guardianship must be replaced with regimes of supported decision-making. As such, Section 107 of the Children Act runs contrary to

46 United Nations Office of the High Commissioner for Human Rights. 'Initial State Reports of State Parties Due in 2010: Kenya' para 130 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29> (accessed on 9 May 2016).

47 Kenya National Commission on Human Rights. 'How to Implement Article 12 of the Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper' p102-104 <<http://www.knchr.org/ReportsPublications/ThematicReports/GroupRights.aspx>> (accessed on 9 May 2016).

48 Ibid, para 23.

49 Ibid, para 24(a).

50 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1,17 (n47).

51 Ibid, 138.

52 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1 (n47).

53 Ibid.

54 Ibid, para 127.

Article 12 of the CRPD.

Under Section 38 of the Persons with Disabilities Act, the Attorney General in consultation with the National Council for Persons with Disabilities and the Law Society of Kenya is required to make regulations on free legal services for persons with disabilities, in particular on matters affecting the violation of their rights or the deprivation of their property. These regulations have not been developed to date. Currently, the Persons with Disabilities Act is under review in order to align it with the Constitution.

Section 26 of the Mental Health Act provides that ‘the court may make orders for the management of the estate of any person suffering from mental disorder; and for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person’.⁵⁵ The Act does not define who ‘any other suitable person’ may be. In the event that a person has no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of the person suffering from mental disorder.⁵⁶

The Act makes detailed provisions on the management of property by the person appointed as ‘manager’ but is largely silent on the role of the guardian. This may give ‘credence to the assertion that laws that allow substituted decision-making tend to value property above persons’.⁵⁷ Other relevant sections of the Mental Health Act will be considered in the sections that follow.

IV: GUARDIANSHIP OVER PERSONS AND APPOINTMENT OF MANAGER OVER PROPERTY OF PERSONS WITH PSYCHOSOCIAL DISABILITIES BY KENYAN COURTS

This section examines decided cases on the guardianship of persons and appointment of managers over property of persons with psychosocial disabilities by Kenyan courts. The section focuses on a number of questions. First, what is the ‘profile’ of persons who have had guardians and/or managers appointed for them? Second, in what kinds of courts are applications for guardianship and/or appointment of managers made? How many rulings and/or judgments on guardianship have been made per year since 2008? The third question regards persons who request appointment of guardian or manager and persons who are ultimately appointed as guardians or managers by the court. Are proceedings on guardianship and/or appointment of managers instituted by families or state officials in the Kenyan context? What is the relationship between the individual over whom guardianship or appointment of managers is sought and the persons ultimately appointed guardians and/or managers? Fourth, what reasons prompt applications for appointment of guardians and/or managers or causes for instituting guardianship proceedings? Fifth, what reasons are given by courts

55 Section 26 (1) of the Mental Health Act (No 10 of 1989).

56 *Ibid*, section 26 (2).

57 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1 (n47).

in deciding applications for appointment of guardians and/or managers? What kind of evidence is considered by courts in guardianship proceedings, and how often are guardians and/or managers appointed with regard to persons with psychosocial disabilities following such proceedings? Sixth, what is the distinction between the role of ‘guardians’ and ‘managers’, and do courts in practice make that distinction in their rulings and/or judgments? Finally, what is the extent to which Kenyan courts take a human rights approach in proceedings for appointment of guardians and/or managers?

1: Methodology

In order to identify case law that includes applications under the Mental Health Act for guardianship and for appointment of managers over property of persons with psychosocial disabilities, searches were conducted on Kenya Law Reports (KLR).⁵⁸ KLR is a semi-autonomous state corporation under the judiciary and derives its authority from the National Council for Law Reporting Act,⁵⁹ which mandates it to monitor and report on the development of Kenya’s jurisprudence through the publication of the Kenya Law Reports and to revise, consolidate and publish the laws of Kenya.

Searches were conducted in November and December 2015, before finally being updated on the May 3, 2016. Only cases from 2008 (when Kenya ratified the CRPD) were taken into account. Searches, conducted using the term ‘Mental Health Act’, identified 590 cases.⁶⁰ Of these, case law that included applications under the Mental Health Act relating to an individual being in a comatose state,⁶¹ ‘of extreme old age and sickly’,⁶² having suffered traumatic brain injury⁶³ or having neurological complications,⁶⁴ dementia,⁶⁵ stroke or other health conditions⁶⁶

58 Kenya Law Reports <<http://kenyalaw.org/caselaw/>> accessed on 9 May 2016.

59 Act No 11 of 1992.

60 The majority of the 590 cases came up because they contained the search words ‘mental’ or ‘health’ or ‘act’ rather than for making reference to the Mental Health Act.

61 For example: *In the Matter of M.Z.G.* Misc. Application 730 of 2012 [2013] eKLR; and *In Re G.N.K (The Patient)* Misc. Civil Application 143 of 2015 [2015] eKLR.

62 For example: *In the matter of G N M* Misc. Application 154 of 2014 [2015] eKLR; and *Loghan Njenga Waweru v Teresia Nyokabi Karanu & Another* Civil Suit 242 of 2005 [2014] eKLR.

63 For example: *In Re the Matter of B M K* [2011] eKLR. In this case, the court refused to appoint a guardian and found that the person had recovered significantly enough to manage his own affairs. In his testimony to the court, the person stated: “I am able to make my own decisions. I am able to give instructions if I want something done for me...I will continue to handle my own affairs. I will call for assistance from my brother as and when I need it.”

64 For example: *Paresh Jesang Shah v Neel Paresh Shah* Misc. Cause 107 of 2012 [2013] eKLR.

65 For example: *In Re of DHLH* [2015] eKLR; *In Re V M L* [2015] eKLR; *In Re R W K* [2015] eKLR; *Paul Thuo Gikonyo & 2 Others v Carol Mwihaki Gikonyo & Another* [2014] eKLR; *In Re S.N.K* [2015] eKLR; *In the Matter of an Application for Guardianship of EWM; Paul Thuo Gikonyo & 2 Others v Carol Mwihaki Gikonyo & Another* [2015] eKLR; *LSF Inc v Director of Medical Services & Kenya Board of Mental Health* [2015] eKLR; *In Re G.N.M* [2014]; *Lucia Njeri Mwangi v Joyce Wangui Mbugua* [2015] eKLR; *Maryann Nyambura Munda v MNJ* [2016] eKLR and *K v K* [2009] eKLR - *K v K* is one of few cases where issues of human rights are raised. The court, in declining to appoint a guardian stated: ‘the court shall be very wary of making an order which can go to the extent of deprivation of a person’s liberty and property’. Cases where individual have dementia were excluded from consideration in this article to ensure a narrow focus on mental health conditions that are not specifically associated with aging. Hence, a recommendation for future research is to examine the intersection of disability and aging, specifically to look into the manner in which guardianship applies with regard to older persons.

66 For example: *Manan Jayendra Chunibhai & Another v Jitendakumar C. Patel & Another* E & L Case 23 of 2012 [2012] eKLR. In this case, the individual concerned had a range of health conditions, including clinical depression.

were excluded.⁶⁷ Cases that made reference to the Mental Health Act for reasons other than guardianship or appointment of managers were also excluded. Ten cases specific to appointment of guardians or managers being made on account of an individual having a ‘mental illness’, a ‘mental disorder’ or having a specifically named mental health condition such as schizophrenia, depression or bipolar disorder were reviewed and analysed.⁶⁸

A final preliminary point to note is that in many parts of the world, guardianship orders are sought with regard to persons with intellectual disabilities.⁶⁹ However, in the Kenyan context, there does not appear to be any decision where guardianship was sought with regard to an individual with an intellectual disability. This may in part be attributed to that in the Kenyan context, guardianship proceedings seem to be instituted (for the most part) to address issues related to property, and many people with intellectual disabilities in the Kenyan context tend to live in conditions of poverty.⁷⁰

2: Persons in Relation to Whom Guardianship Applications or Applications for Appointment of Managers are Made

In nine of the 10 considered cases, the persons subject to applications for guardianship or for whose estates a manager was to be appointed were men.⁷¹ Only in one case was the person subject to an application for guardianship and appointment of manager a woman.⁷² In five out of ten cases, the ages of the persons against whom proceedings were instituted for appointment of guardians or managers were not indicated.⁷³ In the remaining five cases, the ages of the individuals ranged from 50 to 72 years.⁷⁴ It was not possible to establish conclusively the socio-economic classes of the

67 The author concedes that the distinction between the different kinds of conditions that result in adults being put under guardianship (including brain injury, dementia, neurological complications and stroke) and ‘mental disability’ is often a flimsy one. In particular, Kenyan courts seem to rule that dementia is a mental disorder and/or a mental illness for purposes of applying the Mental Health Act to persons with dementia. For example, in *Maryanne Nyambura Mundia v M N J* [2016] eKLR, the court stated that ‘After careful examination of the evidence brought before this court it is clear that the Respondent suffers from mental disorder specifically dementia’.

68 *GAD V AMAM* ELC Misc. Application No. 14 of 2012 [2015] eKLR; *In the matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In Re the matter of Silas Wanga Masibo* [2014] eKLR; *PPKN v AWN* [2015] eKLR; *In re Joseph Gathecha Kinyanjui* [2013] eKLR; *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR; *WK V AW* [2014] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *In Re matter of E.M.M.* [2010] eKLR; *In re Matter of Captain PGM* [2015] eKLR.

69 See generally: Inclusion International. ‘Independent but not Alone: A Global Report on the Right to Decide’ <http://inclusion-international.org/wp-content/uploads/2014/06/Independent-But-Not-Alone_-final.pdf> (accessed on 9 May 2016). A specific example of a country where many people with intellectual disabilities are under guardianship is Israel, see: Bizchut (n16).

70 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1 (n47), p78-79.

71 *WK v AW* Misc. Cause No. 13 of 2014 [2014] eKLR; *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *In Re Matter of E.M.M.* [2010] eKLR; *In re Joseph Gathecha Kinyanjui* [2013] eKLR; *PPKN v AWN* [2015] eKLR; *In Re the Matter of Silas Wanga Masibo* [2014] eKLR; *In re Matter of Captain PGM* [2015] eKLR; *GAD V AMAM* [2015] eKLR.

72 *In Re the matter of Kaka Ziro Ngole* Misc. Application No. 37 of 2008 [2008] eKLR.

73 *WK V AW* [2014] eKLR; *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *PPKN v AWN* [2015] eKLR; *GAD V AMAM* [2015] eKLR.

74 *In Re the matter of Kaka Ziro Ngole* [2008] eKLR – 50 years; *In Re Matter of E.M.M.* [2010] eKLR – 54 years; *In Re the Matter of Silas Wanga Masibo* [2014] eKLR – 61 years; *In re Matter of Captain PGM* [2015] eKLR – 65 years; *In re Joseph Gathecha Kinyanjui* [2013] eKLR – 72 years.

litigants, but it could be deduced that the cases involved litigants who were relatively well off given that the guardianship proceedings were instituted to safeguard property.

One common criticism against guardianship and other substituted decision-making regimes is that they elevate concerns for property above concerns for the person.⁷⁵ In the majority of the considered cases, courts did not record whether or not the individuals against whom proceedings were instituted were actually present in court when determinations were made regarding the appointment of guardians or managers. Only in the case of *PPKN v AWN*⁷⁶ did the court record reasons why the person for whom a guardian was being sought was not present in court. In this case, the court admitted evidence from a psychiatrist confirming that ‘the ward’ was in admission at hospital for treatment at the time of the hearing. As such, the court dispensed with the individual’s presence.

In some cases, the court sought audience with other relatives of the individual,⁷⁷ or evidence was presented that other relatives of the individual consented to the proceedings to appoint a guardian and/or manager.⁷⁸ In *Re matter of E.M.M.*,⁷⁹ the individual was not present in court during the proceedings. However, the court required the consent of the other relatives of the individual before making further orders. In addition to filing the consent of the said relatives, the court stated: ‘the court would like to see all the relatives to confirm if the applicant’s application is well founded’.

In *WK v AW*, the court relied on attached photographs depicting that ‘the mental patient is in a deplorable state, in unhygienic condition’.⁸⁰ In this case, a guardian was appointed, and the court specifically required the guardian to *inter alia* ensure the individual’s hygiene.

It is striking that in the majority of cases the courts did not seem to consider it necessary to give audience to the individual whose rights were at risk of being taken away, or to record whether or not such audience was given. By and large, courts seemed to approach guardianship cases as if the individual were a ‘non-person’, and to seek the voice of others (for the most part psychiatrists, relatives and/or chiefs) instead of allowing the voice of the affected individual to weigh in on what should happen to their person and/or property.

A question of interest is the manner in which the courts referred to the individuals against whom guardianship orders were sought.⁸¹ Words used to describe such individuals included:

75 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1 (n47) p45.

76 Misc. Application 7 of 2015 [2015] eKLR.

77 In *Re Matter of E.M.M.* Misc. Application 85 of 2009 [2010] eKLR.

78 In *Re Joseph Gathecha Kinyanjui* [2013] eKLR; *PPKN v AWN* [2015] eKLR.

79 In *Re Matter of E.M.M.* [2010] eKLR.

80 *WK v AW* Misc. Cause No. 13 of 2014 [2014] eKLR.

81 The Mental Health Act uses the term ‘person suffering from mental disorder’. Section 2 of the Mental Health Act defines a ‘person suffering from mental disorder’ to mean ‘a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and a person suffering from mental impairment due to alcohol or substance abuse’.

‘mental patient’,⁸² ‘patient’,⁸³ ‘person suffering from mental disorder’,⁸⁴ ‘ward’,⁸⁵ ‘Subject’⁸⁶ and ‘Respondent’⁸⁷. While it may be argued that some of these words are merely descriptive, words such as ‘mental patient’, ‘patient’ and ‘person suffering from mental disorder’ may lead the court to perceive the person as ‘sick’, with the attendant risk that the court may take an overly paternalistic stance and make orders geared towards caretaking rather than towards support for the individual’s autonomy. Seen through the prism of ‘sickness’, one is unlikely to be perceived as a subject of rights, an individual with their own will and preferences deserving of equal respect.

3: Courts in Which Guardianship Applications are Made and Rulings on Guardianship per Year

Under the Mental Health Act, ‘court’ means ‘High Court’.⁸⁸ Applications and determinations relating to guardianship were made in the High Court in all the cases considered.⁸⁹ None of those cases was an appeal, pointing to the fact that the individual ceased to be a person before the law as soon as guardianship orders were made. In essence, there was no longer a ‘person’ to mount an appeal. In six of the ten cases, the court that made the decision regarding whether or not to appoint a guardian and/or manager was located in Nairobi.⁹⁰ The rest of the decisions were made in the High Court at Kitale,⁹¹ Mombasa,⁹² Bungoma⁹³ and Malindi⁹⁴.

With regard to rulings per year, of the analysed cases, the highest number of rulings was delivered in

82 *WK v AW* [2014] eKLR.

83 *In the Matter of the Estate of COO (patient)* Misc. Civil Application 78 of 2013 [2014] eKLR; *In Re the Matter of Silas Wanga Masibo* Misc. Application No. 25 of 2014 [2014] eKLR; *In Re the matter of Kaka Ziro Ngole* Misc. Application No. 37 of 2008 [2008] eKLR.

84 *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR.

85 *PPKN v AWN* [2015] eKLR.

86 *In Re Joseph Gathecha Kinyanjui* [2013] eKLR; *In re Matter of Captain PGM* [2015] eKLR.

87 *GAD V AMAM* [2015] eKLR.

88 Section 2 of the Mental Patients Act.

89 It is unclear which division of the High Court issued rulings in the following cases: *WK V AW* [2014] eKLR; *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *In Re Matter of E.M.M.* [2010] eKLR; *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN v AWN* [2015] eKLR; *In Re the Matter of Silas Wanga Masibo* [2014] eKLR; *In re Matter of Captain PGM* [2015] eKLR. *In re Joseph Gathecha Kinyanjui* [2013] eKLR, the ruling was made by the Civil Division of the High Court. *In G A D v A M A M* [2015] eKLR, the judgment was made by the Environmental and Land Division of the High Court.

90 *WK V AW* [2014] eKLR; *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *In re Joseph Gathecha Kinyanjui* [2013] eKLR; *PPKN v AWN* [2015] eKLR; *In re Matter of Captain PGM* [2015] eKLR.

91 *In Re Matter of E.M.M.* [2010] eKLR.

92 *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR.

93 *In Re the Matter of Silas Wanga Masibo* [2014] eKLR.

94 *In G A D v A M A M* [2015] eKLR.

the years 2014⁹⁵ and 2015⁹⁶ (three cases per year). The years 2008,⁹⁷ 2009,⁹⁸ 2010,⁹⁹ and 2013¹⁰⁰ each had one case per year.

4: Persons Who Request Appointment of Guardian or Manager

Of the ten cases reviewed in this article, guardians and/or managers were appointed in nine cases. In eight of the nine cases, the appointed persons were relatives of the person with disability.¹⁰¹ In one case, it is unclear whether the applicant was a relative of the individual concerned.¹⁰² In four cases, the court appointed several relatives as joint guardians.¹⁰³ Relatives appointed as guardians and/or managers included father,¹⁰⁴ wife,¹⁰⁵ brother,¹⁰⁶ stepbrother,¹⁰⁷ son,¹⁰⁸ daughter,¹⁰⁹ and cousin¹¹⁰.

95 *In the Matter of the Estate of COO (patient)* [2014] eKLR; *In Re the Matter of Silas Wanga Masibo* Misc. Application No. 5 of 2014 [2014] eKLR; *WK V AW* [2014] eKLR.

96 *PPKN v AWN* [2015] eKLR; *In re Matter of Captain PGM* Misc. Cause No. 15 of 2015 [2015] eKLR; *In G A D v A M A M* [2015] eKLR.

97 *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR.

98 *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR.

99 *In Re Matter of E.M.M.* [2010] eKLR.

100 *In re Joseph Gathecha Kinyanjui* [2013] eKLR.

101 *WK V AW* [2014] eKLR; *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *Re Joseph Gathecha Kinyanjui* [2013] eKLR; *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN v AWN* [2015] eKLR; *In Re Matter of Captain PGM* [2015] eKLR; *G A D v A M A M* [2015] eKLR; *In Re the matter of Silas Wanga Masibo* [2014] eKLR.

102 *In Re Matter of E.M.M.* [2010] eKLR.

103 *In the Matter of the Estate of COO (patient)* [2014] eKLR, the court appointed the elder brother, the wife and the elder son of the concerned individual as joint managers of the individual's estate. *Re Joseph Gathecha Kinyanjui* [2013] eKLR; the court appointed the step-brother and one other individual who shares the surname of the step-brother; *In Re the matter of Silas Wanga Masibo* [2014] eKLR, the court appointed the daughter as guardian, and granted her power to 'receive and manage the patient's estate'. In addition, in this case, the court appointed the daughter, the son and one wife jointly for purposes of operating bank accounts of the individual. *In Re Matter of Captain PGM* [2015] eKLR, the court appointed the two daughters and the wife as joint guardians of the individual and joint managers of his estate.

104 In *WK V AW* [2014] eKLR, the court appointed the father of the individual as the individual's guardian.

105 *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR the court appointed the wife as both guardian and manager. Similarly, in *PPKN v AWN* [2015] eKLR, the court appointed the wife as both guardian and manager. In this case, the children of the individual who were all adults gave their consent for their mother to be appointed guardian and manager.

106 *In the Matter of the Estate of COO (patient)* [2014] eKLR, the court appointed the elder brother, the wife and the elder son of the concerned individual as joint managers of the individual's estate.

107 In *Re Joseph Gathecha Kinyanjui* [2013] eKLR, the 1st applicant was the stepbrother of the Subject. The Subject's only other living stepbrother also gave his consent for the orders sought.

108 In *Re the Matter of Kaka Ziro Ngole* [2008] eKLR the court appointed the son as guardian and manager of his mother's estate.

109 In *Re the matter of Silas Wanga Masibo* [2014] eKLR the court appointed the daughter as guardian, and granted her power to 'receive and manage the patient's estate'; in *Re Matter of Captain PGM* [2015] eKLR, the court appointed the two daughters and the wife as joint guardians of the individual and joint managers of his estate.

110 In *G A D v A M A M* [2015] eKLR, the cousin of the individual was appointed guardian and manager of the individual's estate.

In one case, the court appointed a guardian on its own motion.¹¹¹ In this case, the applicant (the father of the person with a psychosocial disability) was seeking an injunction to restrain the respondent (the sister-in-law to the person with psychosocial disability) from dealing with a contested piece of land belonging to the person with psychosocial disability.¹¹² In addition to issuing a temporary injunction, the court appointed the father as guardian of the person and manager of his estate. In the one case where a guardian and/or manager was not appointed, the court instead required audience with all the relatives of the individual before making orders as to whether or not to appoint a guardian and/or manager.¹¹³

5: Reasons Prompting Applications for Appointment of Guardian and/or Manager

Substituted decision-making measures in terms of guardianship and/or appointment of manager in Kenya are usually instituted for reasons which primarily concern the protection of property in circumstances where a person's mental capacity to make financial decisions is questioned. Other reasons for instituting guardianship proceedings include ensuring that the individual obtains proper medical care and hygiene and ensuring provision for the individual's dependents.

*In the Matter of the Estate of COO (patient)*¹¹⁴, the individual was awarded substantial damages following an industrial accident that rendered him of 'unsound mind'.¹¹⁵ Guardianship proceedings were instituted following advice from the petitioners' advocates that 'to manage the patient's estate they need to be appointed as managers of the patient's estate'.¹¹⁶ *In re Joseph Gathecha Kinyanjui*,¹¹⁷ guardianship and appointment as managers was sought to allow the applicants to take necessary action to institute proceedings in court for the preservation of the estate of the individual with psychosocial disability. In this case, no discussion ensued regarding the wellbeing of the individual concerned; the main focus was on the preservation of the estate of the person. In *G A D v A M A M*,¹¹⁸ application to be made guardian and manager of the estate was made to safeguard property. The applicant also sought to be appointed guardian ad litem for the individual in order to safeguard the property in question.

In *WK v AW*,¹¹⁹ the court on its own motion appointed the father of the individual 'the guardian

111 *WK v AW* [2014] eKLR.

112 *WK v AW* [2014] eKLR.

113 *In Re Matter of E.M.M.* [2010] eKLR.

114 *In the Matter of the Estate of COO (patient)* Misc. Civil Application 78 of 2013 [2014] eKLR.

115 *In the Matter of the Estate of COO (patient)* [2014] eKLR, para 2 the Court noted that the individual 'has had treatment by various doctors but they have not been able to restore his mental condition and he has been declared as a person with unsound mind'.

116 *Ibid*, para 3.

117 [2013] eKLR.

118 ELC Misc. Application No. 14 of 2012 [2015] eKLR.

119 *WK v AW* Misc. Cause No. 13 of 2014 [2014] eKLR.

of the mental patient to ensure he obtains proper medical care and hygiene'.¹²⁰ The court also ruled that the guardian would 'collect the rents for the two plots and use the proceeds for the maintenance of the mental patient'.¹²¹ *In re the matter of Kaka Ziro Ngole*,¹²² guardianship and appointment as managers was sought to allow the applicant dispose of part of the individual's property 'in order to facilitate the patient's medical expenses'.

In *PPKN V AWN*,¹²³ guardianship was sought on grounds that 'the ward lacks mental capacity to care for his own personal health and financial welfare'. It was also alleged that the individual 'suffers from severe impairment to his mental capacity and lacks the capacity to make decisions'. The question of capacity to make decisions also came up expressly in *Re the matter of Silas Wanga Masibo*¹²⁴. In this case, guardianship was sought on grounds that the patient was of unsound mind and unable to make decisions for himself. The applicant was the wife of the individual for whom she sought guardianship. The applicant alleged that she 'needed to access the monies in the cited accounts to be able to take care of the minors who were children of the patient who numbered seven'.¹²⁵

In re Matter of Captain PGM,¹²⁶ guardianship was sought for reasons that the individual was 'in danger of imminent death if urgent medical care is not availed or accessed soon'. The daughters of the individual sought appointment as managers because there were concerns that the person was being taken advantage of, 'leading to loss of substantial investment and monies'. Further, the applicants alleged that the person's properties were going to waste.

While the court did not grant guardianship in *Re matter of E.M.M.*,¹²⁷ the application for guardianship was founded on the allegation that the person required funds for treatment but the person could not 'speak, write or sign documents to facilitate the withdrawal of the requisite funds'.

6: How Often Guardians or Managers are appointed with Regard to Persons with Psychosocial Disabilities and the Reasons for Decisions to Appoint Guardians or Managers
Substituted decision-making approaches, including guardianship, are premised on three approaches: status attribution, application of the outcome test, or use of the functional test.¹²⁸

120 *WK V AW* [2014] eKLR.

121 *WK V AW* [2014] eKLR.

122 Misc. Application No. 37 of 2008 [2008] eKLR.

123 Misc. Application 7 of 2015 [2015] eKLR.

124 Misc. Application No. 25 of 2014 [2014] eKLR.

125 *In Re the matter of Silas Wanga Masibo* [2014] eKLR.

126 Misc. Cause No. 15 of 2015 [2015] eKLR.

127 *In Re Matter of E.M.M.* Misc. Application 85 of 2009 [2010] eKLR.

128 A Dhanda. 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' [34] *Syracuse Journal of International Law and Commerce* (2006-2007)429.

Under the outcome test, the attribution of incompetence is made based on the decision arrived at by the person with disability. If a person makes a decision viewed as failing to conform to ‘normal’ or ‘societal values’, then the person is regarded as lacking capacity.¹²⁹

The functional approach assesses capacity on an ‘issue-specific’ basis.¹³⁰ The person with disability is considered incapable if, by reason of the disability, he or she is unable to perform a specified function.¹³¹ Focus is on the individual’s cognitive capacities—the ability to understand the nature and consequences of a specific decision. The General Comment on Article 12 clarifies that the functional approach is contrary to Article 12 of the CRPD.¹³²

The Mental Health Act takes a status approach to legal capacity. Section 26 of the Act provides for the appointment of a guardian and/or manager on account of an individual being a ‘person suffering from mental disorder’. Under the status approach, once it is established that any individual is a person with disability, the law presumes lack of capacity. The very existence of a particular impairment is sufficient to strip the individual of legal capacity. In line with the Mental Health Act,¹³³ Kenyan courts largely take a status-based approach to legal capacity, as evidenced in the reasons given by courts in instances where guardians or managers were appointed. In *WK v AW*, the court noted that the person was ‘in need of medical care’ and that his health was at risk of deteriorating. The court directed the guardian to ensure that the person would obtain ‘proper medical care and hygiene’. In *the matter of the Mental Health Act & in the matter of James Karimi Gikongo v Winfred Njeri Mwai*¹³⁴, the court appointed a guardian after conducting an inquiry, which revealed that the individual was ‘suffering from mental disorder to such an extent as to be incapable of managing his affairs’.

In seven of the ten cases reviewed for this article, the courts primarily relied on medical evidence in reaching decisions on whether or not to appoint guardians and/or managers.¹³⁵ In two cases, it is not clear whether medical evidence was relied on by the courts.¹³⁶ In one case, the court relied on photographs that depicted the individual as living in a deplorable state.¹³⁷

129 J Bellhouse, A Holland, I Clare & M Guinn. ‘Decision-making Capacity in Adults: Its Assessment in Clinical Practice’, [7] *Advances in Psychiatric Treatment* (2001) p 294 -301.

130 G Quinn. ‘Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’, HPOD Conference, Harvard Law School, 20 February 2010.

131 A Dhanda (n128).

132 United Nations Human Rights Office of the High Commissioner for Human Rights CRPD/C/GC/1 para 15 (n3).

133 Part XII of the Mental Health Act on ‘Judicial Power Over Persons and Estates of Persons Suffering from Mental Disorder’.

134 [2009] eKLR.

135 *In the Matter of the Estate of COO (patient)* [2014] eKLR; *In re Joseph Gathecha Kinyanjui* [2013] eKLR; *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN v AWN* [2015] eKLR; *In re Matter of Captain PGM* [2015] eKLR; *G A D v A M A M* [2015] eKLR; and *In Re the Matter of Silas Wanga Masibo* [2014] eKLR. However, in *In Re the Matter of Silas Wanga Masibo*, the court also relied on *viva voce* evidence. Further, in this case, the court ordered a further mental examination, being dissatisfied with a letter from the dispensary, which was issued as proof that the person was of unsound mind.

136 *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In Re Matter of E.M.M.* [2010] eKLR.

137 *WK V AW* [2014] eKLR.

How, therefore, did courts respond to medical evidence in guardianship cases? *In the Matter of the Estate of COO (patient)*,¹³⁸ the court concluded that it was evident from the medical report of the doctor ‘that the patient is incapable of managing his affairs’. *In re Joseph Gathecha Kinyanjui*¹³⁹ the court relied *inter alia* on a medical report from a psychiatrist which stated that the individual ‘suffers chronic schizophrenia’ which was described as ‘a debilitating mental illness and is lifelong’. The medical report also stated that ‘any crucial decision concerning [the Subject’s] welfare should be made in consultation with his immediate next of kin’. In line with the medical report, the court concluded that it was satisfied that the individual concerned ‘suffers from a mental disorder to such an extent as to be incapable of managing his affairs’ and appointed a guardian and manager for the individual. *In re Joseph Gathecha Kinyanjui*,¹⁴⁰ the psychiatrist’s report was to the effect that the individual was ‘suffering from severe mental illness and that she is not in a position to care for herself’. The psychiatrist also indicated that ‘the patient needed long-term medical psychiatric care and family support’. The court indicated that it was satisfied that the conditions required by law before granting orders of guardianship and before appointment of a manager had been shown to exist. In *PPKN v AWN*,¹⁴¹ the court relied on a medical report stating that the individual had bipolar disorder whose symptoms included poor financial choices and rash spending sprees. In addition, the doctor’s prognosis was to the effect that:

‘The Bipolar disorder cannot be cured but treated effectively over a long term. It is best that the applicant who is his wife manages the estate and has custody and care of the ward until he stabilises and is capable to handle his affairs.’¹⁴²

The ruling of the court in *PPKN v AWN*¹⁴³ was influenced heavily by the medical report. The court stated that ‘[t]his court is satisfied that the ward is sick and require[s] help’. *In re Matter of Captain PGM*¹⁴⁴ the court relied on medical evidence which confirmed that the individual was a ‘very sick looking man wasted, and confused...disoriented in time, place and person...is not capable of making any rational decision’. In *G A D v A M A M*,¹⁴⁵ the court stated:

‘The evidence by PW1 [the psychiatrist] that the Respondent has been mentally ill for the past six years was not controverted by any other expert evidence. In the circumstances, I am satisfied that the Respondent has been mentally ill for the past six years...Having found that the Respondent is suffering from mental disorder as defined by Section 2 of the Mental Health Act, this court appoints the Petitioner to be a guardian and manager...’

138 *In the Matter of the Estate of COO (patient)* Misc. Civil Application 78 of 2013 [2014] eKLR.

139 [2013] eKLR.

140 [2013] eKLR.

141 Misc. Application 7 of 2015 [2015] eKLR.

142 *PPKN v AWN* [2015] eKLR.

143 Misc. Application 7 of 2015 [2015] eKLR.

144 Misc. Cause No. 15 of 2015 [2015] eKLR.

145 ELC Misc. Application No. 14 of 2012 [2015] eKLR.

In some cases, courts relied on evidence other than (or in addition to) medical evidence in considering the issue of whether or not to appoint guardians and/or managers. In *WK v AW*,¹⁴⁶ the court relied on photographs depicting the person ‘in a deplorable state, in unhygienic condition’. There was no medical evidence in this case. In *Re the matter of Silas Wanga Masibo*,¹⁴⁷ in addition to medical evidence, the court decided to hear the matter through *viva voce* evidence from the local chief as well as the individual’s family members. In this case, the local chief had also written a letter in support of the application. In *GAD v A M A M*,¹⁴⁸ the court also proceeded by way of *viva voce* evidence.¹⁴⁹

In *Re matter of Captain PGM*,¹⁵⁰ in addition to medical reports, the court also relied on draft minutes of an extraordinary meeting showing that the individual had agreed to sell his 25 per cent share of the plot where he resided without a valuation report. The court asserted that the person ‘could not have made proper judgment as his decision-making capacity is impaired by the current illness that has been ongoing for a long time’. In essence, in this case, the court nullified a decision made by the individual prior to issue of guardianship orders. In *GAD v A M A M*¹⁵¹ the court also nullified a contract for sale of ‘a house without land’ entered into by the individual prior to issue of guardianship orders.¹⁵² In this case, the court stated that ‘the Respondent had no capacity to sale [sic] the house ...because of his mental status’ and expressed that ‘a person of unsound mind’ cannot pass any interest in property.

In *WK v AW*,¹⁵³ while the court appointed a guardian, it made it explicit that the property remained that of the ‘mental patient’:

‘The attached documents confirm that the mental patient is the legal owner of the two (2) properties and should benefit from the same. The older brother and husband of the Respondent is now deceased and therefore the property ought to be owned by the mental patient and he should obtain any/all benefit from the ownership of the two plots.’¹⁵⁴

*Re matter of E.M.M.*¹⁵⁵ is the only one of the ten cases considered in this article where the

146 *WK v AW* Misc. Cause No. 13 of 2014 [2014] eKLR.

147 Misc. Application No. 25 of 2014 [2014] eKLR.

148 ELC Misc. Application No. 14 of 2012 [2015] eKLR.

149 In *GAD v A M A M* [2015] eKLR. In addition to the evidence by the medical professional, the individual’s mother also gave evidence that ‘the Respondent is mentally ill and that he has been unwell since he was twelve years old’.

150 Misc. Cause No. 15 of 2015 [2015] eKLR.

151 ELC Misc. Application No. 14 of 2012 [2015] eKLR.

152 The sale agreement was nullified for reasons that the property could not be sold before confirmation of grant of probate, in addition to reasons related to the mental status of the individual concerned.

153 *WK v AW* Misc. Cause No. 13 of 2014 [2014] eKLR.

154 *WK v AW* [2014] eKLR.

155 In *Re Matter of E.M.M.* Misc. Application 85 of 2009 [2010] eKLR.

court did not appoint a guardian or manager. Upon discovering that the individual over whom guardianship was sought had other relatives resident in Kenya, the court required the applicant to file the consent of the individual's other relatives. The court also ordered all seven relatives to come to court to confirm whether the application was well founded. *In Re the matter of Silas Wanga Masibo*,¹⁵⁶ the court appointed a guardian other than the individual who had applied to be made guardian. In this case, the individual's wife who had applied to be made guardian had not disclosed material particulars including that she had deserted the individual over whom she sought to have guardianship. The court appointed the person's daughter in place of the wife. Similarly, *In re Matter of Captain PGM*,¹⁵⁷ the court added the wife as one of the joint managers in addition to the two applicants (both daughters to the individual).

7: Distinction between the Role of 'Guardian' and 'Manager'

Section 26 of the Mental Health Act distinguishes between orders 'for the management of the estate of any person suffering from mental disorder' and orders 'for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person'. According to Section 26 (3), the court may make orders for the management of the estate of a 'person suffering from mental disorder' in circumstances where upon inquiry such a person is found to be incapable of managing their affairs. If such a person is 'capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency' the court need not make orders as to the custody of the person.

The approach of courts is mixed regarding their perception of whether the roles of 'manager' and 'guardian' are distinct.¹⁵⁸ The court in *WK v AW*¹⁵⁹ did not make a distinction between 'guardian' and 'manager'. In this case, the court appointed the father of the individual as 'guardian' but at the same time required him to collect the rents for the individual's property. Similarly, the court in *In the Matter of the Estate of COO (patient)*¹⁶⁰ appeared not to make a distinction between 'guardian' and 'manager'. In this case, the court appointed the individual's elder brother, wife and eldest son as 'manager' but also required them to 'file a report every six months on the status of the patient'. The court in *Re the matter of Silas Wanga Masibo*¹⁶¹ did not make a distinction between 'guardian' and 'manager'. In this case, the court appointed the daughter as 'guardian', but granted her 'power to receive and manage the patient's estate'. *In the matter of the Mental Health Act & in the matter of James Karimi Gikongo v Winfred Njeri Mwai*¹⁶² the court found that the individual was capable of managing himself yet proceeded to appoint a guardian for the individual. Once appointed 'guardian'

156 Misc. Application No. 25 of 2014 [2014] eKLR.

157 Misc. Cause No. 15 of 2015 [2015] eKLR.

158 It can be argued that Section 26 of the Mental Health Act requires the appointment of both manager and guardian and that in no circumstance may someone be appointed a guardian and fail to have his or her estate appointed a manager.

159 *WK v AW* Misc. Cause No. 13 of 2014 [2014] eKLR.

160 *In the Matter of the Estate of COO (patient)* Misc. Civil Application 78 of 2013 [2014] eKLR.

161 Misc. Application No. 25 of 2014 [2014] eKLR.

162 [2009] eKLR.

the wife was authorised to have full access to the individual's income.

In other cases, the court made a clear distinction between the role of guardian and manager.¹⁶³ In these cases, the court granted applications for appointment both as 'guardian of the subject' as well as 'manager of the estate of the subject'.

In eight out of the ten cases considered in this article, the court explicitly made reference to Section 26 of the Mental Health Act in its ruling or judgment on an application for the appointment of guardian and/or manager.¹⁶⁴ In two out of the ten cases, the court did not explicitly make reference to any section of the Mental Health Act or indeed to any other law.¹⁶⁵ In four cases, the court made reference to Section 26 and other sections of the Mental Health Act and/or other laws.¹⁶⁶

8: The Extent to Which Courts Take a Human Rights Approach in Proceedings for Appointment of Guardian and/or Manager

The CRPD establishes the human rights approach to issues of guardianship. As already highlighted in this article, the CRPD Committee has interpreted the Convention as requiring the abolition of guardianship and its replacement with supported decision-making. Hence, a 'human rights approach to guardianship' is arguably a contradiction in terms since the only human rights approach to guardianship is its abolition. The author agrees with this overall approach. In addition, though, the author recognises that getting to the point of the full abolition of guardianship may take some time. In the Kenyan context, abolition of guardianship would involve repeal or amendment of relevant sections of the Mental Health Act and the Children Act, and as is well known, law reform processes can be long drawn out. Hence, in the meantime, this article finds it useful to highlight the weaknesses in the current guardianship system and to point out the changes that need to be made in the interim as we move towards a future without guardianship.

A key element of a human rights approach to issues of equal recognition before the law is the requirement under Article 12 (4) of the CRPD that 'measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law'. According to Article 12 (4) of the CRPD, measures relating to the

163 *In the case of Re Joseph Gathecha Kinyanjui* [2013] eKLR; *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN v AWN* [2015] eKLR; *GAD V AMAM* [2015] eKLR; and *In Re Matter of Captain PGM* [2015] eKLR.

164 *WK V AW* [2014] eKLR; *In the Matter of the Estate of COO (patient)* [2014] eKLR; *Re Joseph Gathecha Kinyanjui* [2013] eKLR; *In Re the matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN v AWN* [2015] eKLR; *In Re the matter of Silas Wanga Masibo* [2014] eKLR; *In Re Matter of Captain PGM* [2015] eKLR – in this case, the court also made reference to Section 27 of the Mental Health Act; *G A D v A M A M* [2015] eKLR – in this case, the court also made reference to Section 27 of the Mental Health Act.

165 *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In Re matter of E.M.M.* [2010] eKLR.

166 *In PPKN v AWN* [2015] eKLR, the court made reference to section 26, 27, 28, 32 and 33 of the Mental Health Act. *In Re the Matter of Kaka Ziro Ngole* [2008] eKLR, the court made reference to Section 26 (1) a) and b) of the Mental Health Act and Order XXXI rule 15 and Order L rule 1 of the Civil Procedure Rules. *In Re the matter of Silas Wanga Masibo* [2014] eKLR the court made reference to Section 26 (1) a) and b) of the Mental Health Act and the record generally indicates that the application was brought under the Civil Procedure Rules 2010. Given the nature of the case in *G A D v A M A M* [2015] eKLR, the court also made reference to Section 2 (3) and (4), Section 82(b) (iii) of the Law of Succession Act, Section 5 of the Kadhi's Act and Article 170(5) of the Constitution.

exercise of legal capacity should be 'proportional and tailored to the person's circumstances, apply for the shortest time possible' and be 'subject to regular review by a competent, independent and impartial authority or judicial body'.

Section 33 (1) of the Mental Health Act requires the manager to furnish an 'inventory of the property belonging to the person of whose estate he has been appointed manager...together with a statement of all debts owed by or due to such person' within six months of the date of appointment as manager. Further, the manager is required to furnish to the court and to the Public Trustee 'within three months of the 31st December, an account of the property in his charge showing the sums received and disbursed on account of the estate during the year and the balance'. However, the Act makes no provision for review of guardianship orders in terms of specific timeframes.¹⁶⁷ Hence, one key consideration in reviewing the cases was to examine whether any limits were placed on appointment of guardians or managers by courts.

In eight of the ten cases considered in this article, guardianship was ordered without any express indication as to safeguards.¹⁶⁸ Only in two cases did the court give a specific time frame within which the manager was to file a report in court on the status of the person¹⁶⁹ or of the person's property.¹⁷⁰

In six out of the nine cases where guardianship orders were issued, guardianship seems to have been established in such a manner as to run indefinitely; the courts in these cases did not indicate any period within which the guardianship orders would be reviewed.¹⁷¹ In two of the remaining three cases where guardianship orders were issued, the courts were vague regarding the time when the orders would be reviewed.¹⁷² To illustrate, *in re Matter of Captain PGM*,¹⁷³ the court authorised the applicants to jointly carry out the guardianship over the subject and to 'provide status and/or progress report to the court' without indicating a time frame within which a status report would

167 Section 36 of the Mental Health Act addresses 'orders on recovery of person previously suffering from mental disorder'. The section provides that where it is shown that the person has recovered, 'the court may...make such order as in the circumstances it deems just and expedient'.

168 *WK v AW* [2014] eKLR; *G A D v A M A M* [2015] eKLR; *In Re Joseph Gathecha Kinyanjui* [2013] eKLR; *in Re Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN V AWN* [2015] eKLR; *In Re the Matter of Silas Wanga Masibo* [2014] eKLR; *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* orders given by the court by way of safeguards are vague: the court authorises the petitioner to manage the estate of the individual 'until he is capable of managing his own affairs or the further order of the court'; *In Re Matter of Captain PGM* [2015] eKLR the court authorises the applicants to jointly carry out the guardianship over the subject and to 'provide status and/or progress report to the court'. This is a safeguard, but is vague compared to how specific the court is about the fact that in this case, the manager must provide update on the property within one month.

169 *In the Matter of the Estate of COO (patient)* [2014] eKLR.

170 *In Re Matter of Captain PGM* [2015] eKLR.

171 *WK v AW* [2014] eKLR; *In Re Joseph Gathecha Kinyanjui* [2013] eKLR; *in Re Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN V AWN* [2015] eKLR; *G A D v A M A M* [2015] eKLR; *In Re the matter of Silas Wanga Masibo* [2014] eKLR.

172 *In the Matter of the Mental Health Act & in the Matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR; *In re Matter of Captain PGM* [2015] eKLR.

173 Misc. Cause No. 15 of 2015 [2015] eKLR.

be provided to the court. Only *in the Matter of the Estate of COO (patient)*¹⁷⁴ did the court provide a specific timeframe within which a status report on the individual would be filed in court. In this case, the court required the joint managers to ‘file a report every six months on the status of the patient’. Hence, it appears that Kenyan courts approach the issue of guardianship on the basis of the presumption that the state of ‘mental incapacity’ is a permanent one and the person would never again be able to exercise his or her right to autonomy.

In seven cases, the court appointed a manager or gave the person(s) appointed as ‘guardian’ power to manage the property of the individual put under guardianship. In these cases, the courts also failed to explicitly require the person(s) appointed to manage the individual’s property to give an inventory of the property belonging to the person of whose estate the manager(s) were appointed.¹⁷⁵ In *Re matter of Captain PGM*,¹⁷⁶ while guardianship was established in such a manner as to run indefinitely, the court indicated that with regard to property, the managers were to ‘account for the proceeds, monies received and properties dealt with by filing a status or progress report in court in one month’.¹⁷⁷

In Re the matter of Silas Wanga Masibo,¹⁷⁸ the court appointed the individual’s daughter as guardian and manager of the individual’s estate *generally*. However, the court ruled that the bank accounts of the individual would be operated jointly by his daughter, son and wife. There is no indication in the ruling as to when the individual over whom guardianship orders were issued would resume operating his bank accounts. The court in *Re the matter of Silas Wanga Masibo*¹⁷⁹ (more than in any other case considered in this article) made very specific orders on how the property of the individual could be utilised. The court *inter alia* specified that the proceeds from the account shall go towards medical expenses of the person, school fees of school going children and upkeep of the wife and of all the children who were below the age of eighteen.

The specificity on use of finances in *Re the matter of Silas Wanga Masibo*¹⁸⁰ was commendable as it could heighten the chances that the individual’s estate would not be mishandled. On the other hand, this specificity highlighted the failure of the court to give consideration to the will and preferences of the individual.¹⁸¹ From the time orders for guardianship and/or appointment of

174 *In the Matter of the Estate of COO (patient)* Misc. Civil Application 78 of 2013 [2014] eKLR.

175 *WK v AW* [2014] eKLR; *In Re Joseph Gathecha Kinyanjui* [2013] eKLR; in *Re Matter of Kaka Ziro Ngole* [2008] eKLR; *PPKN V AWN* [2015] eKLR; *G A D v A M A M* [2015] eKLR; *In Re the matter of Silas Wanga Masibo* [2014] eKLR; *In the matter of the Mental Health Act & in the matter of James Karimi Gikongo v Winfred Njeri Mwai* [2009] eKLR.

176 Misc. Cause No. 15 of 2015 [2015] eKLR.

177 The court in this case exercised its discretion; Section 33 of the mental Health Act requires an inventory to be provided within six months of appointment.

178 Misc. Application No. 25 of 2014 [2014] eKLR.

179 [2014] eKLR.

180 [2014] eKLR.

181 Article 12 (4) of the CRPD.

manager are made, it appears that the individual exists only as a 'sick person' in need of treatment and care. Any possibility for the person to spend their money towards a cause of their choosing is extinguished. In essence, it is as if the person has no other dreams or hopes that may need money to accomplish, and given the indefinite nature of guardianship orders, as if he or she will never be able to exercise decision-making autonomy. This is why commentators have referred to guardianship as a form of civil death.¹⁸²

Article 12 (4) of the CRPD also requires that 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence'. Of the ten cases considered in this article, the courts did not have regard to the 'will and preferences' of the individual. In most of the cases, the courts took a 'best interest' approach, even where 'best interest' was not explicitly named in the ruling/judgment as the guiding principle.¹⁸³ To illustrate, the applicants in *Re Joseph Gathecha Kinyanjui*¹⁸⁴ averred that it was 'in the Subject's best interests to grant the orders sought' and indeed the court did appoint a guardian and manager in this case. In *Re matter of Captain PGM*,¹⁸⁵ the court went as far as specifying the doctors who were to provide the individual with medical attention (the same team that attended to him as shown in the affidavit of the wife). This effectively curtailed the individual's decision-making not only with regard to management of finances but also with regard to choice of medical treatment. Only in one of the ten analysed cases did the petitioner submit/argue that she had no interest 'in competition with those of the subject'.¹⁸⁶

V: DILEMMAS ON IMPLEMENTING ARTICLE 12(5) IN THE KENYAN CONTEXT

Article 12 (5) of the CRPD promotes the autonomy of persons with disabilities in decision-making with regard to financial affairs. Yet several dilemmas remain with regard to the implementation of this provision in the Kenyan context.

First, the medical model of disability is still the predominant prism through which issues of disability are seen in Kenyan society. In its concluding observations to Kenya, the CRPD Committee expressed its concern that 'persons with psychosocial and/or intellectual disabilities are disproportionately affected by stigma which limits their access to education, health and employment'. With regard to exercising the right to make decisions on financial affairs, the predominant view within society is that a person with a psychosocial disability is 'sick' and 'needs help'. Thus, merely reforming the law

182 G Quinn. 'From Civil Death to Civil Life Perspectives on Supported Decision-Making for Persons with Disabilities', Tbilisi State University, Georgia, 20 December 2015.

183 For example, in *PPKN V AWWN* [2015] eKLR, the court stated that the applicant was appointed manager 'to provide for the wellbeing of the ward'.

184 [2013] eKLR.

185 Misc. Cause No. 15 of 2015 [2015] eKLR.

186 *G A D v A M A M* [2015] eKLR.

on guardianship is not enough; it is necessary to have more concerted efforts on awareness raising, self-advocacy and social support to families of persons with disabilities.

Second, there are limited options to psychiatry,¹⁸⁷ compounded by a lack of affordable mental health care.¹⁸⁸ In some cases considered in this article, guardianship orders were sought to access money for paying the individual's health expenses. In the absence of viable alternatives to psychiatry and good quality state funded mental health care, the right of persons with psychosocial disabilities to legal capacity remains precarious.

The third dilemma relates to concerns about harm. While these concerns are a global rather than a context specific phenomenon,¹⁸⁹ they are exacerbated in the Kenyan context by the widespread fraud in property dealings.¹⁹⁰ In several cases considered in this article, family members sought to be appointed managers over the property of a relative with a psychosocial disability to prevent fraudulent dealings. In *Re matter of Captain PGM*,¹⁹¹ the court noted that:

‘Due to the subject’s condition employees, agents and friends have taken advantage of him leading to loss of substantial investments and monies from him. The properties are going to waste, the properties are in a state of disrepair, and the rents are not remitted to the subject, hence the need for a manager of the estate.’

While all persons are prone to attempted illegal dealings with their property, persons with disabilities may be disproportionately affected given that they experience additional difficulties in accessing justice.¹⁹²

The fourth dilemma is that neither the bench nor the bar appears to be much engaged with the CRPD on the question of guardianship. None of the reviewed cases mentioned the CRPD; and indeed, human rights discourse did not seem to be a consideration in determining those cases. This lack of engagement with human rights is striking considering that substituted decision-making measures are extremely limiting of a person's human rights.

Finally, it may be argued that Kenya (for the large part) retains a communal outlook rather than an individualist libertarian one.¹⁹³ In cultures with a communal outlook, tolerance for ‘making mistakes’ may be lower, because families rather than the state provide the social cushioning needed

187 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1 (n47) p88.

188 Ibid, p89.

189 Bizchut (n16).

190 Standard Digital ‘Kenya ranked fourth globally in list of countries worst hit by fraud’ <<http://www.standardmedia.co.ke/business/article/2000142773/kenya-ranked-4th-globally-in-list-of-countries-worst-hit-by-fraud>> (accessed on 10 May 2016)

191 Misc. Cause No. 15 of 2015 [2015] eKLR.

192 United Nations Office of the High Commissioner for Human Rights (n46) para. 128.

193 RMJ Oduor. ‘Ethnic Minorities in Kenya's Emerging Democracy: Philosophical Foundations of their Liberties and Limits’ PhD thesis, University of Nairobi, 2011.

should a person fall on hard times. Hence, much more than legal reform is needed to encourage the dignity of risk with regard to financial decision-making by persons with psychosocial disabilities, partly because it is the family that has to mitigate any negative consequences of an individual's decision.

VI: RECOMMENDATIONS FOR REFORM

This section makes recommendations towards enhancing the property rights of persons with psychosocial disabilities in Kenya. The recommendations are geared towards redressing the situation of formal guardianship rather than the *de facto* guardianship experienced by the majority of persons with psychosocial disabilities in Kenya.¹⁹⁴

Clearly, the law is limited in its ability to deliver the social, cultural and political change required to provide justice to people with disabilities.¹⁹⁵ At the same time, though, the law is critical as a means for ensuring rights for people who have experienced discrimination, including people with disabilities.¹⁹⁶ Hence, the first and main recommendation regards law reform. Kenya ratified the CRPD in 2008 and thus it is committed to providing support to persons with disabilities to exercise legal capacity on an equal basis in all spheres of life. The CRPD Committee expressly called upon Kenya to 'repeal legislation and practices that allow for deprivation of legal capacity on the basis of impairment'. The Committee specifically expressed concern that the Children Act, the Mental Health Act and the Marriage Act deprive persons with intellectual and/or psychosocial disabilities of their legal capacity.¹⁹⁷ Thus, Kenya should as a matter of priority repeal or amend these laws and establish a system of support for decision-making that is in line with Article 12 of the CRPD.

Inevitably, there will be a transition process prior to the full abolition of guardianship. Hence, judicial officers should keep a number of issues in mind as they consider guardianship matters in the interim.

First, where orders for guardianship and/or appointment of manager are sought in respect of a person with psychosocial disability, the court should first warn itself against a paternalistic approach. The court should approach the issue from the vantage point that the person is a full and equal human being who can make his or her own decisions. The only question should be one of what support the individual needs in order to make his or her own decisions.¹⁹⁸ In part, this approach can be reflected

194 Kenya National Commission on Human Rights CRPD/C/KEN/CO/1 (n47) p78-80; United Nations Office of the High Commissioner for Human Rights (n46) para 23-24.

195 M Jones & LA Basser-Marks. 'The Limitations on the Use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992' in M Hauritz, C Sampford & S Blencowe (eds), *Justice for People with Disabilities: Legal and Institutional Issues* (Federation Press, 1998), p60.

196 Ibid.

197 United Nations Office of the High Commissioner for Human Rights (n46) para 23.

198 M Bach & L Kerzner. 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Paper Commissioned by the Law Society of Ontario 2010) <<http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>> (accessed on 9 May 2016).

by use of more neutral and less victimising terminology such as ‘subject’ or ‘respondent’ rather than ‘mental patient’ or ‘person with mental disorder’.

The second recommendation is with regard to ensuring the active participation of the individual with psychosocial disability in instances where guardianship proceedings have been brought against the individual. In the first place, judges should always require the presence of the person in court. In cases where this is not practicable (which cases should be construed very narrowly), judges should note expressly in the body of the ruling and/or judgment why the presence of the individual whose rights are being adjudicated was dispensed with. A medical report, while important, should never form the sole basis upon which a decision to appoint a guardian and/or manager is reached.

Third, in a significant number of cases, guardianship orders are made purely on the basis of the deposition of the relative making the application, without necessarily hearing other members of the family. As a rule, judges should always sound out other members of an individual’s family prior to granting guardianship and/or appointing a manager. Generally, hearing *viva voce* evidence from other people besides the applicant (including for example the local chief) could provide the court with relevant information to better understand the prevailing circumstances. Hearing an individual’s relatives should not be a substitute to hearing the individual against whom guardianship orders are sought.

Fourth, it is important to safeguard the process, in particular, to require regular reviews of guardianship orders and/or orders for the appointment of manager. Reviews should be geared towards ensuring the least restrictive measures against the individual at every stage. It is equally necessary for the court to satisfy itself at all times that individuals are being supported to express their will and preferences. Currently, the presumption seems to be that guardianship operates for life, which is contrary to Article 12 of the CRPD. Indeed the Mental Health Act provides for the issuing of temporary orders;¹⁹⁹ this provision should be preferred over full guardianship orders and/or orders for appointment of manager over an individual’s estate.

The fifth recommendation relates to exploring options that do not completely strip the person of his or her power to deal with property. Such options include joint accounts (with the person as one of the signatories), entering caveats on property and encouraging the use of tools such as powers of attorney.²⁰⁰

The CRPD emphasises the role of Disabled Persons organisations (DPOs) in all matters relating to persons with disabilities.²⁰¹ Hence, regarding the right of persons with psychosocial disabilities to own property, DPOs should, first raise awareness among people with disabilities and their families

199 Section 29 (2) of the Mental Health Act envisages a situation in which temporary orders may be made where it appears to the court that a person is suffering from mental disorder of a temporary nature and that it is expedient to make temporary provision for his maintenance or for the maintenance of such dependent members of his family. The court in such instances may direct that the person’s property or sufficient part of it be applied for such purpose.

200 Bizchut (n16).

201 Article 4 (3) of the CRPD.

on alternatives to guardianship in financial affairs. DPOs should also conduct research on how *de facto* guardianship operates in financial decision-making and document any human rights violations that may be occurring against persons with psychosocial disabilities in the private sphere. Finally, DPOs should partner with formal avenues for the training of judges, for example in collaboration with the Judicial Training Institute²⁰² and lawyers, in collaboration with the Law Society of Kenya²⁰³ in order to build the capacity of these actors on the rights of persons with disabilities.

VII: CONCLUSION

This article has examined the right to own and manage property and finances by persons with psychosocial disabilities in Kenya using Article 12 (5) of the CRPD as a lens. Several conclusions can be drawn from the research. The first is that the right to own property and the right to legal capacity are intricately linked. Hence, as long as the Mental Health Act with its extensive guardianship provisions remains in force, it will be almost impossible to introduce the supported decision-making paradigm, which is key to the enjoyment of property rights by persons with psychosocial disabilities.

Second, it is possible even within the current legal framework to make Kenyan courts more compliant to human rights standards with regard to the property rights of persons with psychosocial disabilities. Emphasising the role of the individual against whom guardianship orders are sought will likely hasten the shift from viewing persons with psychosocial disabilities as objects of care to persons with full and equal rights.

Third, substituted decision-making measures in terms of guardianship and/or appointment of manager are usually instituted (by families) for a variety of reasons, most of which concern the protection of property in circumstances where a person's mental capacity to make financial decisions is questioned. In order for persons with psychosocial disabilities to enjoy their right to legal capacity on an equal basis with others in the financial sphere, it is important to continue developing contextualised support options to enable the exercise of legal capacity in the financial sphere.

Fourth, the right to legal capacity is broadly about how persons with disabilities are viewed in society. As long as persons with psychosocial disabilities continue to be seen as incapable, guardianship will continue to be imposed. For persons with psychosocial disabilities to exercise the right to property, it is necessary to ensure equality and non-discrimination in all spheres of life including education and work. It is also important to raise awareness on the rights of persons with disabilities within communities so that they may benefit from inheritance on an equal basis with others. For persons with psychosocial disabilities to exercise equal rights to property, it is necessary to ensure broad changes, not just small-targeted measures that are specific to the implementation of Article 12.

202 The Judiciary Training Institute <<http://www.judiciary.go.ke/portal/page/judiciary-training-institute>> (accessed on 9 May 2016).

203 The Law Society of Kenya <<http://www.lsk.or.ke/>> (accessed on 9 May 2016).

WESTERN LIBERALISM, AFRICAN COMMUNALISM AND THE QUEST FOR AN ADEQUATE IDEOLOGICAL FOUNDATION FOR THE RECOGNITION AND PROTECTION OF THE RIGHTS OF PERSONS WITH DISABILITIES IN KENYA

*Reginald M.J. Oduor**

I: INTRODUCTION

There has been considerable progress in the recognition and protection of the rights of persons with disabilities in Kenya since 2003. The Convention on the Rights of Persons with Disabilities (CRPD) enhanced the gains that had already been made through the Persons with Disabilities Act (2003). The promulgation of the Constitution of Kenya (2010) gave further impetus to the efforts to secure these rights. In sharp contrast to the 1963 Kenyan Constitution, the current supreme law mentions these rights in several places, most significantly in Article 54, which is wholly dedicated to them and in Article 27, which forbids discrimination on the basis of, among others, disability. These developments have already translated into tangible gains for persons with disabilities in Kenya. In the area of political participation, for example, the March 4, 2013 General Elections resulted in the election, either through the first-past-the-post or party list electoral systems, of at least 12 Members of Parliament (MPs) and Senators and at least 100 Members of County Assemblies (MCAs) with disabilities.¹ Several persons with disabilities have also been appointed to constitutional commissions, judiciary and cabinet positions.²

However, the realities for persons with disabilities remain stark. The majority of children with disabilities are still out of school. Besides, most adults with disabilities continue to exist in the periphery of society without the benefit of schooling, or as unemployed school leavers and college graduates. The five per cent quota for persons with disabilities in appointive and elective positions stipulated in the Persons with Disabilities Act and reinforced by the Constitution remains a pipedream, as does the quota for public procurement opportunities announced by the government

* Ph.D., Senior Lecturer in Philosophy, Department of Philosophy and Religious Studies, University of Nairobi.

1 Disability Caucus on Implementation of the Constitution. 'THE EFFECTIVE REPRESENTATION IN PARLIAMENT FOR PERSONS WITH DISABILITIES'. Unpublished report in 2014 prepared by Lawrence M. Mute on the PROPOSALS IN RELATION TO ARTICLE 54 (2), ARTICLE 82 (1) (d) AND ARTICLE 100 OF THE CONSTITUTION OF KENYA, 2010.

2 Thus K.I. Laibuta was a member of the Constitution Implementation Commission, Simon J. Ndubai is Vice Chair Person of the Gender and Equality Commission, Samson K. Tororei is a member of the National Land Commission, while Monica Mbaru and Grace Mumbi Ngugi are judges of the High Court. Even before the passing of the Persons with Disabilities Act of 2003, Josephine Sinyo had been nominated to Parliament in the mid 1990s, and Lawrence Mute had been appointed to the Kenya National Commission on Human Rights in the nascent days of the National Rainbow Coalition (NARC) government, signifying a gradual positive change of direction with regard to the inclusion of persons with disabilities in public life.

a few years ago. What is more, accessibility to buildings, public transport and telecommunication services by persons with disabilities is far from being realised, and the attitudes of most members of the public towards such persons continues to be inhibitive rather than facilitative. This situation calls for deep reflection on ways to ensure that the constitutional and legislative gains made by persons with disabilities translate into improved quality of life for all of them. While it will entail lobbying for the greater implementation of relevant constitutional and legislative provisions, it will also require a re-assessment of the country's overall ideological orientation. The latter is the focus of this article.

The debate on the rights of persons with disabilities is part of the wider human rights discourse, which has for centuries been dominated by a Western liberal conceptual framework, making it easy for critics to dismiss it as a manifestation of Western hegemony. In the nascent African states of the 1960s, some African leaders opted for Western liberal democracy with its attendant capitalist economic model, while others, inspired by indigenous African communalism, chose the socialist path. In this article, I seek to illustrate how each of these paths has great potential to enhance the recognition and protection of the rights of persons with disabilities, but also how each of them has had serious negative impacts on the promotion of these very rights. I conclude that a synthesis of the two viewpoints, but one which has a clear communalistic orientation, would facilitate the identification of new ways of securing these rights in Kenya, as it would enable scholars, legal practitioners and activists to think beyond Western liberal orthodoxy.

I set out with some brief reflections on two preliminary questions, namely, the basis for a distinction between Western liberalism and African communalism, and the universality or particularity of human rights. I then examine, in the next two sections, the adequacy of Western liberalism and African communalism respectively to secure the rights of persons with disabilities, before drawing some conclusions.

My reflections proceed from the following three assumptions:

1. Every legal system inevitably rests on an ideological foundation, that is, an explicit or tacit set of goals to be achieved through a specific model of ordering society.
2. The scholarly endeavour to enhance the recognition and protection of the rights of persons with disabilities in Kenya must take cognisance of the fact that law, moral values, ideological orientation and dominant social attitudes have an ongoing impact on one another. Consequently, there is need to adopt an interdisciplinary approach to the issue.
3. Western liberalism and indigenous African communalism are not discrete viewpoints, but rather a matter of emphasis on individuality and collectivity respectively.

II: PRELIMINARY QUESTIONS

1: Are Western Liberalism and African Communalism Distinct Viewpoints?

At the outset, it is crucial to state that in speaking about Western liberalism and African communalism, I do not envisage two distinct and totally unrelated perspectives. Instead, the difference between the

two has to do with emphasis, with the former highlighting the rights of the individual above his or her social responsibilities and the latter giving pre-eminence to the individual's responsibilities to society above his or her personal rights. Indeed, this difference is sociological rather than biological: it is not that members of Western societies are genetically constituted to give pre-eminence to the rights of the individual, nor that there is a gene in the members of African societies that drives them to emphasise social responsibilities above individual rights. Instead, the difference was largely occasioned by the advent of Western modernity, driven by factors such as urbanisation that resulted in cultural plurality and relativity; the Protestant Reformation emphasising on a direct relationship between God and the individual; 18th century Western European Enlightenment, which put a high premium on the individual as a rational being; and the 19th century Industrial Revolution that gave rise to the Western European middle class with its drive for entrepreneurship.

Indeed, pre-modern rural European societies were as traditional as pre-industrial societies in other parts of the world, with their communalistic outlook driven by religious beliefs and family values based on strong kinship relationships. As Marcel Fafchamps observes, in pre-industrial societies throughout the world, there are solidarity bonds among members of the same family, kinship group or village, manifesting in ways including, labour invitations and other forms of manpower assistance for the sick and the old, cost-free land and livestock loans, the care of children that parents cannot support, gifts, food transfers and credit without interest.³

What is more, although in the subsequent discussion I refer to “Western” and “African” perspectives, it is not lost on me that neither the West nor Africa holds a monolithic view of social order. Indeed, by virtue of the individuality of human thought, there is a plurality of outlook not only among ethnic groups, but also within each ethnic group. Nevertheless, there is ample evidence that certain cultures exhibit considerable similarities that warrant some cautious generalisations about them. For example, the name “Baluhia” dates only to the 1920s, when it was used to profess the unity of sixteen distinct Bantu-speaking groups in Western Kenya to which the British referred as the North Kavirondo. Similarly, “Kalenjin” (literally meaning ‘I tell you’), as a group identity, emerged during the World War II period. The group comprises approximately eight Nilotic groups in Kenya's Rift Valley related to each other by common migration and/or origin, settlement, language and material culture.⁴ Similarly, numerous African ethnic groups in the southern, central, eastern and western parts of the continent are classified as “Bantus” because of the similarity of their languages, with linguists convinced that the languages and their speakers had a common ancestry.⁵ It would be strange if the Bantu shared a language and no other aspect of culture. Consequently, we may infer that by virtue of centuries of proximity to one another, the worldviews of various African

3 Marcel Fafchamps. ‘Solidarity Networks in Pre-industrial Societies: Rational Peasants with a Moral Economy’. *Economic Development and Cultural Change*, Vol.41 No.1, (Oct. 1992), pp.147-174. <<http://www.jstor.org/stable/1154225>> (Accessed on 30 October 2016); see also Richard A. Posner. “A Theory of Primitive Society, with Special Reference to Law”. *Journal of Law and Economics*, Vol.23 No.1 (April 1980), p.1-53. <<http://www.jstor.org/stable/725284>> (Accessed on 30 October 2016).

4 See P.A.N. Itebete. ‘Language Standardisation in Western Kenya: The Luluyia Experiment’. In Whiteley, W.H. ed. *Language in Kenya* (Nairobi: Oxford University Press, 1974), pp. 97-101; B.E. Kipkorir and F.B. Welbourn. *The Marakwet of Kenya: a Preliminary Study* (Nairobi: East African Literature Bureau, 1973), p.1, 70 ff.

5 Christopher Ehret. ‘Bantu Origins and History: Critique and Interpretation’. *Transafrican Journal of History*, Vol.2 No.1 (January 1972), p.1-9. <<https://www.jstor.org/stable/24520330>> (Accessed on 15 April 2016).

ethnic groups have some things in common, and that a similar situation obtains with regard to the worldviews of various Western European ethnic groups.

Based on the foregoing considerations, I conclude that the dominant trend of thought and practice in Western cultures is liberalism, while that in African cultures is communalism. However, I do not wish to suggest that the West is devoid of the communalist outlook, nor that Africa lacks in individualist thought. Indeed, it is difficult to see how Western societies would have remained significantly cohesive without a considerable dose of communalism. It is instructive to note that the French Revolution, which is one of the most powerful expressions of Western European liberalism, had as one of its mottos '*Liberté, égalité et fraternité*' ('liberty, equality and fraternity'), and yet 'fraternity' has a much closer affinity to communalism than to liberalism. Similarly, African cultures have considerable room for personal achievement, as is manifest in the idea of heroism so pervasive in them. Nevertheless, I think that Leonhard Praeg's view that any talk about the distinction between Western individualism and African communalism is merely a conflation of the tension between individualism and altruism is misleading.⁶ As I shall seek to illustrate in the next two sections of this article, there is significant difference between the largely individualist post-Industrial Revolution Western European societies and the highly communalistic indigenous African ones, even after the advent of Western colonialism, and this difference can have far-reaching influence on a society's ideological orientation with considerable impact on the rights of persons with disabilities.

2: Are Human Rights Universal or Culture-specific?

Scholars are sharply divided in their answers to this question. On the one hand, Universalists contend that human rights arise from the fact of our common humanity. For example, Jennifer Preece holds that the idea of human rights is predicated upon the notion that every individual human being, by virtue of his or her humanity, should have the freedom to define, pursue and realise his or her conception of the good life. For Preece, from this fundamental conviction arises a whole series of entitlements designed to ensure that such basic conditions of liberty exist for all members of humankind.⁷ It is in the light of this that Kwasi Wiredu defines human rights as entitlements that are morally owed to human beings by other human beings.⁸

On the other hand, particularists insist that like any other notion, the concept of human rights arose in a specific cultural milieu, and therefore ought not to be viewed as objective and universally applicable. For instance, Anthony Pagden argues that the idea of human rights is based on an essentially European conception of the human. For him, the notion of human rights is a development of the older notion of natural rights, and the modern understanding of natural rights evolved in the context of the European struggle to legitimise its overseas empires. He goes on to contend that the French Revolution changed this by linking human rights to the idea of citizenship, thereby tying human rights not only to a specific ethico-legal code, but also, by implication, to a particular

6 Leonhard Praeg. *A Report on Ubuntu* (Pietermaritzburg: University of KwaZulu-Natal Press, 2014) p. 28.

7 Jennifer Jackson Preece. 'Human Rights and Cultural Pluralism: the "Problem" of Minorities'. Draft Prepared for the Cambridge/Dartmouth Conference on the New Human Rights Agenda, Sydney Sussex College, Cambridge, February 18, 2001.

8 Kwasi Wiredu. *Cultural Universals and Particulars: An African Perspective* (Bloomington: Indiana University Press, 1996) p. 172.

kind of political system, both of inescapably European origin. He asserts that in both cases, being employed was an underlying idea of universality, which originated from the ancient Greek and Roman idea of a common law for all humanity.⁹

The particularists raise an important point about the culture-specific origins of human rights discourse but not human rights as such. For example, it is difficult to deny that while indigenous African communities held the human person in high regard, they did not engage in elaborate explications of the rationale for respecting human rights.¹⁰ Nevertheless, except for his Darwinist assumptions, I concur with H. Odera Oruka that the notion of a shared humanity manifesting in universal human nature is a basis for considering human rights as universal. According to Oruka, the concept of human rights is inextricably bound up with that of liberty, and the two can only be defined in terms of removing obstacles to the meeting of human needs. In this regard, he asserts “one cannot survive if one is restricted in all ways.”¹¹ He identifies six kinds of liberties: economic, political, intellectual, cultural, religious and sexual—which for him jointly constitute the complex freedoms necessary in any social order whatever else may be necessary, and all based on human needs, and with economic liberty being basic to all the rest.¹² What is more, Oruka avers that as far as all human beings have qualitatively similar needs, the formal meaning of liberty in terms of needs can be established as an objective truth.¹³ He contends that based on human nature, there are three basic and inherent rights of human persons: physical security, health and subsistence.¹⁴

III: WESTERN LIBERALISM, LIBERAL DEMOCRACY AND THE RIGHTS OF PERSONS WITH DISABILITIES IN KENYA

Western liberalism derives mainly from the French Revolution and the Enlightenment, and is rooted in the scepticism of the 18th Century.¹⁵ While Western liberal ideas are found in isolation very much earlier, it was in the 18th Century that they became more coherent because they were allied with powerful social forces that, through the utilitarians and radicals, influenced social movements in Victorian England:

“what was old in this family of ideas was the notion that all human beings, not a favoured few, have an equal claim to happiness; what was more novel was the

9 Anthony Pagden. ‘Human Rights, Natural Rights, and Europe’s Imperial Legacy’. *Political Theory*, Vol.31 No.2 (Apr., 2003), pp.171-199. < <http://www.jstor.org/stable/3595699>> (Accessed on 15 April 2016).

10 Reginald M.J. Oduor. ‘h. Odera Oruka’s Account of the Foundation of Human Rights: A Critique’. *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)*, New Series, Vol.4 No.2, December 2012, p.221. <<http://ajol.info/index.php/tp>> (Accessed 15 April 2016).

11 H. Odera Oruka. *The Philosophy of Liberty: An Essay on Political Philosophy* (Nairobi: Standard Textbooks Graphics and Publishing, 1991) p. 86.

12 Ibid p. 67-84.

13 Ibid p. 87.

14 H. Odera Oruka. *Practical Philosophy: In Search of an Ethical Minimum* (Nairobi: East African Educational Publishers Ltd., 1997) p. 86.

15 Ninian Smart. *The Religious Experience of Mankind* (New York: Charles Scribner’s Sons, 1969) p. 647.

belief that the happiness of the mass of mankind could be increased by creating a new social order and placing scientific knowledge at its service.”¹⁶

However, liberalism fractures on several issues, among which are the nature of liberty, the place of property and democracy in a just society, the comprehensiveness of liberalism, and the particularist or Universalist reach of the liberal ideal.¹⁷ Nevertheless, all liberals emphasise the pre-eminence of the autonomy of the individual. In 1859, John Stuart Mill classically stated the centrality of this autonomy in Western liberal democratic thought in his *On Liberty*, where he stated that the individual must be protected against the tyranny of the majority in the same way as he or she ought to be protected against political despotism.¹⁸

The upshot of Mill’s contention is that the individual’s liberty takes precedence over the authority of society. In line with this outlook, most contemporary Western liberals reject the claim that group-specific rights are needed to accommodate enduring cultural differences rather than to remedy historical discrimination. Even where they assent to affirmative action, they see it as a means to promoting the integration of society.¹⁹ As John Rawls put it, “The denial of equal liberty can be accepted only if it is necessary to enhance the quality of civilisation so that in due course the equal freedoms can be enjoyed by all.”²⁰

Of great relevance to this article is the liberal emphasis on the importance of tolerance among humankind. While it may at first not be evident, part of the reason for the marginalisation of persons with disabilities is society’s intolerance of difference. By virtue that society is governed by culture, it seeks to create homogeneity through compliance with cultural norms among its members. By definition, measures to promote homogeneity are antithetical to difference and therefore inhospitable to tolerance. Thus, when a person lacks hands and holds his or her pen using his or her mouth, when a person can only communicate by sign language, when a person can only read Braille, or when a person’s pace of learning is much slower than that of his or her classmates, he or she is ‘the odd one out’, and society would rather shunt them aside than cater for their special needs. On the other hand, through its emphasis on the centrality of the autonomy of the individual, liberalism advocates for tolerance. Thus Ayer states:

‘... , I believe that the only possible basis for a sound morality is mutual tolerance and respect: tolerance of one another’s customs and opinions: respect for one another’s rights and feelings; awareness of one another’s needs.’²¹

16 H Hawton. *The Humanist Revolution* (N.P.: Barrie and Rockliff, In association with the Pemberton Publishing Co. Ltd., 1963) pp. 13-14.

17 For an overview of the debates among Western liberals, see Gerald Gaus, Shane D. Courtland and David Schmidtz. ‘Liberalism’. Zalta, Edward N. ed. *The Stanford Encyclopedia of Philosophy*, Spring 2015 Edition. <<http://plato.stanford.edu/archives/spr2015/entries/liberalism>> (Accessed on 6 April 2016).

18 See John Stuart Mill. *On Liberty*. Edward Alexander ed. (Peterborough, Ontario: Broadview Press, 1999 [1859]).

19 See Ben Reilly and Andrew Reynolds. *Electoral Systems and Conflict in Divided Societies* (N.P.: National Academies Press, 1999). <WWW.NAP.EDU> (Accessed on 2nd January 2010).

20 John Rawls. *A Theory of Justice* (Oxford: Oxford University Press, 1971) p. 542.

21 A.J. Ayer. “Introduction”. A.J. Ayer ed. *The Humanist Outlook* (London: Pemberton Publishing Co. Ltd., 1968) p. 10.

In the realm of politics, liberalism manifests as liberal democracy. The major features of this model of democracy include individual freedom (which entitles citizens to the liberty and responsibility of charting the course of their lives and conducting their own affairs), equality before the law, universal suffrage and education, freedom of movement, freedom of expression, and freedom of assembly. Many of these features have been proclaimed in historic documents such as the *U.S. Declaration of Independence* which asserted the right to life, liberty and the pursuit of happiness; the French *Declaration of the Rights of Man and of the Citizen* which affirmed the principles of civil liberty and of equality before the law; and the *Atlantic Charter* which affirmed the “four freedoms”, namely, freedom of speech, of religion, from want, and from fear of physical aggression.²²

However, while liberal democracy may at first appear to be the panacea to the marginalisation of persons with disabilities, it suffers from a number of shortcomings. Even in its Western European cradle, liberal democracy has been under siege for more than a century now. Indeed, towards the mid-19th century, Karl Marx contended that while liberalism was a great improvement on the systems of prejudice and discrimination, which existed in the Germany then, it overlooked the possibility that real freedom is to be found in human community rather than in isolation. Thus, he was of the view that the achievement of the rights of the individual must be transcended on the route to genuine human emancipation.²³ In addition, the concept of ‘social democracy’ gained currency in Western Europe during the latter half of the 19th century as a critique of liberal democracy. Advocates of social democracy argued that liberal democracy grants direct producers only formal democracy and not the substance of democracy, namely, social equity.²⁴ The Russian Revolution of 1917 and the founding of the Communist International in 1919 precipitated an irrevocable split between the revolutionary and evolutionary wings of the social democratic movement, with the former emerging as communist parties and the latter as social democratic parties.²⁵ Nevertheless, albeit for different reasons, both communists and social democrats consider liberal democracy to be an inadequate system of government.

Besides, in the last few decades, a sizeable number of Western political theorists have recognised that liberal democracy is in a crisis that is not confined to the politico-economic sphere, but which also permeates the socio-cultural realm.²⁶ Thus towards the end of the 20th century, some Western

22 Congress of the United States of America. *The Declaration of Independence*, 1776. <www.earlyamerica.com/earlyamerica/.../text.html> (Accessed on 4 March 2010); National Assembly of France. *Declaration of the Rights of Man and of the Citizen*, 1789. <www.hrcr.org> (Accessed on 8 April 2016); UK and US. *Atlantic Charter*, 1941. <www.internet-esq.com/ussaugusta/atlantic1.htm> (Accessed on 4 April 2010).

23 Karl Marx. “On the Jewish Question”. *Deutsch-Französische Jahrbücher*, February 1844. <www.marxists.org/archive/marx/works/1844/.../index.htm> (Accessed on 10 April 2016).

24 A. Mafeje. ‘Democratic Governance and New Democracy in Africa: Agenda for the Future’. Paper prepared for presentation at the ‘African Forum for Envisioning Africa’ in Nairobi, Kenya, 26-29 April 2002. <www.worldsummit2002.org/texts/ArchieMafeje2.pdf> (Accessed on 5 April 2010).

25 Helena Sheehan. *Marxism and the Philosophy of Science: A Critical History* (Atlantic Highlands, NJ : Humanities Press International, 1993); Ingvar Carlsson and Anne-Marie Lindgren. *What is Social Democracy?* (Stockholm: Arbetarrörelsens Tankemedja and Idé och Tendens, 2007) pp. 48-49.

26 Thomas Pantham. ‘Thinking with Mahatma Gandhi: Beyond Liberal Democracy’. *Political Theory*, Vol.11 No.2, May 1983, p. 172.

political theorists, dissatisfied with the highly individualistic orientation of liberalism, espoused communitarianism instead—a view which criticises the image presented by liberalism of humans as atomistic individuals. Communitarians stress the importance of collective interests. For them, there is no such thing as an unencumbered self; instead, the self is always constituted through the community.²⁷ Thus, communitarians point out that values and beliefs are formed in public space in which debate takes place. In this space, both linguistic and non-linguistic traditions are communicated to children and are the backdrop against which beliefs are formulated and understood. In other words, communitarianism draws attention not merely to the process of socialisation, but also to the conceptual impossibility of separating an individual's experiences and beliefs from the social context that assigns them meaning.²⁸ D.A. Masolo explains:

“Deriving from Hegel, Western communitarianism maintains that the rights of individuals are not basic, and that the collective can have rights that are independent of, and even opposed to, what liberals claim are the rights of individuals.”²⁹

In addition, throughout Western democracies, there is increasing concern that the political process is unrepresentative and non-participatory, in the sense that it fails to reflect the diversity of the population. Legislatures in most of these countries are dominated by middle-class, able-bodied, Caucasoid (white) men. Consensus is building that a more representative process would include members of ethnic and racial minorities, women, the poor and persons with disabilities.³⁰ This greater inclusivity has been greatly hampered by the fact that liberalism views the individual as an atomic entity whose liberties are distinct from considerations of social welfare. Classical liberalism only envisages human rights as being strictly entitlements of individuals. John Rawls, one of the most celebrated twentieth century expositors of this view, assumes that the political actors in a democracy are individuals, no more and no less. His focus is on the freedom of citizens who find themselves, as individuals, at a disadvantage in society. Rawls does not see the need to cater for a minority view that is specific to a particular cultural group.³¹ While this critique is usually discussed in the context of inter-ethnic relations,³² it is also relevant to the discourse on the rights of persons with disabilities, as such persons constitute a marginalised group just as other non-dominant groups do.

Furthermore, the liberal democratic model, as espoused by influential Western political thinkers, was designed for Western modern industrial societies.³³ Some of the most influential factors in

27 Andrew Heywood. *Political Theory: An Introduction*, Third Edition (Houndsmill Palgrave Macmillan, 2004) p. 33.

28 Ibid, p. 35.

29 DA Masolo. 'Western and African Communitarianism: A Comparison'. Kwasi Wiredu ed. *A Companion to African Philosophy* (N.P.: Blackwell Publishing Ltd., 2004) p. 483.

30 Will Kymlicka. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) p. 32.

31 See John Rawls (21) p. 179.

32 See RMJ Oduor. *Ethnic Minorities in Kenya's Emerging Democracy: Philosophical Foundations of their Liberties and Limits* (Saarbrücken: Lambert Academic Publishing, 2012). <www.lap-publishing-house.com> (Accessed on 8 April 2016).

33 David Held. *Models of Democracy*, Second Edition (Cambridge: Polity Press, 1996) p. 97.

the rise of liberal democracy were the 17th and 18th century secularisation of Western Europe, beginning with the separation of power between Church and State; the 18th and 19th century industrial revolution, with the attendant rise of the free market and middle class; and the works of Western political philosophers over the past four centuries that have provided a rationale for the concepts underpinning this model of democracy.³⁴ Indeed, as A.O. Mojola has correctly observed, at the core of Western liberal democracy are ideas as the Kantian concept of the autonomy of the will; Jean Jacques Rousseau's theory of the state as based upon the will of the people; Karl Popper's idea of an open and pluralistic society; and John Stuart Mill's notions of freedom and of the absolute sovereignty of the individual.³⁵ Thus liberal democracy works considerably well in the West arguably because of its symbiotic relationship with other factors in the society such as capitalism, industrial technology, nation-state and professional knowledge—factors that either do not all exist in Africa or do not do so to any appreciable degree.³⁶ Thus, Uma O. Eleazu noted:

“The problem of political change in Africa is the situation created by new institutions embodying new values being imposed upon old institutions with their old values....What we then have are two political cultures facing each other.”³⁷

Consequently, the frequently cited ‘failure of democracy in Africa’ is really the failure of *liberal* democracy in Africa. As Ludeki Chweya states, “The coexistence of unfailing faith in the theory of liberal democracy with its practical failure is a paradox that underscores the ideologisation of liberal democracy in Africa”.³⁸

Moreover, despite liberal democracy's advocacy for the autonomy of the individual with the implicit tolerance of difference, countries in which it has been embraced for centuries still manifest numerous systemic injustices. For example, while Western liberals boldly proclaimed the right of all individuals to determine the course of their lives, they comfortably lived with a situation in which women did not enjoy voting rights. In the U.S.A., for instance, it was only on January 10, 1918 that the House of Representatives passed an initial voting rights amendment, and the 19th Amendment was only passed on August 26, 1920 providing full voting rights for Caucasoid (white) women throughout the U.S.A. It was not until four and a half decades later, on 6 August 1965, when President Lyndon Johnson signed the Voting Rights Act into law, that all women in the United States were able to cast

34 AO Mojola. 'Democracy in Precolonial Africa and the Search for Appropriate Models in Contemporary African Society'. Oloka-Onyango, Joseph, Kivutha Kibwana and Chris Maina Peter eds. *Law and the Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996), p.335; Francis E. Owakah and Robert D. Aswani. 'Technocracy and Democracy: The Challenges to Development in Africa'. *Thought and Practice: A Journal of the Philosophical Association of Kenya*, New Series, Vol.1 No.1, June 2009.p.91-92. <<http://ajol.info/index.php/tp/index>> (Accessed on 3 April 2010).

35 Ibid.

36 Ludeki Chweya. 'Western Modernity, African Indigene, and Political Order: Interrogating the Liberal Democratic Orthodoxy'. In Chweya, Ludeki ed. 2002. *Electoral Politics in Kenya* (Nairobi: Claripress, 2002) p. 27.

37 UO Eleazu. *Federalism and Nation-building: The Nigerian Experience 1954-1964* (Devon: Arthur H. Stockwell Ltd., 1977) p. 31.

38 Chweya. (n36) p. 14.

a ballot as full citizens.³⁹

It cannot be denied that Western liberalism has contributed significantly to the recognition and protection of the rights of persons with disabilities in Kenya. Decades of autocratic leadership had stifled the country's economic, social and political development, and this had a direct negative effect on the rights of persons with disabilities who were regarded as objects of charity rather than holders of rights. Thus while former President Daniel arap Moi started a fund for persons with disabilities in 1980, I heard him dismiss the professional opinion of the late Dr. Oki Ooko Ombaka because "he is blind anyway"! Even after the opening up of the political space and the promulgation of the 2010 Constitution, Moi had no qualms claiming, in August 2012, that Dr. Samuel Tororei should not be a Commissioner in the National Land Commission because he (Dr. Tororei) could not effectively safeguard the interests of the Kalenjin community because he is blind.⁴⁰

Nevertheless, that Kenya's independence Constitution was based on liberal tenets (albeit heavily mutilated over the years) energised the progressive movements from the early 1980s in their struggle for the restoration of multi-party politics and for an open society generally. The increasingly open mass media and political environment enabled persons with disabilities to advocate for their rights, resulting in the passing of the Persons with Disabilities Act in 2003.⁴¹ It also made possible their involvement in the constitutional review process. Articles 27 and 54 of the Constitution⁴² are some of the fruits of this struggle, as are the appointments of several persons with disabilities to key public positions.

Progress towards the recognition and protection of the rights of persons with disabilities was also catalysed by developments at the global level, where the United Nations International Year of Disabled Persons in 1981 with the theme of 'full participation and equality'; the Decade of Disabled Persons from 1983 to 1992; the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities of 20 December 1993; and the CRPD of 13 December 2006,⁴³ all contributed to the pressure that resulted in a much more disability-conducive legal environment in Kenya. It is noteworthy that various legal and pseudo-legal instruments at the global level are founded on the highly liberal United Nations Universal Declaration of Human Rights. The Preamble to the

39 See Holly J. McCammon and Karen E. Campbell. 'Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866-1919'. *Gender and Society*, Vol.15 No.1 (Feb., 2001). pp.55-82. <<http://www.jstor.org/stable/3081830>> (Accessed on 15 April 2016); Burton A. Abrams, Russell F. Settle. 'Women's Suffrage and the Growth of the Welfare State'. *Public Choice*, Vol.100 No.3/4 (1999),p.289-300. <<http://www.jstor.org/stable/30026099>> (Accessed on 15 April 2016).

40 See Editorial. 'Moi Should Apologise' in *Daily Nation*, Tuesday, 14 August 2012. <<http://www.nation.co.ke/oped/Editorial/Moi+should+apologise/-/440804/1479300/-/1090c25z/-/index.html>> (Accessed on 11 April 2016).

41 Republic of Kenya. The Persons with Disabilities Act No. 14 of 2003 (Nairobi: Government Printer, 2003).

42 Republic of Kenya. The Constitution of Kenya (Nairobi: Government Printer, 2010).

43 United Nations. Standard Rules on the Equalization of Opportunities for Persons with Disabilities (New York: United Nations, 1993). <<http://internationallaw.uslegal.com/international-human-rights/universal-human-rights-instruments/rights-of-persons-with-disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities>> (Accessed on 11 April 2016); United Nations. Convention on the Rights of Persons with Disabilities (New York: United Nations, 2006). <<http://www.un.org/disabilities/convention/conventionfull.shtml>> (accessed on 11 April 2016).

Declaration takes it to be self-evident that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. Article 1 of the Declaration states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. Although the language of the Preamble and of Article 1 has a communalistic flavour through references to ‘brotherhood’ and ‘human family’, the Declaration goes on to recognise the kinds of rights of individuals typically espoused by the Western liberal democratic tradition such as life, liberty and security of person, freedom from slavery, freedom from torture, and equality before the law.⁴⁴

It is also worth noting that countries that overtly embrace liberalism have not only marginalised women, but also persons with disabilities, with the marginalisation of the group manifesting in at least four ways.

First, classical Western liberal democracy, as espoused by thinkers such as John Locke and John Stuart Mill, only envisages civil rights, with the holders of such rights presumed to be atomic individuals, and considers the entitlement to private property to be a crucial aspect of these rights. Some contemporary liberals have also made a direct connection between personal liberty and the right to own private property. For example, F.A. Hayek contends:

“There can be no freedom of press if the instruments of printing are under government control, no freedom of assembly if the needed rooms are so controlled, no freedom of movement if the means of transport are a government monopoly.”⁴⁵

In view of the fact that it is now widely acknowledged that there is a symbiotic relationship between disability and poverty, it follows that this model of democracy implicitly relegates persons with disabilities to peripheral citizenship status.

Second, liberal democracy presumes that holders of rights are of ‘sound mind’. Illustratively, affidavits in many Common Law jurisdictions are regularly precluded by a statement to the effect that the deponents are ‘of sound mind and understanding’.⁴⁶ The assumption behind that requirement was that anyone with mental illness, mental disability or intellectual disability could not exercise genuine agency and was therefore not a possessor of legal capacity. This outlook has deep roots going back to Plato’s *Republic*, Aristotle’s *Politics* and Immanuel Kant’s insistence that the human person’s autonomy is based on his or her ability to reason. However, tracing provisions in law that disenfranchise persons adjudged to be of unsound mind, and providing interpretation using Kenyan law as well as global human rights norms, Lawrence Mute has cogently argued that the

44 United Nations. The Universal Declaration of Human Rights (New York: United Nations), Arts.3, 4, 5 and 7 respectively. <www.un.org/en/documents/udhr/index.shtml> (Accessed on 10 October 2010).

45 FA Hayek. ‘Liberalism’ in his *New Studies in Philosophy, Politics, Economics and the History of Ideas* (London: Routledge & Kegan Paul, 1978) p. 149.

46 In recent times I have seen affidavits that exclude this phrase.

concept of unsoundness of mind should no longer be the basis for automatically excluding persons with disabilities generally, and those with intellectual disabilities in particular, from voting. Among other thought-provoking observations, Mute makes the interesting point that citizens adjudged to have soundness of mind regularly elect bad leaders anyway.⁴⁷

Third, by insisting that denial of liberty only occurs where the freedom of able-bodied persons is inhibited, liberal democracy insinuates that holders of rights are able-bodied. The celebrated British political theorist, Isaiah Berlin, inadvertently exposed the real shortcoming of liberalism as far as the rights of persons with disabilities are concerned. He took the view that only when other humans restrict one's liberty is one 'unfree'; but when one's liberty is limited by one's own circumstances, one is not strictly 'unfree':

"I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. Coercion is not, however, a term that covers every form of inability. If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind...it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by other human beings."⁴⁸

What Berlin fails to recognise is that society often puts obstacles in the way of persons with disabilities by adopting non-inclusive policies and legislation. Persons who could not read print were under the previous constitutional dispensation in practice barred from standing for the position of Member of Parliament even though that Constitution had made an exemption for persons with visual disabilities in this regard.⁴⁹

Fourth, and partly following from the previous point, it is difficult to see how the kind of thoroughgoing individualism as espoused by liberal democracy, entailing competition rather than co-operation, can be reconciled with the conception of a society in which members are committed to upholding the rights of persons with disabilities. Indeed, while many African social theorists now assume that the only model of social, political and economic development is the Western capitalist one, Claude Ake reminds us that such an assumption conflates the Western capitalist model of ordering society with a universal standard of doing so. Ake goes on to illustrate how liberal

47 LM Mute. 'Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities In Kenya'. *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)*, New Series, Vol.2 No.2, December 2010.p.1-18. <<http://ajol.info/index.php/tp/index>> (Accessed on 1 June 2011).

48 I Berlin. *Four Essays on Liberty* (London: Oxford University Press, 1969) p. 122.

49 Republic of Kenya. *The Constitution of Kenya* (Nairobi: Government Printer, 1963), Section 40 (1) (b).

democracy is really the manifestation, at the political level, of the Western free market ideology.⁵⁰ Liberal democracy turns politics into one more commodity in the marketplace, to be governed by the law of supply and demand. The free market ideology is, in turn, the economic outworking of the Darwinian 'survival for the fittest'. Such 'survival' implies letting the disadvantaged die off as the advantaged march on. It is therefore not surprising that faced with the challenge of ensuring the one-third threshold for both genders in Parliament, able-bodied Kenyan technocrats and politicians see the elimination of nominative seats for special interest groups such as persons with disabilities as the easiest way out.

The upshot of the foregoing discussion is that Western liberal democracy has not only failed to respond adequately to Africa's socio-political realities generally speaking, but has also been inadequately responsive to the rights of persons with disabilities. Yet from the late 1980s, Western academics, governments and financiers advocated for a world in which all countries embrace liberal democracy. For example, with the collapse of Communism and the emergence of the U.S.A. from the Cold War as the only super-power, Francis Fukuyama declared the liberal State as universally victorious, and contended that industrial development necessarily follows a universal pattern set by the leading Western capitalist economies.⁵¹ Nevertheless, as Ademola Kazeem Fayemi observed, Fukuyama's liberal democracy cannot be the end of human history, simply because we are not at the end of human intelligence.⁵² As such, various countries have every right to construct alternative models of democracy that draw from their cultural heritage and respond to their economic, social and political needs.

IV: AFRICAN COMMUNALISM, AFRICAN SOCIALISM, UBUNTU AND THE RIGHTS OF PERSONS WITH DISABILITIES IN KENYA

Scholars disagree over the homogeneity or heterogeneity of the indigenous African worldview. Placide Tempels, John Mbiti and Henry Olela hold the view that the African worldview is characterised by unity.⁵³ Tempels, for example, while giving illustrations mainly from the Luba people of Central Africa, frequently states that he expects the same findings in other African ethnic groups. Even the title of his book, *Bantu philosophy*, suggests that he believes that his findings are applicable to all Bantu-speaking people. We find a similar approach in the choice of titles in Alexis Kagame,

50 C Ake. 'Social Science as Imperialism'. Helen Lauer and Kofi Anyidoho eds. *Reclaiming the Human Sciences and Humanities through African Perspectives* (Accra: Sub-Saharan Publishers, 2011) pp. 1-30.

51 F Fukuyama. *The End of History and The Last Man* (New York: Penguin, 1992).

52 AK Fayemi. 'Towards an African Theory of Democracy'. *Thought and Practice: A Journal of the Philosophical Association of Kenya*, New Series, Vol.1 No.1, June 2009. p108. <[HTTP://AJOL.INFO/INDEX.PHP/TP/INDEX](http://AJOL.INFO/INDEX.PHP/TP/INDEX)> (Accessed on 14 December 2015).

53 P Tempels. *Bantu Philosophy* (Paris: Presence Africaine, 1959); JS Mbiti. *African Religions and philosophy* (London: Heinemann, 1969); H Olela. 'The African Foundations of Greek Philosophy' in Wright, R.A. ed. *African Philosophy: An Introduction* (Washington DC: University Press of America Inc., 1978).

Ocitti and Olela.⁵⁴ For Olela, the essentially homogenous indigenous African worldview is to be traced back to ancient Egypt.⁵⁵ In an earlier study, he sets out to examine common elements of belief among sub-Saharan African ethnic groups with a view to constructing a framework for safe generalisations concerning their worldview.⁵⁶

One very important challenge to the position outlined above is that of Paulin J. Hountondji. His immediate concern is with the anthropologist's study of indigenous African thought, which Hountondji pejoratively refers to as 'ethnophilosophy'. For him, such a study is not scientific because it lacks the controls characteristically associated with scientific investigations.⁵⁷ He concludes that works such as those by Tempels and Kagame are not the philosophies of the peoples mentioned in their titles, but rather the philosophies of the authors of the works. For him, such authors simply make use of African traditions and oral literature, and project on to them their own philosophical beliefs, hoping to enhance their credibility thereby.⁵⁸

In support of his thesis that African thought is pluralistic, Hountondji asserts that when we use the phrase 'traditional African civilisation' instead of using the more value free 'pre-colonial African civilisation', we ignore several important things:

"We ignore, or pretend to ignore, the fact that African traditions are no more homogenous than those of any other continent, that cultural traditions are always a complex heritage, contradictory and heterogenous, an open set of opinions, some of which will be actualised by any given generation, which by adopting one choice sacrifices all the others. We ignore, or pretend to ignore the fact that cultural traditions can remain alive only if they are exploited anew, under one of their aspects at the expense of all the others, and that the choice of this privileged aspect is itself a matter for struggle today, for an endlessly restless debate whose ever uncertain outcome spells the destiny of society. Above all, we ignore or pretend to ignore the fact that African cultural traditions are not closed, that they did not stop when colonisation started but embrace colonial and post-colonial cultural life. So-called modern Africa is just as 'traditional' as pre-colonial Africa in the only acceptable sense of the word 'traditional'—tradition does not exclude but necessarily implies a system of discontinuities."⁵⁹

54 A Kagame. *La Philosophie Bantoue Rwandaise de l'être* (Brussels: Academic Royale des Sciences Coloniales, 1956); JP Ocitti. *African Indigenous Education as Practised by the Acholi of Uganda* (Nairobi: The East African Literature Bureau, 1973); H Olela. *The Rationale for an African Philosophy: a Critical Examination of the African Cosmological Views with Some Reference to the Luo Beliefs* (Michigan: University Microfilms International, Ann Arbor. Ph. D thesis in the Florida State University, 1971); H Olela. *Ibid.* (1978)

55 Olela. *ibid* (1978) p. 66.

56 Olela. (n54) (1971) pp. 3-4.

57 PJ Hountondji. *African Philosophy: Myth and Reality* (London: Hutchinson and Co. Ltd., 1983) p. 62.

58 *Ibid.*

59 *Ibid.* pp. 161-162.

Hountondji's position implies that to view the indigenous African worldview as homogenous throughout sub-Saharan Africa is a fallacy—something he terms as the 'unanimist fallacy'.⁶⁰

We see then that concerning the homogeneity or heterogeneity of the indigenous African worldview, there is a lack of consensus. While scholars such as Tempels, Kagame, Ocitti and Olela argue for the existence of unity of worldview throughout sub-Saharan Africa, Hountondji holds that even within each indigenous African community unanimity is non-existent.

Both those scholars who argue for the homogeneity of the indigenous African worldview and those who argue against it hold important aspects of the truth. Hountondji's insistence on the diversity of thought among the various African ethnic groups and inside each ethnic group is clearly justified. This is because sub-Saharan Africa is an expansive terrain with a variety of geographical, historical and social conditions, and must therefore exhibit diversity of outlook. Furthermore, even people in the same ethnic group must possess divergent thought in view of the uniqueness of each individual. As the Kiswahili saying goes, 'Akili ni nywele: kila mtu anazake (Brains/thoughts are like hair: each person has his/her own).'

However, Hountondji's view, greatly influenced by his Marxist theoretical framework with its emphasis on dialectical materialism, overlooks that despite the internal plurality in indigenous African communities, we observe a considerable amount of continuity in their thought and practice: there are communal festivals, rites of passage, taboos, marriage customs, and wisdom encapsulated in proverbs, among others, all of which do not undergo drastic changes with each successive generation. This considerable consistency implies that while each of the communities is characterised by internal diversity, there are some dominant trends of thought and practice in each of them. This is a fact which even Marx himself would acknowledge in his claim that the consciousness of the working classes is shaped by the environment created for them by the ruling classes.

In the light of the foregoing reflections, it is reasonable to infer that sub-Saharan Africa is characterised by a unity in diversity: the dominant trends of thought and practice that span it point to an underlying unity, while the diverse geographical, historical and social conditions result in, and point to, considerable diversity. The reflections below focus on the essential unity of ethical thought in such communities, because human rights discourse is an aspect of ethical discourse.

In contrast to Western liberalism with its focus on the liberty of the individual, the outstanding feature of the ethical thought of indigenous African communities is their view that the individual's life can only find fulfilment when he or she co-operates with other members of the community, and puts the interests of the community before his or her own. In other words, these communities consider collective responsibility to take precedence over the rights of the individual. This is what we refer to as communalism. Mojola writes:

"These [indigenous African] communities were animated by this humanistic ideal, this intense concern for human welfare and well being, this care and concern for

60 Ibid. p. 69.

every person in the community.”⁶¹

Similarly, Erny has stated:

“If the distinction between individual and social morality is a viable one, then one can say that the centre of gravity of traditional African morality was social... children came to learn that the common good should take precedence over the individual good, social consensus over personal will, inter-dependence over self-dependence... Mutual social responsibility was a virtue that was given a high priority.”⁶²

African communalism is underpinned by kinship systems, in which relationships are based on blood ties and marriage. According to John S. Mbiti, “Almost all the concepts connected with human relationship can be understood and interpreted through the kinship system. This it is which largely governs the behaviour, thinking and whole life of the individual in the society of which he is a member.”⁶³ Thus in an indigenous African community, every individual is related to every other individual, and there are many kinship terms to express the precise kind of relationship pertaining between two individuals.⁶⁴ The centrality of kinship is clearly seen among the Luo of Kenya in a situation where an elderly woman meets a young man with whom they have no blood ties: she will in such a case refer to the young man as her son-in-law, because he could easily marry her daughter.⁶⁵

The kinship systems serve as a deterrent against antisocial behaviour, since such behaviour is considered to lower the quality of the life of people with whom one is related either by blood or by marriage. Thus in many indigenous African communities, the killing of a kinsman or woman is considered abominable. Among the Kipsigis of Kenya, for instance, a *rumindet*, that is, a Kipsigis who has killed a fellow Kipsigis, is almost permanently considered to be unclean. For the first four days after the death, the uncleanliness is the most severe known in this community.⁶⁶

Nevertheless, we must bear in mind that indigenous African communalism as outlined above is not to be conflated with absolute collectivism. While indigenous African communities lay a high premium on collective responsibility, they also recognise the need to encourage the development of the individual’s unique personality and abilities. In other words, what such communities greatly discourage is not individuality but individualism. ‘Individuality’ refers to that sense of uniqueness, which is the right of every human person. Individuality can therefore co-exist with communality,

61 AO Mojola. *Introductory Ethics for Secondary Schools and Colleges* (Nairobi: Mwassco Publications, 1983) p. 35.

62 P Erny. *The Child and His Environment in Black Africa*. Translated, abridged and adapted by GJ Wanjohi (Nairobi: Oxford University Press, 1981) p. xvi.

63 JS Mbiti (n53) p. 104.

64 Ibid.

65 RMJ Oduor. ‘Social Education and Ethics Programme: Its Main Sources and their Justifications in Post-colonial Kenya’. Unpublished M.A. Thesis at Kenyatta University, 1990, p. 102.

66 IQ Orchardson. *The Kipsigis* (Nairobi: East African Literature Bureau, 1961) p. 28.

since the ultimate purpose of communality is the promotion of the good of all the members of the community. 'Individualism', on the other hand, refers to that outlook which seeks to promote the individual's good regardless of the effects of such promotion on the other members of the community. This is to say that individualism is tantamount to egoism. Indigenous African communalism is therefore more opposed to individualism than to individuality. Maurier has stated this point as follows:

"We are not of the opinion that the African subject is drowned in a crushing collectivism as we too often hear. We can speak of an African subjectivism, but in a very different sense from that of Western subjectivism. The latter, having evolved in an individualistic and objectivist perspective, looks upon the subject as self-sufficient, autonomous, a consciousness, a free agent, a strong personality, competitive, who should assert himself, master himself in and by the independence he is assumed to have. African subjectivism will have a quite different flavour because it will be developed in a relational setting; the subject will affirm himself (strengthen his personality) not by isolating himself but by cultivating contacts with others, constantly exchanging with others."⁶⁷

Indeed, indigenous African communities allow room for personal achievement. This is evident in their recognition of heroism. Among the Luo of Kenya, for example, individuals are allowed, maybe even expected, to sing their own personal praises. During a dancing party, a Luo man or woman may occasionally stop a harpist in order that he or she may *pakre* (boast his or her virtues).⁶⁸ Nevertheless, such latitude is not permitted to obscure the overbearing obligation to promote the collective good, the understanding being that the individual would not exist, let alone achieve anything, without the under-guarding role of the community. Mbiti memorably summarised this outlook as "I am because we are, and because we are, therefore I am".⁶⁹ Thus, the Swahili of East Africa say *mtu ni watu*, literally translatable as 'a person is people'. Similarly, the Shona of Zimbabwe say '*munhu munhu muvanhu*', while both the Ndebele of Zimbabwe and the Zulu of South Africa say '*umuntu ngumuntu ngabantu*', all of which are translated as 'A person is a person through other persons'.⁷⁰

With the advent of political independence in the mid twentieth century, a number of African leaders proposed the application of indigenous African communalism to the formulation of an ideology for catalysing the total liberation of the continent. Such an ideology was often referred to as 'African socialism'. Julius K. Nyerere is one of the most well known advocates of this approach.⁷¹

67 H Maurier. 'Do We Have an African Philosophy?' in Wright, R.A. ed. *African Philosophy: An Introduction* (Washington DC: University Press of America Inc., 1978) p. 14.

68 ABC Ochola-Ayayo. *Traditional Ideology and Ethics Among the Southern Luo* (Uppsala: The Scandinavian Institute of African studies, 1976) p. 45.

69 JS Mbiti (n53) p. 141.

70 See F Mangena. 'Ethno-philosophy is Rational: A Reply to Two Famous Critics'. *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)*, New Series, Vol.6 No.2, December 2014, p.36. <<http://ajol.info/index.php/tp/index>> (Accessed on 14 December 2015).

71 See JK Nyerere. *Ujamaa: Essays on Socialism* (Dar es Salaam: Oxford University Press, 1968).

More recently, scholars in Southern Africa have asserted that indigenous African thought crystallised into *Ubuntu*, which literally means ‘human-ness’ or ‘humane-ness’.⁷² The Shona, Ndebele and Zulu sayings in the preceding paragraph of this article are often cited as expressions of *Ubuntu*. Nevertheless, while some South African writers have often given the impression that *Ubuntu* is a novel philosophy, Praeg—also South African—has pointed out that this sense of novelty arises due to the intellectual isolation of South Africa from the rest of the continent during the formative years of what would emerge as the sub-discipline of African philosophy; therefore, many South African intellectuals are unaware that ‘Ubuntu discourse must be recognised as little more than an as yet underdeveloped and under-theorised latecomer’.⁷³

With regard to the recognition and protection of the rights of persons with disabilities, indigenous African communalism can temper the excessive preoccupation with individual rights by reminding us that such rights are only meaningful in the context of a collective existence. The comparison is often made between the ambience of the public spaces in Kenya and Tanzania. It is often observed that the public space in Tanzania is characterised by courtesy and considerate behaviour, while that in Kenya is distinctive for its generally egotistic approach to interaction with ‘strangers’. This difference is often attributed to the communalist and liberal paths adopted at independence by Tanzania and Kenya respectively. Thus while Tanzania officially gave up its *Ujamaa* (African socialist) policy over twenty years ago, her people still refer to each other as ‘*ndugu*’ (brother), with the attendant considerateness befitting a member of the family. At the height of the ideological contest between Nyerere’s communalist/socialist Tanzania and Jomo Kenyatta’s liberal/capitalist Kenya in the early 1970s, and at a time when Kenya’s population was approximately ten million people, the late Member of Parliament for Nyandarwa North, Josiah Mwangi Kariuki, is famously quoted as having said “Kenya has become a nation of ten millionaires and ten million beggars.” In view of the nexus between poverty and disability earlier referred to in this article, such a polity is bound to be less mindful of the rights of persons with disabilities than one with a more communalistic orientation.

In addition, a Kenya with a strong indigenous African communalistic orientation is more likely to make progress on the road to cohesion than one that leans more towards Western liberalism and capitalism. This is because a sizeable proportion of the Kenyan masses, with their communalistic outlook, are more likely to identify with such a state than with one that extols the rights of the atomic individual. Indeed, scholars have frequently pointed out that the post-colonial African state remains a weak institution because it is an imposition from the West. It is for this reason that Basil Davidson referred to the post-colonial African state as a burden and a curse.⁷⁴ Such a state remains foreign to the African masses because it does not significantly reflect their worldview. Narang’s words, in a slightly different context, are applicable to the present point as well:

‘Individuals expect to recognise themselves in public institutions. They expect some consistency between their private identities and the symbolic contents

72 For a helpful outline and assessment of discussions on *Ubuntu*, see L Praeg (n 6).

73 Ibid p. 94.

74 B Davidson. *The Black Man’s Burden: Africa and the Curse of the Nation-State* (New York: Three Rivers Press, 1992).

upheld by public authorities, embedded in the social institutions, and celebrated in public events. Otherwise, individuals feel like social strangers, they feel that the society is not their society.⁷⁵

If the legitimacy of the Kenyan state is enhanced through the deployment of indigenous communal concepts and idioms, its endeavours to promote the rights of persons with disabilities would be more likely to enjoy greater acceptance by the citizenry.

However, indigenous African Communalism and its contemporary expressions as African socialism or *Ubuntu* fails to adequately promote the recognition and protection of the rights of persons with disabilities on at least three counts.

First, the emphasis on collective welfare above individual liberties is susceptible to gross inhumanity because society can easily determine that it can dispense with those of its members whom it perceives as liabilities rather than assets. This probably explains why some African communities terminated the lives of twins and/or persons with disabilities. It also probably accounts for the numerous derogatory terms used to refer to persons with disabilities in indigenous African communities. This notoriety is easily illustrated using Kiswahili. Like other Bantu languages, Kiswahili has prefixes for various nouns. Two of the broad categories of these prefixes are those that help to make the distinction between animate and inanimate things, with the former being prefixed by 'm' (singular) and 'wa/we' (plural). Among the prefixes for non-living things are 'ki' (singular) and 'vi' (plural). Thus we have 'mtu-watu' (a person-persons), 'mwizi-wezi' (thief-thieves), 'mchawi-wachawi' (witch-witches); but we have 'kipofu-vipofu' (blind person-blind persons), 'kiwete-viwete' (cripple"-cripples) and 'kiziwi-viziwi' (a deaf person-deaf people), among others. This effectively places persons with disabilities in the class of inanimate things such as spoons (*vijiko*), cups (*vikombe*) and baskets (*vikapu*). This situation reminds me of the Canadian philosopher Charles Taylor's apt observation, given in the context of ethnic minorities but applicable to the plight of persons with disabilities, that a person or group of people can suffer real damage if the people around them mirror back to them a demeaning picture of themselves, imprisoning them in a false, distorted and reduced mode of being.⁷⁶

Second, the communalistic outlook of indigenous African communities, with its emphasis on the collective good, is often interpreted by its adherents as a demand for conformity rather than diversity. This interpretation is susceptible to intolerance of the differences engendered by disability. Society then considers those who perform tasks differently due to their disabilities to be 'odd' if not outright inferior to those of its members who are 'able-bodied'. Consequently, any adjustment which society makes for the benefit of such persons is considered a mark of magnanimity rather than the fulfilment of the obligation to accommodate difference. For example, it is widely reported that

75 AS Narang. 'Ethnic Conflicts and Minority Rights'. *Economic and Political Weekly*, Vol.37 No.27, July 6-12, 2002, p. 2696. <[HTTP://WWW.JSTOR.ORG/STABLE/4412319](http://www.jstor.org/stable/4412319)> (Accessed on 4 April 2010).

76 C Taylor. 'The Politics of Recognition' in Taylor, Charles, K. Anthony Appiah, Jürgen Habermas, Steven C. Rockefeller, Michael Walzer and Susan Wolf. *Multiculturalism: Examining the Politics of Recognition*. Gutmann, Amy ed. (Princeton, NJ: Princeton University Press, 1994), p. 25.

Kenyan members of Parliament elected through the first-past-the-post method consider themselves superior to their colleagues who come to parliament through party lists to represent special interest groups.⁷⁷

Third, that African communalism is underpinned by the kinship systems of the various ethnic groups implies that each of these communities, often claiming to have a common ancestry (Ramogi for the Luo, Gikuyu and Mumbi for the Kikuyu, for instance), sees itself as a ‘family’—an ‘in-group’—while viewing all other ethnic communities as ‘out-groups’. This partly accounts for the powerful appeal of politicised ethnicity in Kenya.⁷⁸ For example, the renowned Kenyan economist, David Ndii, relates an incident where, after the 2013 Kenyan general elections, he met a group of inebriated Kikuyu youth celebrating the declaration of Uhuru Kenyatta as winner of the presidential contest, chanting: “*uthamaki ni witu, thamaki ni ciao*”, which Ndii translates dynamically as “We rule, they fish”, but which translates more literally as “The kingship is ours, the fish are theirs”, with the purported owners of the “kingship” being the victorious Kikuyu and the owners of the fish being the vanquished Luo.⁷⁹

What is more, members of an ethnic group who are critical of the insularity outlined above are often considered to be traitors and threatened with all manner of reprisals. Thus in the current landscape of political cleavage in Kenya, a Luo who chooses to join any party other than Raila Odinga’s Orange Democratic Party (ODM) must be prepared for a hostile response from a sizeable proportion of the Luo community. Similarly, a Kikuyu who opts to join the ODM or any party other than Kenyatta’s The National Alliance (TNA) or its successor must brace for censure from a sizeable proportion of the Kikuyu community. Such politicised ethnicity diverts Kenyans from the task of building a more just society. Consequently, persons with disabilities suffer intensely from this situation, as the ethnic elites spend considerable time and financial resources on efforts to consolidate or acquire power rather than to address the needs of vulnerable members of society. Furthermore, such competition has often exploded into full-scale inter-ethnic violence, with persons with disabilities bearing the brunt of the ensuing social upheavals along with the elderly, women and children. In short, it is difficult to transpose indigenous African communalism into contemporary cosmopolitan societies.

77 See Disability Caucus on Implementation of the Constitution. ‘THE EFFECTIVE REPRESENTATION IN PARLIAMENT FOR PERSONS WITH DISABILITIES’. Unpublished report in 2014 prepared by Lawrence M. Mute on the PROPOSALS IN RELATION TO ARTICLE 54 (2), ARTICLE 82 (1) (d) AND ARTICLE 100 OF THE CONSTITUTION OF KENYA, 2010.

78 For a detailed examination of politicised ethnicity in Kenya, see RMJ Oduor. *Ethnic Minorities in Kenya’s Emerging Democracy: Philosophical Foundations of their Liberties and Limits* (Saarbrücken: Lambert Academic Publishing, 2012), Chapter 3. <www.lap-publishing-house.com> (Accessed on 8 April 2016).

79 D Ndii. ‘My dear Kenyans, monuments do not make a nation’. In *The Saturday Nation*, 9 April 2016. <<http://www.nation.co.ke/oped/Opinion/My-dear-Kenyans--monuments-do-not-make-a-nation--/440808/3151706/-/8vg420z/-/index.html>> (Accessed on 10 April 2016).

V: CONCLUSION

In the light of the foregoing reflections, it is evident that a country's ideological orientation has serious ramifications for its development trajectory from a human rights point of view in general and from the standpoint of the rights of persons with disabilities in particular. It is also manifest that while avid proponents of Western liberalism and indigenous African communalism would have us believe that their preferred positions are the panacea to the myriad obstacles to the full recognition and protection of the rights of persons with disabilities in Kenya, the more correct position is that neither ideological pole is an answer to these challenges. Instead, we need to deploy liberalism's emphasis on the rights of the individual to discourage Kenyan society from treating persons with disabilities in a paternalistic manner, to cease from acting towards such persons on the basis of stereotypes or intolerance, and to engage with them as equals who happen to have a set of challenges different from those faced by most people. On the other hand, we ought to deploy the communalist emphasis on collective responsibility to temper the excesses of the Western liberal/capitalist orientation, and to convince members of the Kenyan public that respect for the rights of persons with disabilities is part of their collective responsibility arising from a shared humanity of persons with disabilities and persons without them.

Nevertheless, that Western liberalism has for centuries foisted itself upon the bulk of humanity as the only viable ideology, it supplies an overworked template for performing the task at hand, thereby stifling innovation based on non-Western worldviews. Consequently, Kenyan human rights scholars ought to double their efforts at developing an ideological orientation that better utilises the rich indigenous African communalistic thought. While some work has already been done in this area through investigations such as those into African customary law, philosophy and oral literature, there is much more to do in these areas and others.

Finally, the foregoing discussion is likely to raise the question of the need to cite instances of 'best practice'. This is to say that in line with current convention in the social sciences, some of my readers are likely to demand that I cite instances in which my proposals have yielded desirable results. My response to this concern is that the foregoing reflections have been undertaken utilising the tools of philosophical reflection rather than those of empirical investigation.⁸⁰ As such, I hope that social scientists can take up some of the issues I have raised and problematise them in a way that enables them to undertake empirical inquiries of the kind that contribute to literature on best practices.

80 See Reginald M.J. Oduor. 'Research Methodology in Philosophy within an Interdisciplinary and Commercialised African Context: Guarding against undue Influence from the Social Sciences'. *Thought and Practice: A Journal of the Philosophical Association of Kenya*, New Series, Vol.2 No.1, June 2010, pp. 87-118.< <http://ajol.info/index.php/tp>> (Accessed 15 April 2016).

PROMOTION, PROTECTION AND MONITORING: IMPLEMENTING ARTICLE 33 (2) OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN KENYA

*Miriam Nthenge**

I: INTRODUCTION

Monitoring human rights treaties is a prerequisite for assessing whether implementation measures are adopted and applied, and evaluating their results and providing feedback to support further implementation.¹ Monitoring mechanisms foster accountability and, over the long term, strengthen the capacity of states to fulfil their commitments and obligations.² The United Nations Convention on the Rights of Persons with Disabilities (CRPD) has been described as the most revolutionary treaty of the 21st century. The CRPD was adopted on December 13, 2006 by the United Nations General Assembly and was open for ratification in 2007.³ The CRPD's central novelty lies in its tripartite approach to the human rights of persons with disabilities. First, it combines civil and political rights with economic, social and cultural rights.⁴ Second, it underlines the participation of persons with disabilities and their representative organisations in all decision-making processes.⁵ Third, which is the central theme of this article, is the Convention's structures of implementation and monitoring. Unlike other treaties, the CRPD establishes two monitoring mechanisms: at the international level⁶ and at the national level. The latter mechanism, which is anchored in Article 33 of the Convention, obliges State Parties to designate focal points and coordination mechanisms within government for matters relating to the implementation of the Convention⁷ and establish or designate monitoring frameworks to protect, promote and monitor implementation of the Convention.⁸

* Policy Research Officer, Kenya Dialogues Project, Society for International Development (SID); LL.M International and Comparative Disability Law and Policy (National University of Ireland).

1 Para 11. Office of the High Commissioner for Human Rights. 'Thematic study by the Office of the UN High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities'. A/HRC/13/29 (2009).

2 Ibid.

3 Resolution A/RES/61/106; see current status of ratification of the CRPD <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx> (accessed on 9 March 2016).

4 See for instance Article 19 of the CRPD on living independently and being included in the community.

5 Articles 3 (c) and 4 (3) of the CRPD.

6 Article 34 of the CRPD provides: There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.

7 Article 33 (1) of the CRPD.

8 Article 33 (2) of the CRPD.

This article examines the operationalisation of Article 33 (2) of the CRPD in Kenya. It responds to two main questions: what it entails, and to what extent do Kenya's legislative and institutional framework provides a means for implementing it.

Proceeding from this introduction, section II of this article explains the concept of national monitoring and operationalises key terms. Section III focuses on the import of Article 33 (2) of the CRPD. Section IV examines Kenya's legislative framework in light of Article 33 (2) of the CRPD. Section V assesses state obligations under Article 33 (2) of the CRPD against their practice. Section VI draws conclusions.⁹

II: CONCEPTUALISING NATIONAL MONITORING AND DEFINITION OF KEY TERMS

1: Defining Key Terms

A: National Human Rights Institutions

National Human Rights Institutions (NHRIs) are state bodies with constitutional and/or legislative mandates to protect and promote human rights. They are part of the state apparatus and are funded by the state.¹⁰ The Principles Relating to the Status of National Institutions (usually referred to as 'the *Paris Principles*') guide the establishment of NHRIs.¹¹ These Principles provide guidance on criteria for the establishment and running of NHRIs. Under the Principles, NHRIs should, among other criteria, have a broad mandate, which is clearly set forth in a constitutional or legislative text. They should also have guarantees of independence and pluralism so that they may engage with diverse actors in the promotion and protection of human rights.¹² NHRIs that comply with the Paris Principles are accredited accordingly by the International Coordinating Committee of National Institutions as fully compliant, partly compliant or not compliant. NHRIs take such forms as ombudspersons, equality bodies, human rights commissions, human rights institutes, public defenders or parliamentary advocates.¹³

B: Independent mechanism

In order to distinguish between NHRIs and independent mechanisms, reference to independent mechanisms in this article relates to an institution that has officially been assigned the role of

9 The article is adapted from: M. Nthenge. 'Promotion, Protection and Monitoring, All Under One Roof? Implementing Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities on National Monitoring in Kenya' Unpublished Thesis (National University of Ireland) 2015.

10 Office of the High Commissioner on Human Rights. 'National Human Rights Institutions: History, Principles, Roles and Responsibilities'. Professional Training Series No.4. (United Nations: 2010) p. 13.

11 The Paris Principles were adopted on 20 December 1993 by the UN General Assembly as guiding principles for states in their establishment of national human rights institutions.

12 These include members of civil society, academics, legislature and other arms of the government.

13 United Nations Development Programme and Office of the High Commissioner for Human Rights. '*UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions*' (2010) p. 22.

promotion, protection and monitoring in accordance with Article 33 (2) of the CRPD, whether that body is an NHRI or not.

C: Monitoring framework

Both the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)¹⁴ and the CRPD make reference to the designation or establishment of one or more independent mechanisms or a national preventive mechanism. In this article, reference to a monitoring framework relates to the official designation of several bodies as independent mechanisms or the official designation of a single body as the independent mechanism, which further officially includes other bodies in its activities through a recognised agreement such as a memorandum of understanding.

D: Civil society

At the heart of the evolution of disability rights and the disability movement is the mantra ‘nothing about us without us’. This slogan has been pivotal to the participation of persons with disabilities and their representative organisations in the formulation, evaluation and implementation of matters related to them, including policies and legislation. The Standard Rules on Equalisation of Opportunities for Persons with disabilities (Standard rules) underscore the participation and involvement of persons with disabilities in all matters concerning them.¹⁵ The CRPD cements this by making the inclusion of persons with disabilities in all decision-making processes a mandatory obligation for states.¹⁶ Article 33 (3) of the CRPD provides that civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.

In clarifying the concept of participation of persons with disabilities in decision-making processes, the UN Special Rapporteur on the Rights of Persons with Disabilities defines representative organisations of persons with disabilities by underlining four key elements: that they are non-governmental membership based organisations; that they are led and controlled by persons with disabilities; that they are recognised by those they represent; and finally that they operate as individual organisations, coalitions or umbrella organisations of persons with disabilities.¹⁷ Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation on an equal basis with others.¹⁸ This article’s reference to civil society focuses on persons with disabilities, the representative organisations of persons with disabilities and organisations of parents with children with disabilities.

14 Article 17.

15 Rule 18; see also para. 14, Committee on Economic, Social and Cultural Rights, general comment No. 5 (1994) on Persons with Disabilities.

16 Para. (o) of the preamble, Article 4 (3) and 33 (3), CRPD.

17 Para. 36, Human Rights Council, Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/31/62 (2016) <<http://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Reports.aspx>> (accessed on 10 March 2016).

18 Article 1 of the CRPD.

2: Conceptualising National Monitoring

Human rights monitoring traces its origins in the UN Charter,¹⁹ which calls upon states to establish conditions for maintaining justice and respect for obligations established in treaties and other international laws. The Charter further reminds states about the need to cooperate in the protection and promotion of human rights.²⁰ The commitment to protect and promote human rights is evident from the initial steps by the General Assembly of adopting various human rights instruments and establishing institutional monitoring frameworks such as treaty body committees. Key such treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social and Economic Rights (ICESCR).²¹ The Commission for Human Rights, which was later replaced by the Human Rights Council in 2006, was part of the initial human rights monitoring institutional framework.²²

The present expanded UN human rights monitoring machinery includes the treaty system and the charter based system. The former comprises different committees assigned to monitor states compliance with various treaties. The latter includes the Human Rights Council and its special procedures.²³

The success of these monitoring frameworks cannot be underestimated, and the periodic reviews of the human rights situations in states have led to significant promotion and protection of human rights. Nevertheless, the system has faced challenges such as state non-compliance with reporting obligations,²⁴ backlogs in the consideration of state reports and individual complaints, capacity gaps and limited resources.²⁵ States have expressed their frustration in having to deal with multiple reporting obligations.²⁶ Amid these challenges the effectiveness and efficiency of the UN monitoring system has continued to be tested sorely.

Regarding the influence of the treaty system, C Heyns observes that ‘the greatest impact of the international system has been where treaty norms have been made part of domestic law and not as a result of norm enforcement (through reporting, individual complaints or confidential inquiry

19 Signed and adopted on 21 June 1945.

20 Article 1 (3) of the United Nations Charter.

21 Adopted in 1966, came in to force in 1976.

22 P. Alston and R. Goodman. *‘International human rights, the successor to international human rights in context: Law, politics and morals’* (2013) p. 691.

23 Currently there are 56 special procedures both thematic and country specific <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>> (accessed on 28 March 2016).

24 C. Heyns and F. Viljoen. *The impact of the United Nations Human Rights Treaties on the Domestic Level* (2002- Kluwer Law International) 15; See M. Kirby. UN Procedures: A Response to Professor Hillary Charles Worth in Alfredsson, Zayas, *The international Human Rights Monitoring Mechanisms* (2001) 710.

25 United Nations High Commissioner for Human Rights. *Strengthening the United Nations Human Rights Treaty Body System*, (2012) p. 20.

26 *Ibid* p. 7.

procedures).²⁷ This proposition complements his other observation that unless there is impact at the national level—that is unless there is a bridge between the treaty systems and ‘domestic constituencies’—ratification of treaties remains an empty gesture.²⁸

In line with these observations, the UN system has been evolving to increase its effectiveness and efficiency. Discussions in this regard have pivoted on three key issues: enhancing efficiency and effectiveness of the treaty bodies; harmonising the work of treaty bodies; and strengthening national protection mechanisms.²⁹

Why, then, do national protection mechanisms need to be strengthened? Where is the nexus between national protection mechanisms and the international monitoring system?

Goodman and Jinks argue that in order to ensure diffusion of international norms to the domestic level, there should be ‘domestic receptor sites’.³⁰ Domestic receptors are constituencies such as parliament, judges, civil society organisations, NHRIs and the media.³¹ These receptors act as recipients of the law and champions of human rights as well as intermediaries in the translation of global norms to local ‘vernacular’.³² These receptors should have the power to effect compliance with human rights standards and bring about social change.³³ For instance, Heyns observes that the presence of a significant percentage of women in Japan’s Parliament influenced compliance with the Convention on the Elimination of All Forms of Discrimination against Women.³⁴

Receptors should, through persuasive approaches, be able to encourage desirable behaviour by engaging systematically with governments—fostering structural opportunities for transnational networks to engage with government and all other relevant stakeholders, and encouraging state actors to think harder about human rights violations.³⁵ Quinn observes:

“If a critical mass of key policymakers can be persuaded—either through ‘persuasion’ or ‘socialisation’—to tackle a core impediment (especially one that

27 C. Heyns (n24) p. 5.

28 United Nations High Commissioner for Human Rights (n25).

29 Ibid.

30 R. Goodman. *National Human Rights Institutions, State Conformity and Social Change: How to Influence State Parties: Socialisation and international Law*, Duke Law.

31 C. Heyns (n24) p. 35.

32 R. Goodman (n30).

33 Ibid.

34 C. Heyns (n24).

35 R Goodman and D. Jinks. *Socialising State Parties, Promoting Human Rights through International Law* (2013) p. 127.

might have huge symbolic value such as outdated conceptions of legal capacity) then change can happen.”³⁶

The establishment of NHRIs is premised on the assumption that they will serve as special vehicles for fostering the diffusion of international human rights norms within local settings.³⁷ Their independence financially, personally and functionally, coupled with their quasi-judicial powers, equips them with the necessary powers to shape and influence human rights compliance. Finally, the ability of national monitoring mechanisms to socialise states to comply with international human rights is not the only primary reason for encouraging their establishment. National monitoring mechanisms have also been seen as a symbol of affirming state sovereignty as well as the primary responsibility for states to protect human rights.³⁸

Hence, to sum up, national monitoring mechanisms provide a bridge between the outside world and the national apparatus. The role of the national monitoring framework under Article 33 (2) of the CRPD is to act as a receptor of international norms on the human rights of persons with disabilities which then are translated to common language within the domestic level through its three-fold mandates of promotion, protection and monitoring.

III: THE IMPORT OF ARTICLE 33 (2) OF THE CRPD

Negotiations for what became Article 33 of the CRPD were driven by the spirit of ‘not repeating the mistakes of past human rights treaties’.³⁹ The aim was to introduce a positive system that would not only criticise non-compliance but also support domestic reform efforts by providing local knowledge and constructive advice to governments for promoting compliance.⁴⁰

Article 33 (2) of the CRPD provides as follows:

“State Parties shall, in accordance with their legal and administrative systems,

36 G Quinn. ‘Resisting the Temptation of Elegance: Can the Convention on Rights of Persons with Disabilities Socialise State Parties to the Right Behaviour?’ In Quinn, G and Arnardottir, O, *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspective* (2009); see also G. Quinn, ‘The CRPD as an Engine of Domestic Law Reform’ paper presented at Conference of States Parties to the Convention on Rights of Persons with Disabilities, UN headquarters New York, October 31, 2008.

37 Jean-Bernard Marie. ‘National Human Rights Institutions for Protection of Human Rights’ in Janusz Symonides (ed) *Human Rights: International Protection, Monitoring and Enforcement* (2003) p. 265; Rachel Murray, ‘The Role of National Human Rights Institutions at the International and National Levels: the Experience of Africa’, *Human Rights Law in Perspective*, Vol. 11 (Hart Publishing, 2007) p. 27.

38 Elna Steinerte. ‘The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms under the Optional Protocol to the UN Torture Convention’, 14 *Human Rights Law Review* (2014) pp. 1-29; see also James Crawford. ‘Sovereignty as a Legal Value’, in Crawford & M. Koskeniemi (eds.), *The Cambridge Comparison to International Law* (2012) p. 122.

39 Daily Summaries of Negotiations, Netherlands, Ad Hoc Committee Vol. 5 #2, 4 session (August 24, 2004) <<http://www.un.org/disabilities/default.asp?id=1423>> (accessed on 20 March 2016).

40 Daily Summaries of Negotiation, Canada, Ad Hoc Committee, Vol. 5 #1, (Aug 23/2004) <<http://www.un.org/disabilities/default.asp?id=1423>> (accessed on 20 March 2016).

maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, State Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.”

This subsection examines the key tenets of this provision in three strands: the designation or establishment of a framework including one or more independent mechanisms; the threefold mandates of protection, promotion and monitoring; and reference to the guiding principles for the establishment or designation of an independent mechanism. The subsection closes by bridging Article 33 (2) and Article 33 (3) on participation of people with disabilities and their representative organisations in the monitoring process.

1: Designation or Establishment of a Framework Including One or More Independent Mechanisms

Article 33 (2) of the CRPD requires states to maintain, strengthen, designate or establish a framework including one or more independent mechanisms. Two issues underpin this particular strand: the words ‘designation’ or ‘establishment’, and the requirement for the appointment of one or more independent mechanisms.

The proposition of designation anticipated that states would strengthen existing institutions to undertake the roles of promotion, protection and monitoring. This approach may have been premised on the assumption that states which had set up independent monitoring mechanisms for other human rights purposes or those that had set up national preventive mechanisms under OPCAT would assign such institutions the additional mandate of monitoring the CRPD. It may also be argued that since the framework has to be established in accordance with the Paris Principles, NHRIs could be designated this role through a formal communication such as an act of parliament or ministerial statement or an appointment through relevant state departments.⁴¹ For example, in Denmark, the process of designation included examination of different options by a consultancy firm which formulated a ‘Proposal for a parliamentary decision on the promotion, protection and monitoring of the implementation of the UNCRPD’⁴² which then resulted in the designation of a framework. In Kenya, the Office of the Attorney General was responsible for designating the Kenya National Commission on Human Rights (KNCHR) and later the National Gender and Equality Commission (NGEC) as the independent mechanisms in 2011 and 2014 respectively.⁴³

41 G. Beco. ‘Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights institutions?; Human Rights Council’, Office of the UN High Commissioner for Human Rights (n1); Mental Disability Advocacy Centre, *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities* (2011) p. 41.

42 See M.V. Lissberg, ‘Implementation of Article 33 CRPD in Denmark: the Sails are Up, but Where is the Wind?’ In G. de Beco (eds), *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National structures for the implementation and monitoring of the Convention* (2013).

43 Letter dated 1 February 2011, AG/CONF/19/6350/VII; Letter dated 14 August 2014, DOJ/COM/8/2/VOL1/45.

With regard to the requirement of establishment, states would be required to set up a new system that fulfils the criteria set under Article 33 (2) of the CRPD to undertake the promotion, protection and monitoring roles. For example, Austria set up a new framework—the Independent Monitoring Committee—to be the independent monitoring mechanism.⁴⁴ It is worth noting though that this Austrian framework was faulted for not complying with the Paris principles.⁴⁵

The requirement that states should designate one or more independent mechanisms was premised by the debate of variance in political systems⁴⁶ and the possibility of a state having multiple human rights bodies. States with federal systems argued that having a single monitoring system would be challenging since each federal unit was distinct. The CRPD committee has indeed recommended that federal states should ensure designation of implementation bodies in every state of the federation.⁴⁷ States with multiple NHRIs may establish multiple independent mechanisms, hence a coordination strategy should be designed and agreed upon and specific mandates allocated to each body. In the case of Northern Ireland, the framework consists of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.⁴⁸

2: The Three-fold Mandates

The primary function of the Article 33 (2) framework is to translate the CRPD into the local ‘vernacular’ and promote conformity by socialising actors—making disability issues a natural reflex rather than an afterthought.⁴⁹ This is engraved in the framework’s three-fold mandates: promotion, protection and monitoring. Promotion requires the Article 33 (2) framework to create awareness on the rights of persons with disabilities to foster acceptance of the values underlying the CRPD for internalisation. To this end, the Article 33 (2) framework is required to design activities such as training materials and training forums for different actors and to engage with relevant partners including the media in demystifying stereotypes about persons with disabilities.

The second element on protection requires the Article 33 (2) framework to have the capacity to undertake activities that ensure that persons with disabilities are not open to abuse and that adequate remedy is awarded in situations where their rights have been violated. This function resonates with the emphasis of NHRIs as the preferred institutions since many of them enjoy quasi-judicial mandates. To this end, the article 33 (2) framework should be able to receive and investigate complaints, submit advisories to various courts and be enjoined as *amicus curiae*.⁵⁰

44 Para. 358, Austria State Report, CRPD/C/AUT/1.

45 Para. 52, CRPD Concluding Observations to Austria, CRPD/C/AUT/CO/1.

46 UN Enable, Daily Summaries of Negotiations, Canada, Russian Federation, Ad Hoc Committee, session (11 August 2005) <<http://www.un.org/disabilities/default.asp?id=1423>> (accessed on 21 March 2016).

47 See CRPD Committee Recommendations to Austria CRPD/C/AUT/CO/1 and Germany CRPD/C/DEU/CO/1 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5> (accessed on 28 March 2016).

48 R. Murray and K. Johnson. ‘Implementation of Article 33 in the United Kingdom: The Need to Consolidate Civil Society Engagement’, in G Beco (n42).

49 G Quinn, (n36).

50 Para 66, Office of the High Commissioner on Human Rights (n1).

Finally, the monitoring aspect requires that the Article 33 (2) framework assess the conformity of a state with its obligations in the Convention. It includes activities such as visiting places where services are availed to the public whether by state or private entities, conducting inquiries, contributing to state reports and ensuring follow up to concluding observations of treaty bodies. Indeed, Article 16 of the CRPD obligates states to prevent occurrence of all forms of exploitation and abuse against persons with disabilities by designating an independent authority to monitor facilities and programmes designed for persons with disabilities. The CRPD Committee has reiterated this requirement in its concluding observations and recently in the Committee's guideline on article 14 of the CRPD.⁵¹

3: The Paris Principles as Guiding Principles for the Establishment or Designation of Independent Mechanisms

Article 33 (2) of the CRPD requires states in their designation or establishment of the independent mechanism to consider the principles relating to the status and functioning of national institutions for the protection and promotion of human rights (Paris Principles). The CRPD Committee has emphasised these Principles in its recommendations to states under Article 33 (2).⁵² It has been argued that emphasis on the Paris Principles automatically favours the designation of NHRIs as independent mechanisms.⁵³ However, it has also been suggested that bodies which are not compliant with the Paris Principles should not be locked out from being part of a framework under Article 33 (2) so long as within the framework there is one body that abides by the Principles.⁵⁴ In other words, designation of a single entity would require a body that is fully compliant with the Paris Principles while multiple entities would require at least one entity that fulfils the Paris Principles.

Arising relevant questions include how NHRIs can carry the monitoring duty effectively without jeopardising the broad mandate of the monitoring framework. Second, does designation of NHRIs as independent mechanisms demand further specific human, financial and other resources?

A number of observations have been made about countries which have designated NHRIs as independent mechanisms. In New Zealand, a commissioner for disability has been assigned the duty to oversee this mandate and specific resources have been allocated to undertake arising monitoring activities.⁵⁵ The Paris Principles require NHRIs to be functionally, personally and financially

51 Para 36, CRPD Committee Concluding Observations for Germany, CRPD/C/DEU/CO/1; see also para 19, Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the CRPD, the Right to Liberty and Security of Persons with Disabilities (adopted during the 14th Session held in September 2015) <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>> (accessed on 31 March 2016).

52 See para. 53 and 67 of CRPD Committee Concluding Observations for Austria and Denmark respectively, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5> (accessed on 22 June 2015).

53 G Quinn. 'The UN Convention on the Rights of Persons with Disabilities: National Institutions as Key Catalysts of Change' in Office of the High Commissioner for Human Rights, *National Monitoring Mechanisms on the Convention on the Rights of Persons with Disabilities, the National Human Rights Commission of Mexico and the Network of National Institutions for the Promotion and Protection of Human Rights of the Americas*, May 2008, p. 130.

54 Para. 44, Office of the High Commissioner for Human Rights (n1).

55 Article 33 Convention Coalition Monitoring Group. *Making Disability Rights Real, Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities* (2013) 7 <<https://www.hrc.co.nz/your-rights/people-disabilities/our-work/making-disability-rights-real/>> (accessed on 20 March 2016).

independent. The presumption is therefore that NHRIs will have the capacity to deliver and where there are gaps that states are obligated to strengthen the capacities of NHRIs. The dilemma of function balancing and the allocation of adequate funds can therefore be resolved through designing disability-specific programmes as well as mainstream activities and having earmarked budgets.

4: “Nothing about Us without Us”: Bridging Article 33 (2) and Article 33 (3) of the CRPD on Participation of People with Disabilities and Their Representative Organisations in the Monitoring Process

Article 33 (3) of the CRPD obliges states to include and ensure the active participation of persons with disabilities and their representative organisations in the monitoring processes. Furthermore, the Convention requires states to consult with and actively involve persons with disabilities, including children, through their representative organisations, in all decision-making processes.⁵⁶ Consequently, the CRPD Committee advised Paraguay to ensure that ‘the independent mechanism is in permanent consultation with disabled persons organisations at the national level.’⁵⁷ Similarly, the CRPD Committee urged Kenya to ensure the full participation of persons with disabilities and their representative organisations in the monitoring process, including by providing the necessary funding.⁵⁸

But how can effective involvement and participation of persons with disabilities and their representative organisations in the monitoring process be achieved? Sherlaw and Hudebine observe that: ‘representative organisations of persons with disabilities have a voice, but this is an advisory one framed by institutional constraints.’⁵⁹ Birtha on the other hand draws a distinction between active and effective participation. The former is achieved through regular presence of disability organisations in government meetings and negotiations while the latter is achieved when contributions of representative organisations of persons with disabilities are reflected in laws and policies.⁶⁰ Distinction between involvement and consultation emphasises that consultation has a passive role rather than an active one. The Mental Disability Advocacy Centre also underscores effective and meaningful participation of representative organisations of persons with disabilities in policy formulation and evaluation, stating that such policies are more likely to reflect real needs, result in effective implementation and have ownership by the community.⁶¹

To elaborate the concept of meaningful participation, the UN Special Rapporteur on the Rights of Persons with Disabilities identifies a number of prerequisites towards promoting consultation

56 Article 4 (3).

57 Para. 10, 76, CRPD Committee Concluding Observations to Paraguay (adopted during the Ninth Session, 15-19 April 2013).

58 Para. 60, CRPD Committee Recommendations to Kenya, CRPD/C/KEN/CO/1.

59 W. Sherlaw and H. Hudebine. ‘The UNCRPD: Opportunities and Tensions within the Social Inclusion and Participation of Persons with Disabilities’, *ALTER European Journal of Disability Research* (2015) 9.

60 M. Birtha. ‘Nothing About CRPD Monitoring Without Us: A case Study on the Involvement of the Disability Movement in Policy-Making in Zambia’. In C Ngwenya *et al. African Disability Rights Yearbook* Vol. 1 (Johannesburg: Pretoria University Law Press, 2013) p. 124.

61 Mental Disability Advocacy Centre (n41) p. 21.

with and the active involvement of persons with disabilities and their representative organisations. First, legal frameworks must recognise participation in decision-making processes as a right and place a mandatory obligation on state authorities to consult persons with disabilities.⁶² Second, institutionalised consultative bodies and mechanisms such as focal points for implementation of disability issues that ensure permanent engagement must be established.⁶³ Third, non-discrimination especially for groups that face multiple types of discrimination such as women and girls with disabilities and people with intellectual disabilities must be ensured.⁶⁴ Fourth, access to information remains vital.⁶⁵ Finally, awareness raising is key to the active participation of persons with disabilities and their representative organisations.⁶⁶

States therefore must facilitate and guarantee participation of persons with disabilities and their representative organisations in monitoring. Measures such as recognising their participation in the appointment of the monitoring framework, adequate funding as well as building their capacity to be equal participants should be instituted.

Hence, Article 33 (2) of the CRPD can be summarised as follows: designate or establish a monitoring framework in line with the Paris Principles; facilitate its functioning by providing adequate funding and personnel to promote, protect and monitor implementation of the CRPD; and ensure meaningful participation of persons with disabilities and their representative organisations throughout the monitoring process.

IV: IMPLEMENTING ARTICLE 33 (2) OF THE CRPD IN KENYA

This section of the article examines the extent to which Kenya's legislative framework facilitates implementation of Article 33 (2) of the CRPD. It provides an overview of the status of persons with disabilities in Kenya and analyses the country's laws in light of Article 33 (2) of the CRPD.

1: Implementation of the Rights of Persons with Disabilities in Kenya

Persons with disabilities constitute 4.6 per cent of Kenya's population, translating to 1.7 million people.⁶⁷ However, the accuracy of this figure remains contested, particularly in light of estimates that Persons with disabilities constitute 15 per cent of the global population.⁶⁸

62 Para 62, Human Rights Council (n17).

63 Para 66, Human Rights Council. Ibid.

64 Para 71, Human Rights Council. Ibid.

65 Para 75, Human Rights Council. Ibid.

66 Para 81, Human Rights Council. Ibid.

67 National Coordinating Agency for Population and Development (NCAPD). *Kenya National Survey for Persons with Disabilities-Preliminary Report*. (2008) <<http://www.afri-can.org/CBR%20Information/KNSPWD%20Prelim%20Report%20-%20Revised.pdf>> (accessed on 30 June 2015).

68 World Health Organisation, World Disability report <http://www.who.int/disabilities/world_report/2011/report.pdf> (accessed on 30 June 2015).

Kenya has enacted quite progressive laws that safeguard the rights of persons with disabilities. These include the Persons with Disabilities Act of 2003, which makes provisions for the rights of persons with disabilities; the Social Assistance Act 2013, which entitles persons with disabilities to social assistance; the Sexual Offences Act 2006, which guarantees the right to an intermediary for vulnerable witnesses; and the Basic Education Act of 2013.

Despite this legislative context, persons with disabilities continue to face direct or indirect discrimination, which adversely impacts their access to education, health care and employment. Efforts to implement inclusive education programmes remain elusive and the majority of children with disabilities still learn in segregated environments.⁶⁹ Additionally, Kenya is still grappling with the concept of public participation and persons with disabilities and their representative organisations largely continue to face limitations in their possibility of participating in county and national affairs. This is exacerbated by the dissemination of information to them in inaccessible formats. Finally, women and girls with disabilities continue to face violence and sexual abuse, with persons with intellectual disabilities disproportionately affected. In its concluding observations, the CRPD committee urged Kenya to design and implement a strategy for protecting women and girls with disabilities from exploitation, violence and abuse.⁷⁰

2: Kenya's Legislative Framework in Light of Article 33 (2) of the CRPD

A: The Constitution

The Constitution includes a number of provisions, which catalyse implementation of Article 33 (2) of the CRPD. The transformation of Kenya from a dualist to a monist state under Article 2 (6) of the Constitution allows direct application of the CRPD at the national level. In *Wilson Morara v the Republic*, for instance, the High Court held that failing to recognise the right to legal capacity for persons with disabilities was inconsistent with Article 12 of the CRPD and by dint of Article 2 (6) of the Constitution, the Convention forms part of the laws of Kenya.⁷¹ Similarly, in *Ripples International & 11 others v the Inspector General of Police*, the High Court concluded that the rights of the appellant had been violated:

“Having considered the evidence in the petitioners’ affidavit and the petition herein, the relevant articles in the Constitution of Kenya, 2010, the general rules of international law, treaties or conventions ratified by Kenya and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on the part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners’ complaints of defilement and other forms of sexual violence infringes on the petitioners’ fundamental rights and freedoms under Articles 21 (1), 21 (3),

69 Kenya National Commission on Human Rights. ‘From Norm to Practice: The Status of Implementation of Rights of Persons with Disabilities’ (2014).

70 Para 32, CRPD Committee Concluding Observations to Kenya, CRPD/C/KEN/CO/1 (30 September 2015).

71 *Wilson Morara Siringi vs the Republic* Criminal Appeal No 17 of 2014 [2014] eKLR.

27, 28, 29, 48, 50 (1) and 53 (1) (d) of the Constitution of Kenya, 2010⁷².

Chapter 4 of the Constitution has an expansive Bill of Rights, which specifically prohibits discrimination based on disability. The Bill of Rights also has a specific article on the rights of persons with disabilities (Article 54) whose norms the designated independent mechanism under Article 33 (2) of the CRPD may use for monitoring purposes. The Constitution also obliges the Executive to submit an annual report on compliance with international obligations and this opens an avenue for accountability and dissemination.⁷³ Unlike OPCAT, which obliges states to publish and disseminate reports of national preventive mechanisms, the CRPD does not delve in to the operations of the monitoring frameworks at the national level. Yet if properly utilised, the obligation to report to the National Assembly on compliance with international obligations may yield positive results. Finally, the Constitution establishes independent commissions to promote and protect human rights.⁷⁴ As already stated in this article, the establishment of NHRIs through constitutional text is vital to promoting their independence functionally, personally and financially. The Constitution empowers NHRIs to receive and investigate complaints both in the public and private spheres.⁷⁵ Such powers are indispensable to holistic fulfilment of the three-fold mandates of the Article 33 (2) framework, as general obligations require states to eliminate discrimination based on disability both by public and private entities.⁷⁶

With regard to the participation of persons with disabilities and their representative organisations, Article 10 of the Constitution recognises inclusiveness, non-discrimination, protection of the marginalised and public participation as essential national values.⁷⁷ These national values and principles bind all state organs, state officers, public officers and any persons when applying the Constitution, making or implementing public policy decisions.⁷⁸ Article 21 of the Constitution obliges state organs and all public officers to address the needs of vulnerable groups including persons with disabilities.⁷⁹ These provisions provide a backdrop against which evaluation of policies, laws and activities of both state and non-state actors can be examined on the extent to which they have actively involved and meaningfully ensured participation of persons with disabilities and their

72 *C K (A Child) through Ripples International as her guardian and next friend & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* [2013] eKLR.

73 Article 132 (1) (c) of the Constitution obliges the President once a year to:

- (i) Report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in Article 10;
- (ii) Publish in the Gazette the details of the measures and progress under sub-paragraph
- (iii) Submit a report for the debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.

74 Article 59, Constitution of Kenya 2010.

75 Article 59 (2) (c), Constitution of Kenya 2010.

76 Article 4 (1), CRPD.

77 Article 10 (2) (b), Constitution of Kenya 2010.

78 Article 10 (1), Constitution of Kenya 2010.

79 Article 21 (3) of the Constitution.

representative organisations.

B: The Persons with Disabilities Act 2003

The Persons with Disabilities Act of 2003 provides another enabling framework in light of Article 33 (2) of the CRPD. Section 7 of the Act obliges the National Council for Persons with Disabilities (NCPWD) to advise the minister in charge of disability on the provisions of any treaty or agreement relating to the welfare or rehabilitation of persons with disabilities.⁸⁰ The Persons with Disabilities Act also obligates NCPWD to implement disability related programmes. Article 33 (1) of the CRPD requires states to designate focal points within government for matters relating to the implementation of the CRPD. The NCPWD and the Ministry of Labour, Social Security and Services, though not officially designated as the focal points in line with Article 33 (1) of the CRPD,⁸¹ have in practice been implementing disability programmes. Article 33 of the Convention requires coordination and cooperation of both the focal points and the monitoring framework. The existence of this institutional framework provides an enabling environment for implementing Article 33 (2) of the CRPD. Specifically, the promotional aspect, which requires implementation of programmes such as awareness raising, can be undertaken together with the focal point.⁸²

C: The Kenya National Commission on Human Rights Act, 2011

The Kenya National Commission on Human Rights Act of 2011 restructured the Kenya National Equality and Human Rights Commission established pursuant to Article 59 of the Constitution. Section 8 of the Act mandates the Kenya National Commission on Human Rights (KNCHR) to receive and investigate complaints except those relating to the violation of the principle of equality and freedom from non-discrimination. KNCHR is also required to act as the principal organ of the state in ensuring compliance with international and regional treaties and human rights; except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination.⁸³

D: The National Gender and Equality Commission Act, 2011

The National Gender and Equality Commission Act of 2011 establishes the National Gender and Equality Commission (NGEC), with its primary role being to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution. Its mandate also includes acting as the principal organ of the state in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interests including persons with disabilities. NGEC is also tasked with conducting audits on the status of special interest groups including persons with disabilities.

80 Section 7 Para. (b) (iii) of the Persons with Disabilities Act.

81 Para 59, CRPD Committee Concluding Observations to Kenya (n70).

82 Para 88, replies of Kenya to the list of issues to the Initial report to the CRPD Committee <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=22>(accessed on 15 April 2016).

83 Sec 8 (d), (f), NGEC Act 2011.

V: STATE OBLIGATIONS UNDER ARTICLE 33 (2) OF THE CRPD

1: Designation or Establishment of One or More Independent Mechanisms

There is 'no one size fits all' in the designation or establishment of a monitoring framework. Certain parameters though are indispensable when evaluating which body or bodies would be best suited as independent mechanism(s). These parameters include: the legal intricacies of the state, willingness to cooperate, funding, clarity of mandate, the legitimacy of the organisation to persons with disabilities and their representative organisations, and the extent to which carrying out the mandates is prioritised within the existing activities of an institution.⁸⁴

As earlier alluded, Kenya began by designating KNCHR as the independent mechanism in 2011.⁸⁵ KNCHR has A-status accreditation, implying that it fully complies with the Paris Principles. Some of the activities which KNCHR undertook during its tenure as the independent mechanism included conducting monitoring visits in various counties and assessing the extent to which the rights of persons with disabilities were being implemented in areas such as access to education, healthcare, transport, physical access and adequate standard of living. KNCHR also appointed a disability focal point to coordinate all disability related work. Additionally, it guaranteed participation of persons with disabilities through their representative organisations in the monitoring process by ensuring individuals from different representative organisations accompanied the monitoring teams for field visits. Other activities included joint submissions and joint research with representative organisations of persons with disabilities.⁸⁶

In 2014, KNCHR was replaced by the NGEC as the independent mechanism.⁸⁷ NGEC is an equality body whose mandate is to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution. This change was prompted by mandate changes that empowered NGEC as the principal organ of the state in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interests including persons with disabilities.⁸⁸

The central question regarding this shift is whether indeed a distinction can be drawn on matters of equality and non-discrimination from other human rights issues. Is it possible to draw a line on which institution should undertake equality as distinct from human rights mandates? Commentaries on NHRIs and equality bodies indicate that their distinctions are usually blurred due to mandate

84 M Nthenge (n9) p. 43.

85 See <<http://www.knchr.org/OurWork/Minoritiesandmarginalisedgroups/Personswithdisabilities.aspx>> (accessed on 15 April 2016).

86 See details of thematic research on legal capacity <<http://www.knchr.org/ReportsPublications/ThematicReports/GroupRights.aspx>> (accessed on 15 April 2016).

87 M.V. Liisberg (n42).

88 Sec 8 (c), NGEC Act 2011.

overlaps, and hence the two types of bodies are described as natural bedfellows.⁸⁹ It has been argued that the existence of multiple bodies leads to unnecessary competition for resources and competition for relevance.⁹⁰ Proponents of multiple bodies argue that for reasons derived from either principle or practical effectiveness, there should be specialised bodies devoted to the human rights of particular vulnerable groups.⁹¹

So why the concern about the transition from a NHRI to an equality body? Did Kenya fail to fulfil its obligations under Article 33 (2) of the CRPD with this shift? The answer to this question is in the affirmative. As the only independent mechanism, NGEC does not meet Paris Principles requirements. Indeed, the CRPD committee stated the following:

“[T]he committee is concerned that the [KNCHR] does not form part of the national mechanism for monitoring the Convention, and that the current mechanism does not comply with the Paris Principles”.

Scholarship on the Paris Principles argues that full compliance is essential to ensuring that NHRIs are effective. Full compliance enables NHRIs to work independently and professionally in promoting and protecting human rights.⁹² It also gives them legitimacy and credibility domestically and internationally. Additionally, it ensures that NHRIs receive support from other domestic human rights advocates and organisations, from other NHRIs, from the UN and other inter-governmental agencies and from other international actors, including international donors. The Paris Principles enable NHRIs to participate fully in the international human rights system through accreditation by the International Coordinating Committee of National Institutions (ICC).⁹³

Indeed, during Kenya’s review by the CRPD Committee, KNCHR as the only ICC-accredited institution independently submitted a report on progress towards implementation of the rights of persons with disabilities.⁹⁴ Conversely, NGEC was part of the government delegation presenting the state report. This situation raises questions on the NGEC’s functional independence, which in turn implicates its appointment as Kenya’s independent mechanism. Further, NGEC failed to submit any information to the CRPD committee, which would have been expected of an independent mechanism. An interesting observation is also made in Kenya’s concluding observations where the CRPD committee categorically recommends that the capacity of NGEC should be enhanced to ensure advancement of the rights of women and girls with disabilities.⁹⁵ With regard to Article 33

89 N Crowther and C O’ Cinneide. ‘Bridging the Divide? Integrating the Functions of National Equality Bodies and National Human Rights in the European Union’ (2013).

90 R Carver, ‘One NHRI or Many? How Many Institutions Does it take to Protect Human Rights. Lessons from the European experience’ (2011), [Vol 3.1] *Journal of Human Rights Practice*.

91 *Ibid.*

92 Asia Pacific Forum. ‘A manual on Human Rights Institutions’, (2015) p. 95.

93 *Ibid.*

94 Para 3, CRPD Committee Concluding Observations; see also <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=995&Lang=en> (accessed on 15 April 2016).

95 Para 12 (b).

(2) of the CRPD, the Committee also specifically highlighted the role of KNCHR in the monitoring framework, recommending that:

‘[T]he State party establish a national mechanism to monitor the implementation of the Convention, with the participation of the [KNCHR] as the institution in compliance with the Paris Principles, in line with Article 33 (2) of the Convention’⁹⁶

A further question relates to what the phrase ‘with the participation of the [KNCHR]’ implies. This leans towards the recommendation of multiple entities as independent mechanisms or, in other words, a monitoring framework. Kenya can borrow inspiration from jurisdictions such as New Zealand and Denmark. New Zealand has established a Disability Convention Independent Monitoring Mechanism, which comprises the New Zealand Human Rights Commission, the Ombudsman and the New Zealand Convention Coalition, which represents representative organisations of persons with disabilities.⁹⁷ Similarly, Denmark has appointed its national human rights institution, the Danish Human Rights Institute, as the independent mechanism⁹⁸ and the Danish Disability Council and the Parliamentary Ombudsman as cooperation partners in the national monitoring of the Convention.⁹⁹

In the case of Kenya, therefore, the monitoring framework may include KNCHR, NGEC and representative organisations of persons with disabilities. As the only institution that complies with the Paris principles, the coordination role solely rests on KNCHR. The success of this framework would depend on a number of factors, including establishing coordination strategies such as joint meetings, joint promotional activities and an official agreement on how to centralise and rationalise activities. Adequate funding remains vital to achieving the functions of the monitoring framework, and hence Kenya has to allocate a specific budget for the Article 33 (2) monitoring framework.¹⁰⁰ International cooperation remains key to supporting national efforts for the realisation of the purpose and objectives of the CRPD, especially in developing countries. Kenya should utilise its international links to facilitate the functioning of the monitoring framework not only financially but also in the provision of technical assistance.

96 Para 60.

97 New Zealand signed and ratified the UNCRPD in March 30 2007 and ratified in September 26 2008; Article 33 Convention Coalition Monitoring Group, ‘Making Disability Rights Real, Second Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities (2013)7<<https://www.hrc.co.nz/your-rights/people-disabilities/our-work/making-disability-rights-real/>> (accessed on 7April 2016).

98 Parliamentary Decision B15 of December 2010; Para383, Denmark Initial Report to the CRPD Committee <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fDNK%2f1&Lang=en> (accessed on 14 April 2016).

99 Para 386, Denmark initial report to CRPD Committee.

100 For instance, following the designation of New Zealand Human Rights Commission and the Ombudsman Office, New Zealand allocated the institutions an additional budget allocation of \$1.59million.

2: Ensuring Participation of Persons with Disabilities and Their Representative Organisations in the Monitoring Process

While efforts have been made to actively involve persons with disabilities and their representative organisations in the monitoring process, this engagement has been described as ad hoc usually passive as opposed to meaningful participation.¹⁰¹ Article 3 presents some of the formal consultative mechanisms through which meaningful participation of persons with disabilities and their representative organisations can be guaranteed. The UN Special Rapporteur on the Rights of Persons with Disabilities has underscored transparency and autonomy as variables for defining criteria of representativeness as core to ensuring meaningful participation in monitoring processes. The New Zealand Convention Coalition comprises national disabled peoples' organisations and it is a member of the monitoring framework in New Zealand.¹⁰² Additionally, the Coalition receives funding for monitoring activities. On the other hand, representative organisations of persons with disabilities in Zambia reported lack of support from the government, lack of transparency and inaccessible working methods of their human rights commission as key impediments to meaningful participation in the monitoring process.¹⁰³

The CRPD committee has called upon states including Kenya to ensure meaningful participation of the representative organisations of persons with disabilities in the monitoring process including allocating them enough funds to carry out monitoring activities. One way through which representative organisations in Kenya can be facilitated financially is through the annual budget for NCPWD where a certain amount can be secured to fund representative organisations undertaking monitoring activities. International cooperation can also be utilised, hence the need to include representative organisations in the planning and allocation of funding such as in the implementation and monitoring of Sustainable Development Goals which are interlinked with the CRPD.

VI: CONCLUSION

This article has argued that Kenya remains at the forefront of implementing the CRPD and making Article 33 (2) of the CRPD operational. Most states who are party to the CRPD in Africa are yet to establish monitoring frameworks.

Certain measures should be instituted to bridge current gaps and ensure success of Kenya's monitoring framework. A monitoring framework comprising the NGEC and KNCHR should be established. To facilitate functioning of this monitoring framework a clear outline of activities, goodwill and cooperation as well as adequate funding will be vital. Finally, a broad strategy must be adopted to ensure participation of representative organisations of persons with disabilities in the monitoring process.

101 Disabled peoples' Organisations. 'Implementation of the UN Convention on the Rights of Persons with Disabilities in the Republic of Kenya, submission to the CRPD Committee of the response to list of issues –LOI 2015 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fKEN%2f21296&Lang=en> (accessed on 15 April 2016).

102 Asia Pacific Forum (n92).

103 M BIRTHA (n60) p. 137.

AN APPRAISAL OF THE DRAFT PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA

Lawrence Mute and Elizabeth Kalekye***

I: INTRODUCTION

Doubts have historically and intermittently been raised about the need or relevance of regional human rights mechanisms. Even the United Nations (UN) was for many years ambivalent about the development of regional systems for the protection of human rights, the thinking being that this would undermine the idea of the universality of human rights.¹ Ilias Bantekas and Lutz Ette have however noted that these fears have largely given way to an appreciation of the beneficial roles that regional human rights systems bring to the protection and promotion of human rights. They further note that indeed these systems are closely connected to regional political developments and integration, which potentially gives them more traction than the UN system.²

In overall terms, regional human rights instruments continue to play essential roles in the protection, promotion and monitoring of human rights. The norms captured in these instruments are in many instances evocative of the spirit if not the letter of the universal³ norms established in international human rights instruments; yet too regional instruments sometimes do originate notable content or perspectives not before covered by international human rights instruments.⁴ Regional instruments also establish oversight institutions discrete from approximate international peer institutions.

Article 66 of the African Charter on Human and Peoples' Rights⁵ ('African Charter', 'ACHPR' or

* LLB, University of Nairobi; LLM (Law in Development), University of Warwick; Lecturer, School of Law, University of Nairobi; Member of the African Commission on Human and Peoples' Rights; Chairperson of the Committee for the Prevention of Torture in Africa; Member of the Working Group on Older Persons and People with Disabilities in Africa.

** LLB, University of Nairobi; Advocate of the High Court of Kenya; Programme Associate, Research and Pan-African Engagement, UHA; previously aid to Commissioner Lawrence Mute.

1 It was only in 1977 that the UN launched a campaign to encourage the establishment of regional human rights systems. see GA Res.32/127 (1977). Also see C. Heyns and N. Killander. 'Towards Minimum Standards for Regional Human Rights Systems', in M. Arsanjani et al (eds). *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (2011) p. 527.

2 Ilias Bantekas and Lutz Oette. *International Human Rights Law and Practice* (Cambridge University Press: 2013) p. 219.

3 Regional, and in particular, African human rights instruments do not purport to substitute the concept of the universality of human rights with that of human rights as culturally relative, and cultural relativism as an exclusive idea therefore is not discussed to any length in this article. For an incisive commentary on cultural relativism, see chapter five of Roland Burke. *Decolonisation and the Evolution of Human Rights* (University of Pennsylvania Press: 2010) from p. 112.

4 This is the case with the African Charter on Human and Peoples' Rights that establishes the innovative concept of peoples' rights which is not otherwise legislated in the core international human rights instruments. See Makau Mutua 'The African Human Rights System: A critical Evaluation'. UNDP. 2001.

5 African Charter on Human and Peoples' Rights, adopted on 27 June 1981, entered into force on 21 October 1986 <<http://www.achpr.org/instruments/achpr/>> (Accessed 30 May 2016).

‘Charter’) provides that special protocols or agreements may be prepared if necessary to supplement the provisions of the Charter. In the last three decades, the Organisation of African Unity—and its successor the African Union—have adopted at least four protocols in pursuance of Article 66 of the ACHPR: Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights;⁶ Protocol to the African Charter on human and Peoples’ Rights on the Rights of Women in Africa⁷ (‘Maputo Protocol’ or ‘Women’s Rights Protocol’); Protocol on the Statute of the African Court of Justice and Human Rights;⁸ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa.⁹

This article offers an appraisal of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (‘Disability Rights Protocol’ or ‘Disability Protocol’) which was adopted by the African Commission on Human and Peoples’ Rights (‘African Commission’ or ‘Commission’) during its 19th Extra-Ordinary Session held between 16 and 25 February 2016.¹⁰ The African Commission subsequently transmitted the Disability Rights Protocol for consideration and final adoption by the African Union.¹¹

Questions have been raised about the need and prudence of preparing a regional disability rights instrument when the majority of African states are already party to the UN Convention on the Rights of Persons with Disabilities (CRPD).¹²¹³ The premise of this article is that the Disability Rights Protocol will play an eminent role in providing a regional anchor for the protection and promotion of the rights of persons with disabilities in Africa. The article shows that there have been worthwhile yet modest initiatives by the African Commission to protect and promote the rights of persons with disabilities. Yet these efforts have been constrained by outmoded philosophical

6 Adopted on 11 July 2000, entered into force on 26 May 2001, <<http://www.achpr.org/instruments/court-establishment/>>(Accessed 30 May 2016).

7 Adopted on 7 November 2003, entered into force on 20 November 2005, <<http://www.achpr.org/instruments/women-protocol/>> (Accessed 30 May 2016).

8 Adopted on 27 June 2014, <<http://www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>> (Accessed 30 May 2016).

9 Adopted by the Assembly of the African Union in Addis Ababa, Ethiopia, at its 26th Ordinary Session held on 30-31 January 2016, <http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf> (Accessed 30 May 2016).

10 Final Communique of 19th Extra- Ordinary Session of the African Commission on Human and Peoples’ Rights, paragraph 11 (iv) < http://www.achpr.org/files/sessions/19th-EO/info/communique19eos/final_communique_19th_extraordinary_session.pdf> (Accessed 20 March 2016).

11 Other draft statutes which the African Commission has submitted to the African Union for consideration in recent years include the Draft Protocol to the African Charter on Human and peoples’ rights on the Abolition of the Death Penalty in Africa, adopted during the 56th Ordinary Session of the Commission held on 21 April-7 May 2016, <<http://www.achpr.org/instruments/general-comments-right-to-life/>> (Accessed 30 May 2016).

12 Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006, entered into force on 3 May 2008, <<http://www.un.org/disabilities/convention/conventionfull.shtml>> (Accessed 8 May 2016).

13 As of May 2016, 41 and 25 African states respectively were party to the CRPD and its Optional Protocol. United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a (accessed on 1 June 2016).

The CRPD has indeed engendered a paradigm-shift of huge proportions subsequent to which persons with disabilities are recognised as human beings with personhood and dignity: individuals with legal capacity who now live independently in the community, are educated in inclusive settings, and have the right to retain their fertility, to have intimate relations and bring up a family.¹⁴ Still, the CRPD cannot technically root or amend Africa's normative and institutional framework, and the Disability Rights Protocol will now play the role of ensuring that the continent's norms and institutions properly anchor protection and promotion of the rights of persons with disabilities including through the employment of the social rather than the medical model of disability. The CRPD and the Disability Protocol should, in this sense, be understood as contemporary and complementary instruments to which Africans with disabilities may leverage to seek succour according to their contexts and needs. The most obvious comparative advantage of a fully-fledged regional system is the far greater access the system would provide to African states and individuals in comparison to the access accorded by the Committee on the Rights of Persons with Disabilities, which has to give audience to a far greater number of states. Individuals may in fact not gain access to the Committee if their states have not taken the further step of becoming party to the Optional Protocol to the CRPD.¹⁵

Apart from this introduction, the article is segmented into five other sections. Section II establishes the historical background for the preparation of an African disability rights instrument. Section III sets the context within which the African Commission found it necessary to proceed with the preparation of an African disability rights instrument. It highlights the arguments used variously in support of and against preparation of the Disability Rights Protocol. Section IV draws from the functions and strategies of the ACHPR to show the extent to which the rights of persons with disabilities are reflected in both norm and practice within existing African instruments and institutions. Section V introduces key content of the Disability Rights Protocol. Finally, the article makes some conclusions.

II: BACKGROUND FOR THE PREPARATION OF AN AFRICAN DISABILITY RIGHTS INSTRUMENT

The idea of an African instrument on the rights of persons with disabilities initially arose during the first African Union Ministerial Conference on Human Rights held in Kigali, Rwanda, in 2003. States were called upon to develop a protocol on the protection of the rights of people with disabilities and the elderly.¹⁶ The African Commission heeded this call by establishing the Focal Point on the Rights of Older Persons in Africa, at its 42nd Ordinary Session held in November

14 Lawrence Mute. 'Moving From the Norm to Practice: Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya', in *Equal Rights Review* (2012), <http://www.equalrightstrust.org/ertdocumentbank/err9_mute.pdf> (Accessed 1 June 2016).

15 Of the 11 communications finalised by the Committee on the Rights of Persons with Disabilities, none are from African states. Determined cases are from Austria, Australia, Italy, Sweden, Brazil, Argentina, Hungary, United Kingdom and Germany. Three cases from Tanzania, one of 25 African States which are party to the Optional Protocol to the CRPD, are pending determination <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx>>(Accessed> 6 June 2016).

16 Kigali Declaration of 2003, para. 20, < <http://www.achpr.org/instruments/kigali/>> (Accessed 20 March 2016).

2007 in Brazzaville, Republic of Congo.¹⁷ Then, at its 45th Ordinary Session held in Banjul, The Gambia, in November 2009, the African Commission transformed the Focal Point into the Working Group on the Rights of Older Persons and People with Disabilities in Africa (Working Group).¹⁸

The terms of reference of the Working Group, *inter alia*, were:

- To hold comprehensive brainstorming sessions to articulate the rights of older persons and people with disabilities;
- To draft a concept paper for consideration by the African Commission that would serve as a basis for adopting a protocol on ageing and people with disabilities;
- To facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the Continent, including their socioeconomic rights;
- To collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development of member states; and
- To identify good practices to be replicated in member states.¹⁹

An initial attempt by the Working Group to prepare a disability rights instrument, which coalesced in August 2009 around what was referred to as the Accra Draft Protocol, flopped with the abandonment of the Accra Draft on account of inadequate consultations with stakeholders and because of conceptual and normative conflation on matters such as whether the disability rights instrument should be framed as a charter or a protocol.²⁰ The second initiative to prepare the instrument took place between 2012 and 2015 when the Working Group undertook consultations with stakeholders from across Africa in face-to-face meetings as well as by posting drafts onto the Commission's website for feedback.²¹ The Working Group released at least three drafts for stakeholder inputs and feedback. During that time, face-to-face meetings were held with state and non-state actors from all of Africa's Regional Economic Communities.²² Indeed, a welcome spin-off from these engagements was the increased participation of organisations of and for persons

17 ACHPR Res. 118: Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, <<http://www.achpr.org/sessions/42nd/resolutions/118/>> (Accessed 16 March 2016).

18 ACHPR Res. 143: Transformation of the Focal Point on the Rights of Older Persons in Africa into the Working Group on the Rights of Older Persons and People with Disabilities in Africa, <<http://www.achpr.org/sessions/45th/resolutions/143/>> (Accessed 20 March 2016).

19 Ibid.

20 Helene Conbrinck and Lawrence M. Mute. 'Developments Regarding Disability Rights During 2013: The African Charter and African Commission on Human and Peoples' Rights', (2014) 2 ADRY 309-317, <http://www.adry.up.ac.za/index.php/2014-2-section-c-regional-developments/african-charter-and-the-achpr#pgfid-1066085> (Accessed 16 March 2016).

21 The Working Group received written submissions from organisations such as the Office of the High Commissioner for Human Rights; South African Human Rights Commission; African Disability Alliance; Centre for Disability Law Policy; University of Western Cape; Centre for Reproductive Rights; Disability Rights Watch; Epilepsy South Africa; Mental Disability Advocacy Centre; Open Society's Disability Rights Programme; Pan African Network of People with Psychosocial Disabilities; South African Disability Alliance; and a coalition of organisations of persons with disabilities from Eastern Africa.

22 In 2015 alone, stakeholders from the East African Community, the Economic Community of West African States, the Economic Community of Central African States, the Southern African Development Community and countries from North Africa provided inputs in face-to-face workshops. Feedback was also received by the Working Group from further afield.

with disabilities in activities of the Commission. These organisations began to make statements during sessions of the Commission and a number of organisations received accreditation to the Commission as observer nongovernmental organisations.²³

The next section of the article explores the reasons why the African Commission found it necessary to prepare an African disability rights instrument.

III: THE CASE FOR AN AFRICA-SPECIFIC DISABILITY RIGHTS INSTRUMENT

While the Working Group was preparing the Disability Protocol, scepticism was raised on whether it was necessary or prudent that Africa should prepare a specific disability rights instrument.²⁴ The tenor of the arguments revolved around normative and pragmatic considerations. It was felt that the CRPD had already established revolutionary and fundamental norms for ensuring the rights of persons with disabilities and hence that a regional disability-rights instrument might tarnish rather than varnish the CRPD standard. The fact that the majority of African states were parties to the CRPD was cited as proof of the CRPD's exclusive eminence. More pragmatic arguments questioned whether time and resources should be spent preparing a new instrument instead of investing in implementation of the CRPD.

Another pragmatic contention related to the concern that African states would be conflicted between whether to follow international or continental standards.

Viljoen and Biegon²⁵ have analysed and dismissed what they see as the two rationales in favour of adopting a disability rights instrument: that the process of adopting the CRPD was flawed as African participation in its elaboration was inadequate; and that the CRPD itself was defective since it did not address adequately issues pertinent to and reflective of the lived realities of persons with disabilities in Africa. In fact, the Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa, prepared by the Working Group in 2013,²⁶ agreed with the contentions by Viljoen and Biegon when it noted that African government

23 These included: African Decade of Persons with Disabilities Secretariat – now the Africa Disability Alliance - (accredited during the 49th Ordinary Session in 2011); African Union for the Blind (accredited during the 52nd Ordinary Session in 2012); and Royal Commonwealth Society for the Blind (Sight Savers) (accredited during the 52nd Ordinary Session in 2012).

24 For example, see Frans Viljoen and Japheth Biegon. 'The Feasibility and Desirability of an African Disability Rights Treaty: Further Norm Elaboration or Further Norm Implementation?' 346 (2014) 30 *SAJHR*; Japheth Biegon. 'The Promotion and Protection of Disability Rights in the African Human Rights System', in Ilze Grobbelaar-du Plessis and Tobias van Reenen (eds). *Aspects of Disability Law in Africa* (Pretoria University Law Press, 2011). Questions on the need for regional human rights protocols have arisen each time a new human rights instrument has been mooted. For example, in respect of a protocol on abolishing the death penalty, see Lilian Chenwi. 'Breaking New Ground: The Need for a Protocol to the African Charter on the Abolition of the Death Penalty in Africa', *African Human Rights Law Journal*, Vol. 5 No. 1 2005.

25 Frans Viljoen and Japheth Biegon. *Ibid.*

26 Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa. Prepared by the Working Group on Older Persons and People with Disabilities in Africa, 2013. On file with authors.

delegations, national human rights institutions and civil society, were actively involved in the drafting process.²⁷ What the Working Group recognised was that any negotiations process involves compromises whose effect is that negotiators do not get everything they desire. The Concept assessed the varied contributions to the negotiations process made by African states and sought to answer the question whether the compromises, which necessarily had to be made, suited Africa or whether additional value for persons with disabilities could be gained through an African-wide instrument.²⁸ Illustratively, Article 21 (c) of the CRPD requires States Parties to urge private entities that provide services to the public to provide information and services in accessible and usable formats for persons with disabilities. The standard 'urge' was included at the behest of the European Union when in fact Kenya had argued for the higher standard 'require'.²⁹

Why, therefore, did the Working Group proceed to prepare the Disability Rights Protocol? Why did the African Commission adopt it?

A number of key arguments have been set out on the inadequacies of Africa's normative framework and the actual practice for ensuring the rights of persons with disabilities. Continental instruments establish limited content for purposes of ensuring the rights of persons with disabilities. The only norm, which specifically covers persons with disabilities in the African Charter, provides that the aged and the disabled too have the right to special measures of protection in keeping with their physical or moral needs.³⁰ The African Charter does not specifically include persons with disabilities in its anti-discrimination provisions; and this has had to be read into the Charter. Article 2 of the Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. The African Commission has had to interpret the phrase 'other status' as inclusive of grounds not listed under Article 2 of the Charter. In *Communication 245/02 – Zimbabwe NGO Human Rights Forum v. Zimbabwe*, the African Commission acknowledged that the aim of the principle of non-discrimination is to ensure equality in the treatment of individuals irrespective of nationality, sex, race or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.³¹ People with disabilities have far too often been excluded by not being mentioned, a matter of some significance particularly where other key groups liable or vulnerable

27 African States made substantive contributions during the negotiations for the CRPD. For example, Kenya made proposals that the design of personal mobility programmes should enable persons with disabilities to influence the delivery of those programmes; and there should be high-quality mobility aids and other services. Marianne Schulze. *Understanding the UN Convention on the Rights of Persons with Disabilities*. Handicap International, 2010, p.118 <http://www.hiproweb.org/uploads/tx_hidrdocs/HICRPDManual2010.pdf> (Accessed 27 May 2016).

28 Concept on List of Issues (n26).

29 See Marianne Schulze (n27) on the challenges of ensuring equality and non-discrimination for persons with disabilities in a world where the provision of public services has been increasingly privatised. Also see Serges Alain Djoyou Kamga. 'A Call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa'. http://repository.up.ac.za/bitstream/handle/2263/41818/DjoyouKamga_Call_2013.pdf?sequence=3 (Accessed 15 March 2016).

30 Article 18 (4) of the African Charter.

31 Available at <http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf para 169> (Accessed 12 March 2016).

to discrimination are mentioned.

The underwhelming character of disability-specific provisions exists in other group or theme-specific African human rights instruments too. The Women's Rights Protocol establishes the right of women with disabilities to protection from violence, including sexual abuse, discrimination based on disability, the right to be treated with dignity and their access to employment, professional and vocational training as well as their participation in decision-making.³² The African Charter on the Rights and Welfare of the Child (Children's Rights Charter) provides for special measures of protection for physically or mentally disabled children to ensure their dignity and promote self-reliance and active participation in the community. It obligates states to accommodate children with disabilities according to their specific needs.³³ The African Youth Charter recognises the rights of 'mentally and physically challenged' youth and seeks to ensure access to education, training, employment, sport, physical education and cultural and recreational activities for youth with disabilities.³⁴ The African Charter on Elections, Democracy and Governance³⁵ and the African Union Convention for the Protection and Assistance of Internally Displaced Persons³⁶ are other Continental statutes, which contain some provisions on the protection of persons with disabilities.

A number of deficits have been identified in these disability-specific provisions. Serges Kanga notes that Article 23 of the Maputo Protocol is far too narrow since the rights of women with disabilities are broad, multifaceted and complex and therefore cannot be adequately covered in a single provision.³⁷ Similarly, the Children's Rights Charter fails to include issues of education, health-care, rehabilitation and other services to which children with disabilities are entitled.³⁸ Furthermore, the rights of persons with disabilities in some African instruments are made subject to progressive realisation and availability of resources.³⁹ A particular concern of the Working Group was that the treatment of the subject of disability by African human rights instruments as well as actual practice includes a significant dose of the charity model of disability. The charity model anticipates that persons with disabilities have 'needs' resolvable through charity or patronage as distinct from them having 'rights' on a basis of equality. Africa's rights instruments emphasise protection measures almost to the exclusion of the inherence of rights for persons with disabilities. Furthermore, the language employed in Africa's human rights instruments as well as practice tends to be informed by the deficit /medical rather than the social model of disability.⁴⁰ For example, the African Youth

32 Article 23 of the Maputo Protocol.

33 Article 13 of the African Charter on the Rights and Welfare of the Child.

34 Article 24 of the African Youth Charter.

35 Entered into force on 15 February 2012. Articles 8, 31 and 43.

36 Entered into force on 6 December 2012. Article 9 (2)(c)

37 Serges Kanga (n29) p. 23.

38 *Ibid* p. 22.

39 Helene Conbrinck and Lawrence M. Mute (n20).

40 *Ibid*.

Charter makes reference to ‘physically and mentally challenged youth’, thereby employing the euphemism ‘challenged’ which is not appropriate under the social model of disability established in the CRPD where a person with disability’s ‘problem’ is located in society rather than in the individual. To illustrate the consequent disempowerment of persons with disabilities, the Islamic tradition of alms-giving, what is referred to as *zakat*, has been used by some community leaders in northern Nigeria as a basis for discouraging self-vocalisation and self-advocacy by individuals with disabilities, the messaging being that such vocalisation of rights amounts to ingratitude for the charity proffered to them.⁴¹

Another concern the Working Group raised is that Article 18 (4) of the African Charter causes conceptual conflation when it treats older persons and persons with disabilities in one breathe, giving the impression that disability and age have a close and necessary nexus. Consequently, it becomes easier for Africa’s policy-makers and implementers to assume that uniform approaches should be deployed to ensure the rights of the aged and the disabled. It is indeed unsurprising that the Working Group initially intended to draft one protocol covering the rights of both older persons as well as persons with disabilities before realising that approach had conceptual and normative flaws.⁴²

A member of the Working Group has noted that a further consideration related to the reality that African states and the bureaucracy of the African Union Commission needed a homegrown instrument with which to drive the disability rights agenda in Africa. He cites the recent difficult relationship between Africa and the International Criminal Court as evidence of ‘the unfeasibility of simply assuming that the continent will pliantly look outwards for the inspiration to protect and promote the rights of its people.’⁴³ The Working Group’s assessment was that membership of an international treaty mechanism should not be assumed to prejudice norm-creation at the regional level.⁴⁴ Indeed, the African Union and its predecessor institutions took this approach severally when drafting the Women’s Rights Protocol and the Children’s Rights Charter despite the existence of international norms in respect of women and children. It has been pointed out that the Maputo Protocol was drafted as an addition to the African Charter and not as a response to the Convention

41 Remarks by participant from Nigeria during the Sub-Regional Workshop on Mainstreaming Disability in Development Policy and Programming, organised by the African Union Commission and ECOWAS in Lome, Togo, between 9-10 September 2015. Notes on file with authors.

42 Also see Declaration 7 of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, adopted on 17 September 2004, which takes the lead of Article 18 (4) of the Charter, <http://www.achpr.org/instruments/pretoria-declaration/> (Accessed 30 May 2016).

43 Helene Conbrinck and Lawrence M. Mute (n20).

44 To this end, the bureaucracy of the African Union already anticipates the creation of an infrastructure called the African Union Disability Architecture comprising three pillars: the Continental Plan of Action on the African Decade for Persons with Disabilities (2010 – 2019) as the programmatic component; the Disability Rights Protocol as the legal component; and the African Union Disability Institute which will be administered as part of the African Union Commission as the institutional component. Presentation by Lefhoko Kesamang, during the African Union Commission/Economic Community of Central African States Sub-Regional Workshop on Mainstreaming Disability in Development Policy and Programming, Brazzaville, Congo, 31 March-1 April 2015. Notes on file with authors.

on Elimination of All Forms of Discrimination against Women⁴⁵ (CEDAW). The African Charter conflated the rights of women, children, the aged and the disabled in a single article, which primarily dealt with the family.⁴⁶ In addition to this, CEDAW did not address specific concerns of women in Africa, including female genital mutilation, wife inheritance and women in conflict, which are the lived realities of women in Africa. The Children's Rights Charter responded to the Convention on the Rights of the Child's failure to address specific needs and interests of children in Africa due to limited participation by African states during the process.⁴⁷ The Children's Rights Charter addresses the role of parents, children in armed conflict and the treatment of child refugees, which have a practical application to human rights in an African setting.⁴⁸

The justification for preparing the Disability Rights Protocol is summed aptly in three of its preambular paragraphs, which state the concern that adequate effective measures have not been taken to ensure that persons with disabilities may exercise their full rights on an equal basis with others. They recall the lack of a substantive binding African normative and institutional framework for ensuring, protecting and promoting the rights of persons with disabilities; and express consciousness about the need to establish a firm legal continental framework as a basis for policies, laws, administrative actions and resources to ensure the rights of persons with disabilities.⁴⁹

IV: HOW THE COMMISSION'S STRATEGIES HAVE ENSURED PROTECTION AND PROMOTION OF THE RIGHTS OF PERSONS WITH DISABILITIES

The functions of the African Commission are the promotion of human rights, the protection of human rights and the interpretation of the African Charter.⁵⁰ This section of the article reviews key strategies of the Commission to explore how it has sought to ensure the rights of persons with disabilities in Africa. This exploration should be understood within the context established in the preceding section, which has highlighted the dearth of disability-specific norms within Africa's rights instruments. Furthermore, engagements with the Commission by individuals with disabilities or organisations representing them were quite limited until a few years ago.

45 Frans Viljoen. 'An Introduction to the Protocol to the African Charter on the Rights of Women in Africa'. [16] *Washington and Lee Journal of Civil Rights and Social Justice* (2009) p. 11.

46 Ibid.

47 Louise O. Oyaro. 'Africa at a Crossroad: The United Nations Convention on the Rights of Persons with Disabilities.' [30] *American University International Law Review* (2015) p. 2.

48 Ibid p. 17

49 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted at the 19th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held between 16-25 February 2016 in The Gambia, <<http://www.achpr.org/news/2016/04/d216>> (Accessed 6 June 2016)

50 Article 45 of the African Charter.

1: State reporting under Article 62 of the Charter

Article 62 of the African Charter requires each State Party to submit after every two years a report on the legislative or other measures taken to give effect to the rights and freedoms recognised and guaranteed by the Charter.⁵¹ Rule 73 (1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights supplements Article 62 by providing that the said reports shall indicate the challenges affecting the implementation of the African Charter and its relevant protocols. The African Commission uses the submission of these reports as an opportunity for having interactive and candid dialogues with states on progress towards implementation of their obligations as well as contingent challenges. The Commission then issues concluding observations and recommendations setting out significant areas of progress and notable concerns, and making recommendations for the better implementation of Charter rights. While some states have either not fulfilled or have only partially fulfilled their reporting obligations under Article 62 of the Charter, the majority of states do take their reporting obligations seriously and accordingly engage with the Commission from time to time. As of the 58th Ordinary Session of the Commission held in Banjul, The Gambia, from 6-20 April 2016, 17 states were up-to-date on their reporting obligations; three states were late by one report; seven states had not submitted two reports; six states had not submitted three reports; and 14 states were late in submitting more than three reports. Six states had not submitted any reports to the Commission under Article 62 of the Charter.⁵²

States, which include disability-specific information in their periodic reports to the Commission, largely focus on explaining the extent to which they are implementing Article 18 (4) of the Charter. Furnished information tends to be limited with the corresponding effect that recommendations made by the Commission too tend to be sparse.

Typical recommendations made by the Commission in this regard tend to focus on general rather than specific guidance. Following Malawi's presentation of its initial periodic report,⁵³ the Commission recommended that Malawi provide in its next periodic report detailed information on the implementation of the Disability Act and the operations of the Ministry of Disability Affairs and the Disability Trust Fund; and review the definition of non-discrimination in the Disability Act to include reasonable accommodation.⁵⁴ Nigeria's periodic report⁵³ elicited the recommendations that it should, in its next periodic report, provide detailed information in relation to older persons and persons with disabilities; and establish mechanisms for inclusive protection of persons with

51 Similar provisions are established in Article 14 (4) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) as well as Article 26 of the Maputo Protocol.

52 'The Status of Submission of States Parties Reports'. Report presented at the 58th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 6-25 April 2016, on file with authors.

53 Initial and Combined Periodic Report of Malawi. Presented at the 56th Ordinary Session of the African Commission held in Banjul, The Gambia, <<http://www.achpr.org/states/malawi/>> (Accessed 30 May 2016).

54 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 – 2013) Para 131-acb, <http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding_observations__initial__combined_state_report_malawi.pdf> (Accessed 8 May 2016).

disabilities and other vulnerable persons in the country.⁵⁵ The periodic report of Mozambique elicited recommendations that it should monitor and ensure effective implementation of the National Plan on Disability.⁵⁶ Ethiopia⁵⁷ was urged to provide reasonable accommodation for persons with disabilities.⁵⁸ Sudan⁵⁹ was asked to outline in its next report how the rights of older persons and people with disabilities were protected.⁶⁰

From the foregoing, the greatest weakness of the Commission's present periodic reporting approach on matters of disability is the fact that the Commission engages on brief generalities rather than on nuts-and-bolts specifics. The Commission does not have the normative wherewithal for focusing on specifics such as the legal capacity of persons with disabilities, their political participation or on inclusive education since these concepts are not embodied in the African Charter.

2: Promotion and fact-finding missions

The African Commission undertakes missions in states to promote human and peoples' rights and to engage with both state and non-state actors on ways of ensuring better implementation of the Charter.⁶¹ Fact-finding missions are undertaken to investigate and establish the veracity of violations of the African Charter that may be happening in a state.⁶²

Again, promotional and fact-finding missions do not address issues of persons with disabilities significantly. The promotion missions to Uganda⁶³ and Chad⁶⁴ —both in 2013, and the fact-

-
- 55 Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2014), Para 131-132 <http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf> (Accessed 8 May 2016).
- 56 Concluding Observations and Recommendations on the Second and Combined Periodic Report of the Republic of Mozambique on the Implementation of the African Charter on Human and Peoples' Rights (1999 – 2010) <http://www.achpr.org/files/sessions/17th-eo/conc-obs/1-1999-2010/concluding_observations_mozambique_eng.pdf> (Accessed 8 May 2016).
- 57 Ethiopia's Fifth and Sixth Periodic Report considered during the 56th Ordinary Session of the Commission in Banjul, The Gambia <<http://www.achpr.org/states/ethiopia/>> (Accessed 20 May 2016).
- 58 Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia, para 52' http://www.achpr.org/files/sessions/18th-eo/conc-obs/5-2009-2013/concluding_observations_ethiopia_eng.pdf (Accessed 8 May 2016).
- 59 Sudan's Fourth and Fifth Periodic Report considered during the 51st Ordinary Session of the Commission <<http://www.achpr.org/states/sudan/>> (Accessed 8 May 2016).
- 60 Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, para 85, <http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding_observation_.pdf> (Accessed 8 May 2016).
- 61 Rule 70 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010, <http://www.achpr.org/instruments/rules-of-procedure-2010/> (Accessed 2 June 2016).
- 62 Article 42 (5) of the African Charter, Rule 81; Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted in February 1988 and revised in 2010, <<http://www.achpr.org/instruments/rules-of-procedure-2010/>> (Accessed 8 May 2016).
- 63 Report of the Joint Promotion Mission Undertaken in the Republic of Uganda 25-30 August 2013, <http://www.achpr.org/files/sessions/14th-eo/mission-reports/uganda-promo-2013/achpr14eos_misrep_promo_uganda_2013_eng.pdf> (Accessed 6 May 2016).
- 64 Report of the Joint Human Rights Promotion Mission to the Republic of Chad, 11-19 March 2013, <http://www.achpr.org/files/sessions/54th/mission-reports/chad-promo-2014/misrep_promo_chad_2013_eng.pdf> (Accessed 6 May 2016).
-

finding mission to Mali in 2013⁶⁵ made no recommendations on matters of disability rights. The promotion mission to Gabon in 2014 recommended that the state should ensure that all persons with disabilities are protected from discrimination and that they have equal opportunities, notwithstanding the extent of their disability. Also recommended was that Chad should formulate strategies, policies and programmes, particularly in the areas of education, employment, health and social protection, in order to promote self-reliance and the full participation of persons with disabilities in the development of the country.⁶⁶

It is true that more recent promotion missions to countries such as The Sudan specifically interacted with and made recommendations in relation to persons with disabilities;⁶⁷ Yet again, the dearth of norms in African rights instruments has resulted in limited engagements on issues of disability.

3: Communications under the African Charter

States as well as individuals may under the African Charter lodge with the Commission complaints known as communications when they deem that provisions relating to human and peoples' rights under the Charter have been violated.⁶⁸ Subsequent to seizing such complaints, the Commission determines whether the complaints are admissible in terms of Article 56 of the Charter,⁶⁹ following which it determines the communications on their merits. Where a complaint is found in favour of a complainant, the Commission issues remedies, which may include reparative measures such as law reform and compensation.

While the Commission has determined only one Communication whose central theme was the rights of persons with disabilities, the jurisprudence developed in that case straddled a raft of rights under the African Charter. In *Purohit and Moore v Gambia*, Communication 241/01,⁷⁰ the complainants lodged a complaint on behalf of mental patients detained in a psychiatric unit in The Gambia. The complaint challenged the Lunatics Detention Act, alleging violation of various articles of the Charter. In finding for the complainants, the Commission developed disability-specific jurisprudence in a number of areas.

65 Report of the Fact-finding Mission to the Republic of Mali 3-7 June 2013, <http://www.achpr.org/files/sessions/53rd/mission-reports/mali-fact-finding-2013/misrep_factfinding_mali_2013_eng.pdf> (Accessed 6 May 2016).

66 Report of the Human Rights Promotion Mission to the Gabonese Republic, 13-18 January 2014, <http://www.achpr.org/files/sessions/54th/mission-reports/gabon-promo-2014/achpr54os_misrep_promo_gabon_2014_eng.pdf>(Accessed 6 May 2016)

67 Report of the Joint Promotion Mission to the Republic of The Sudan. 22-28 May 2015. <http://www.achpr.org/news/2016/08/d227>.

68 See Articles 47 and 55 of the Charter.

69 Under Article 56 of the Charter, a complaint is considered admissible when it cumulatively: indicates its authors; is compatible with the Charter of the Organisation of African Unity or with the African Charter; is not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity; is not based exclusively on news disseminated through the mass media; is sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; is submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and does not deal with cases settled in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the Charter.

70 *Purohit and Moore v Gambia*, Communication 241/01, <http://www.achpr.org/communications/decision/241.01/> (Accessed 6 May 2016).

First, in relation to Article 2 of the Charter on anti-discrimination and Article 3 on equal protection of the law, the Commission found that persons detained under the Lunatics and Detention Act did not have a right under that Act to challenge the certificates constituting the legal basis of their detention, and that patients were not availed legal aid or assistance in the event they wished to challenge their detention under that Act, amounted to a violation of both articles.

Second, regarding Article 5 of the Charter, which prohibits torture and cruel, inhuman or degrading treatment or punishment, the Commission noted that:

“Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.”⁷¹

The Commission determined that branding persons with mental illness as lunatics and idiots dehumanises and denies them any form of dignity in contravention of Article 5 of the Charter, again noting thus:

“[M]entally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. ... mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well-established principle that all human beings are born free and equal in dignity and rights.”⁷²

Third, the Commission determined that The Gambia violated Article 7 (1) (a) on the right to an appeal and Article 7 (1) (c) on the right to defence, based on that the Lunatics Detention Act does not contain any provisions for review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment, and that the patients do not have the legal right to challenge the two medical certificates constituting the legal basis of their detention.

Fourth, regarding Article 13 of the Charter on every citizen's right to participate freely in the government of their country, the Commission determined that legal incapacity could not be used as a basis for excluding citizens from participating freely in the government of their country unless provisions of the law that conformed to internationally-accepted norms and standards were invoked. There was no objective legal bases for the State's exclusion of mentally disabled persons from political participation.

71 Para. 57, *ibid.*

72 Para. 62, *ibid.*

Finally, in relation to Article 16 of the Charter on the right to health and Article 18 (4) on the special needs of persons with disabilities, the Commission determined that the legal scheme in place lacked therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities. Persons with mental illnesses should never be denied their right to proper health care, which is crucial for their survival and their assimilation into and acceptance by the wider society.

Consequently, the African Commission urged The Gambia to repeal the Lunatics Detention Act, create an expert body to review cases of all persons detained under the Act and make recommendations for their treatment or release, and provide adequate medical and material care for persons suffering from mental health problems.

The number of cases the Commission has dealt with since it was instituted are relatively few when compared with the number of cases handled by the European and Inter-American human rights systems;⁷³ and even then, as we have explained, only one case specific to the rights of persons with disabilities has been determined. Yet, our assessment is that the legal and practical bars for complainants with disabilities to lodge claims before the African Commission are not as high as the requirements for filing a violations claim with the Committee on the Rights of Persons with Disabilities. Indeed, of the 11 communications, which the Committee on the Rights of Persons with Disabilities has heard, none have been from Africa;⁷⁴ and in any case individuals from African states which are not party to the Optional Protocol to the CRPD have no legal standing before the Committee for purposes of lodging individual claims.

4: Soft-law instruments

During the last few decades, the African Commission has fulfilled its human rights protection, promotion and interpretation functions under Article 45 of the Charter in part by preparing soft-law instruments to interpret various aspects of the Charter. Primary soft-law instruments prepared by the Commission have been referred to variously as guidelines and principles, declarations, model legislation and, most recently, general comments.

Recent soft-law instruments adopted by the African Commission have eschewed the medical and charity approaches of disability in favour of the social and rights models of disability. This approach is quite notable in the Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention⁷⁵ (Luanda Guidelines). The Luanda Guidelines approach disability as a social phenomenon by locating the 'problem' of disability within the physical and social environment in which a person

73 For an assessment of the progress and challenges faced by the African Commission, see: Frans Viljoen. 'From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Rights System at the African Commission's 25 Year Mark', *University of Western Cape Law, Democracy and Development Journal of the Faculty of Law*, <http://www.idd.org.za/images/stories/Ready_for_publication/ViljoenAfricancommission25.pdf> (Accessed 16 March 2016).

74 Committee on the Rights of Persons with Disabilities table of jurisprudence, <<http://juris.ohchr.org/en/search/results?Bodies=4&sortOrder=Date>> (Accessed 30 May 2016).

75 Adopted by the African Commission on 8 May 2014 during its 55th Ordinary Session held in Luanda, Angola, <http://www.achpr.org/instruments/guidelines_arrest_detention/> (Accessed 16 March 2016).

with impairment interacts. The Guidelines include multiple provisions that seek to ensure that the environment within which detainees with disabilities may interact is devoid of physical and social barriers. Section 33 of the Luanda Guidelines provides for protections in respect of the arrest and pre-trial detention of persons with disabilities. It defines persons with disabilities, establishes their entitlements in pre-trial detention, requires recognition of their full legal capacity, and establishes requirements on accessibility and reasonable accommodations for detainees with disabilities.⁷⁶

A few other soft-law instruments have attempted albeit usually less successfully to take proper cognisance of the rights of persons with disabilities. The Model Law on Access to Information in Africa,⁷⁷ while still defining persons with disabilities using the medical approach, establishes important principles, for example, requiring an information officer to take all necessary steps to assist a person with disability who wishes to make a request, including by providing requested information in a form capable of being accessed by the person with disability.⁷⁸ The Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights⁷⁹ include disability as a prohibited ground of discrimination as well as requiring states to combat intersectional discrimination based on a combination of grounds including disability.⁸⁰ Finally, there is a category of soft-law instruments, which do not make any reference or even inference to persons with disabilities or which indeed make potentially negative inferences.⁸¹

The Commission also issues resolutions on topical issues as secondary soft-law instruments for enhancing its human rights protection and promotion mandates. These resolutions form important persuasive matter and the appeals or communications captured in them offer important guidance on how states and other actors should implement their Charter obligations.

The Commission in recent times has passed resolutions focusing on significant aspects of disability. Resolution 343—Resolution on the Right to Dignity and Freedom from Torture or Ill-treatment of Persons with Psychosocial Disabilities⁸²—called on states to adopt necessary measures for ensuring

76 For an analysis of the Luanda Guidelines, see African Policing Civilian Oversight Forum. *Pre-Trial Detention for Persons with Disabilities in Correctional Institutions: Towards Implementation of the Guidelines on Arrest, Police Custody and Pre-Trial Detention in Kenya*, (forthcoming).

77 Model Law on Access to Information in Africa, adopted on 24 October 2011, <<http://www.achpr.org/instruments/access-information/>> (Accessed 8 May 2016).

78 Sections 14 (2) and 21 (6) of the Model Law, *ibid*.

79 Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted on 24 October 2011, <<http://www.achpr.org/instruments/economic-social-cultural/>> (Accessed on 8 May 2016)

80 Guidelines 1 and 38, *ibid*.

81 This for example is the case with the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) 2008 <<http://www.achpr.org/instruments/robben-island-guidelines-2008/>> (Accessed 6 June 2016).

82 ACHPR Res. 343: Resolution on the Right to Dignity and Freedom from Torture or Ill-treatment of Persons with Psychosocial Disabilities in Africa ACHPR/Res. 343(LVIII) 2016, adopted during the 58th Ordinary Session of the Commission held in Banjul, the Islamic Republic of The Gambia, between 15-25 March 2016, <<http://www.achpr.org/sessions/58th/resolutions/343/>> (Accessed 30 May 2016).

that persons with psychosocial disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and to review and amend mental health laws used as a basis for the torture or ill-treatment of such persons. It also called on states, national institutions for the promotion of human rights and nongovernmental organisations to monitor on a regular basis institutions that provide services to persons with psychosocial disabilities.

Resolution 305—Resolution on Accessibility for Persons with Disabilities⁸³—called on states, the African Union and its organs to take immediate and effective measures to ensure that all facilities and services open or provided to the public are accessible to persons with disabilities. In particular, they should ensure that meetings in which the public participate are held in places accessible to persons with disabilities. All information intended for the public should be disseminated in accessible formats and technologies appropriate to different kinds of disabilities. They should also recognise and promote the use of sign language at the national, sub-regional and Continental levels. That Resolution also urges states that have not done so to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.⁸⁴

Resolution 263—Resolution on the Prevention of Attacks and Discrimination Against Persons with Albinism⁸⁵—called on states to take all measures necessary to ensure the effective protection of persons with albinism and members of their families; to ensure accountability through the conduct of impartial, speedy and effective investigations into attacks against persons with albinism, the prosecution of those responsible, and by ensuring that victims and members of their families have access to appropriate remedies; to take effective measures to eliminate all forms of discrimination against persons with albinism; and to increase education and public awareness-raising activities. The Resolution also requested states to include in reports submitted to the African Commission under Article 62 of the African Charter information on the situation of persons with albinism including good practices in protecting and promoting the rights of persons with albinism.

Other more general resolutions of the Commission have also included concerns of persons with disabilities.⁸⁶ Overall, the African Commission has spoken regularly on issues of disability during the last few years even in the face of significant normative and practical gaps.

83 ACHPR Res. 305: Resolution on Accessibility for Persons with Disabilities ACHPR/Res.305 (EXT.OS/XVIII) 2015, adopted on 7 August 2015 during the 18th Extraordinary Session of the Commission held in Nairobi, Kenya, <<http://www.achpr.org/sessions/18th-eo/resolutions/305/>> (Accessed 30 May 2016).

84 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted in Marrakesh, Morocco on 27 June 2013. As of May 2016, Mali is the only African State of the 16 countries that have ratified this treaty. <http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301016> (Accessed 30 May 2016).

85 ACHPR Res. 263: Resolution on the Prevention of Attacks and Discrimination Against Persons with Albinism, adopted on 5 November 2013 during the 54th Ordinary Session of the African Commission held in Banjul, The Gambia, <<http://www.achpr.org/sessions/54th/resolutions/263/>> (Accessed 30 May 2016).

86 For example, Resolution 262 on Women's Right to Land and Productive Resources adopted during the 54th Ordinary Session of the Commission held in Banjul, The Gambia, <<http://www.achpr.org/sessions/54th/resolutions/262/>> (Accessed 1 June 2016).

V: OVERVIEW OF THE DISABILITY PROTOCOL AS THE ANCHOR OF THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA

This section offers an overview of the Disability Rights Protocol. It highlights some of the key content, which Africa's human rights institutions, states and non-state actors may use to ensure protection and promotion of the rights of persons with disabilities once the Protocol is adopted, ratified and comes into force.

While preparing the Disability Protocol, the Working Group was conscious, as it explained in one of its public notes, that:

“Drafting a human rights instrument is not rocket science. Human rights concepts and norms are universal in nature. ... (P)recedents and language are drawn from international and regional human rights instruments to guide preparation of the Protocol.”⁸⁷

Hence, the Disability Rights Protocol was inspired by ideas drawn from key international and regional human rights instruments, including the CRPD. Other human rights instruments, which inspired preparation of the Disability Protocol were the African Charter; the Maputo Protocol; the Children's Rights Charter; the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; the Continental Plan of Action for the African Decade of Persons with Disabilities (2010-2019); the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled; the African Youth Charter; and the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.⁸⁸ The Working Group was conscious that key concepts enunciated in the CRPD such as legal capacity must be consistent with the minimum standard established in the CRPD,⁸⁹ specifically noting that: ‘The Protocol should not undermine the letter and spirit of the ... CRPD. It therefore draws from and is inspired by the CRPD without necessarily adopting all the CRPD's detail.’⁹⁰

The Disability Rights Protocol comprises a preamble and 33 articles. The Preamble raises concerns that persons with disabilities face extreme levels of poverty; that they continue to experience human rights violations, systemic discrimination, social exclusion and prejudice within political, social and economic spheres; that they often experience harmful practices, including the maiming or killing of persons with albinism; and that women and girls in particular face multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect and abuse.

87 Protocol to the African Charter on Human and Peoples' Rights in Africa on the Rights of Persons with Disabilities in Africa, Draft II, 14 March 2014. (On file with authors).

88 Explanatory Memorandum of Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities, (on file with authors).

89 Helene Conbrinck and Lawrence M. Mute (n20).

90 Explanatory Memorandum to Draft Disability Protocol (n88).

The Disability Protocol defines persons with disabilities to include those who have physical, mental, intellectual, developmental or sensory impairments, which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others. This definition excludes the 'long-term' limitation present in the CRPD definition of persons with disabilities.

The Working Group agreed with representations that the definition of persons with disabilities should be open-ended and unlimited to allow national law-making maximum flexibility while determining who a person with disability was. As Renteln has noted, the conceptualisation of disability, and hence the rights of persons with disabilities, varies in different parts of the world: not all conditions are considered disabilities in all places; even the question of who is a person with disability does not elicit common answers; and responses to disability vary from country to country depending on matters such as culture and available resources.⁹¹

The Disability Protocol establishes general state obligations in line with the promote-respect-fulfil framework. It requires states *inter alia* to adopt measures for implementation of the rights recognised in the Protocol;⁹² to mainstream disability in all spheres of life;⁹³ and to modify or abolish acts or omissions that constitute discrimination for persons with disabilities.⁹⁴ Members of the African Commission insisted on including obligations to promote positive representations of persons with disabilities through training and advocacy,⁹⁵ as well as required states to put in place adequate resources, including through budget allocations, to ensure the Protocol's full implementation.⁹⁶

The Disability Protocol's provisions on equality and non-discrimination include a specific requirement for states to protect the parents, children, caregivers or intermediaries of persons with disabilities from discrimination based on their association with persons with disabilities.⁹⁷ This provision was included because of strong representations on the essential roles which relatives and caregivers of persons with disabilities play and the endemic discrimination they face when they associate with persons with disabilities.

The Disability Protocol requires states to ensure respect for the life, physical and mental integrity and dignity of persons with disabilities on an equal basis with others.⁹⁸ The right to life is dealt with

91 Alison Dundes Renteln. 'The Significance of Cultural Difference for Human Rights'. in Cindy Holder and David Reidy. *Human Rights*, 1999, Cambridge University Press, pp.87-88.

92 Article 2 (a), Disability Rights Protocol (n49).

93 Article 2 (b), *ibid.*

94 Article 2 (c), *ibid.*

95 Article 2 (e), *ibid.*

96 Article 2 (i), *ibid.*

97 Article 3 (4), *ibid.*

98 Article 4 (a), *ibid.*

innovatively to stress that the right should amount to far more than mere existence. The Protocol links that right to human dignity, requiring states to ensure that persons with disabilities have access to services, facilities and devices to enable them to live with dignity and to realise fully their right to life.⁹⁹ This approach is reflective of proposals unsuccessfully made by states such as India during the CRPD negotiations.

The Disability Protocol requires states to ensure that persons with disabilities are not subjected to acts that may amount to torture or ill-treatment, including: forcible confinement or concealment by any person or institution; medical or scientific experimentation or intervention without their free, prior and informed consent; and sterilisation or any other invasive procedure without their free, prior and informed consent.¹⁰⁰ Article 5 also reaffirms that existence of a disability or perceived disability shall in no case justify deprivation of liberty.¹⁰¹

The Disability Rights Protocol defines 'Harmful practices' as including: 'behaviour, attitudes and practices based on tradition, culture, religion, superstition or other reasons, which negatively affect the human rights and fundamental freedoms of persons with disabilities or perpetuate discrimination.'¹⁰² The question of harmful practices is dealt with at three levels. First, the Protocol requires states to use measures such as legal sanctions, educational and advocacy campaigns, to eliminate harmful practices perpetrated on persons with disabilities, including witchcraft, abandonment, concealment, ritual killings or the association of disability with omens.¹⁰³ Second, states should discourage stereotyped views on the capabilities, appearance or behaviour of persons with disabilities, as well as prohibit the use of derogatory language against persons with disabilities.¹⁰⁴ Finally, the question of redress for victims of harmful practices is addressed through requiring states to offer appropriate support and assistance to victims of harmful practices.¹⁰⁵

Other measures which states are required to take to promote and protect the rights of persons with disabilities include:

1. ensuring that persons with disabilities are consulted in all aspects of planning and implementation of post-conflict reconstruction and rehabilitation;¹⁰⁶
2. ensuring persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and that state, non-State actors and other individuals do not violate the

99 Article 4 (b), *ibid.*

100 Article 5 (2), *ibid.*

101 Article 5 (4), *ibid.*

102 Article 1, *ibid.*

103 Article 6 (1), *ibid.*

104 Article 6 (2), *ibid.*

105 Article 6 (3), *ibid.*

106 Article 7 (b), *ibid.*

- right to exercise legal capacity by persons with disabilities;¹⁰⁷
3. ensuring that traditional forms of justice shall not be used to deny persons with disabilities their right to access appropriate and effective justice;¹⁰⁸
 4. ensuring that community-based rehabilitation services are provided in ways that enhance the participation and inclusion of persons with disabilities in the community;¹⁰⁹
 5. ensuring that the right to barrier-free access for persons with disabilities apply to rural as well as urban settings and take account of population diversities;¹¹⁰
 6. ensuring that a person shall not be deemed uneducable or untrainable on account of disability;¹¹¹
 7. ensuring that appropriate schooling choices are availed to persons with disabilities who may prefer to learn in particular environments;¹¹²
 8. ensuring that employees who become disabled are not dismissed from their jobs on the sole basis of their disability;¹¹³
 9. providing persons with disabilities with health-care in the community;¹¹⁴
 10. ensuring that the principle of equal pay for equal work is not used to undermine the right to work for persons with disabilities;¹¹⁵
 11. recognising the social and cultural value of the work of persons with disabilities;¹¹⁶
 12. putting financial measures in place to cover disability-related expenses, including through the use of tax exemptions or concessions, cash-transfers, duty waivers and other subsidies;¹¹⁷
 13. ensuring that persons with disabilities, including persons with psychosocial disabilities and intellectual disabilities, can effectively participate in political and public life, including as members of political parties, electors and holders of political and public offices;¹¹⁸
 14. recognising and facilitating the right of persons with disabilities to represent themselves in all spheres of life;¹¹⁹

107 Article 8 (3) (a), *ibid.*

108 Article 9 (2), *ibid.*

109 Article 10 (2) (e), *ibid.*

110 Article 11 (2) (b), *ibid.*

111 Article 12 (2), *ibid.*

112 Article 12 (4) (d), *ibid.*

113 Article 15 (2) (g), *ibid.*

114 Article 13 (2) (e), *ibid.*

115 Article 15 (2) (g), *ibid.*

116 Article 15 (3), *ibid.*

117 Article 16 (2) (c), *ibid.*

118 Article 17 (2) (b), *ibid.*

119 Article 18, *ibid.*

15. requiring private entities that provide services to the general public, including through the internet, to provide information and services in accessible and usable formats for persons with disabilities;¹²⁰
16. ensuring that persons with visual impairments or with other print disabilities have effective access to published works including by using information and communication technologies and by making changes as appropriate to the international copyright system;¹²¹
17. discouraging negative representations and stereotyping of persons with disabilities in both traditional and modern cultural activities and through the media;¹²²
18. ensuring persons with disabilities may exercise their right to marry and form a family, with their full, prior and informed consent; and that they have the right not to be deprived of their children on account of their disability;¹²³
19. ensuring that gender perspectives are integrated in policies, legislation, plans, programmes and activities in all spheres that affect women with disabilities;¹²⁴
20. removing barriers that hinder or discriminate against the participation of youth with disabilities in society;¹²⁵
21. ensuring that older persons with disabilities have access to appropriate services that respond to their needs within the community;¹²⁶ and
22. ensuring that older persons with disabilities are protected from violence, including violence based on accusations or perceptions of witchcraft.¹²⁷

One of the more contentious provisions of the Disability Rights Protocol is Article 26, which requires states to recognise that persons with disabilities have duties on an equal basis with others as elaborated in the African Charter. The concern has been raised that this provision establishes duties for persons with disabilities thereby limiting their rights. The Working Group's thinking in this regard was that individuals should not be excused from duties to their families and society simply because they had disabilities.

Duties did in any case apply to all under the African Charter—in relation to the family, society, state and international community—and as such, this provision would be applicable only to the extent of equality with individuals who had no disabilities. Furthermore, the Protocol includes the requirement that states should render to persons with disabilities forms of assistance and support, including reasonable accommodations, which they may require in performance of such duties.

120 Article 19 (2) (b), *ibid.*

121 Article 19 (2) (d), *ibid.*

122 Article 20 (2) (g), *ibid.*

123 Article 21 (a) and (c), *ibid.*

124 Article 22 (d), *ibid.*

125 Article 24 (2) (c), *ibid.*

126 Article 25 (2) (d), *ibid.*

127 Article 25 (2) (e), *ibid.*

Addressing the provisions on duties in the African Charter, Makau Mutua cites apprehensions about those provisions: that the language of duties is little more than the formulation, entrenchment and legitimation of state rights and privileges against individuals and peoples and that emphasis on duties may lead to the tramping of individual rights. Mutua then concludes as follows:

“In my view, these criticisms, while understandable, are mistaken. African states have not notoriously violated human rights because of their adherence to the concept of duty. The disastrous human rights performance of many African states has been triggered by insecure regimes whose narrow political classes have no sense of national interest and will stop at nothing, including murder, to retain power. In any case, it is not a plausible argument that individuals should not owe any duties to the state. In fact, they do, in tax, criminal, and other laws. A valid criticism of the language of duties should rather focus on the precise meaning, content, conditions of compliance, and application of those duties.”¹²⁸

Regarding the Disability Protocol’s implementation mechanism, questions were raised in respect of whether a fully-fledged new institution should be established to oversee implementation of the instrument, or whether the African Commission should be assigned this role. Another contention was raised by officials from the African Union Commission, who desired that that an agency for administering Continental policy on disability be written into the Protocol. Article 28 of the Protocol provides that the African Commission will be seized with monitoring implementation of the Protocol including through receipt and assessment of periodic reports. Under Article 30, the African Commission and the African Court on Human and Peoples’ Rights or its successor are seized with its interpretation.

Finally, the concern was raised that states may be conflicted between whether to follow international or continental standards. This confliction is not novel and indeed plays out each time a government has to report to the African Commission on one hand and on the other hand to global treaty bodies such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights. The Disability Rights Protocol includes a savings clause in Article 30, which provides that nothing in the Protocol shall affect any provisions that are more conducive or favourable to the realisation of the rights and fundamental freedoms of persons with disabilities contained in the law of a state party or in any other convention or agreement in force in that state. The beauty of this provision is it allows persons with disabilities to enjoy whichever is the higher standard between provisions established in the CRPD or those established in the Disability Protocol.

VII. CONCLUSION

Following its adoption by the African Commission, the protocol was forwarded to the African Union Commission for review and validation, after which it would be approved by the Council of Ministers before being transmitted to the African Union Assembly of Heads of States for adoption.

128 Makau Mutua (n4).

Subsequent to that, it would be open for signature and ratification by states. This process will have to contend with at least two variables: the length of time it may take before the Protocol is adopted, signed and ratified; and the nature of any amendments that may be made during this process. The Children's Charter came into force nine years after its adoption. The Maputo Protocol, adopted in 2003, entered into force in 2005,¹²⁹ two years later. The Protocol to the African Charter on the Rights of Older Persons, adopted during the 52nd Ordinary Session of the African Commission in 2012,¹³⁰ was adopted during the 26th African Union Summit in 2016, four years later.¹³¹ It is not clear how long it will take this Protocol to come into force. It is incumbent on organisations of and for persons with disabilities as well as their allies to advocate for the expeditious finalisation, adoption and coming into force of the Disability Rights Protocol. Preceding this, though, all these parties should communicate and advocate for exclusions or any further inclusions they may wish reflected in the Protocol.

The explanatory memorandum that accompanied the Working Group's presentation of the Disability Protocol to the African Commission¹³² noted that the Disability Rights Protocol will be the anchor for initiating a comprehensive Continent-wide normative and institutional basis for ensuring the rights of persons with disabilities as full human beings with inherent dignity and not as mere objects. It will cement the social model of disability in place of the charity and medical models of disability, which continue to guide policy and law making across much of Africa even in spite of the wholesale adoption of the CRPD by African states. The Disability Protocol recognises the important standards set by the CRPD and sets out not to undermine any of those standards. It introduces further mostly subtle normative standards of particular relevance to Africa to ensure full and effective protection and promotion of the rights of persons with disabilities in Africa. The Disability Protocol establishes the content and institutional basis to enable persons with disabilities to seek redress wherever their rights are violated. Finally, once adopted by the African Union and comes into force, it will offer political and diplomatic possibilities at the Continental level for rallying advocacy and action to ensure the rights of persons with disabilities in Africa.

129 <<http://www.achpr.org/instruments/>>(Accessed 16 April 2016).

130 Final Communique of the 52nd Ordinary Session of the African Commission para 47 <<http://www.achpr.org/sessions/52nd/info/communique52/>> (Accessed 29 March 2016).

131 58th Ordinary Session Inter-session Report of the Chairperson of the Working Group on Older Persons and Persons with Disabilities in Africa, Commissioner Yeung Kam John Sik Yeun <http://www.achpr.org/files/sessions/58th/inter-act-reps/247/58os_inter_session_report_yeung_eng.pdf>(Accessed 14 April 2016).

132 Explanatory Memorandum of Draft Protocol (n88).

BOOK REVIEW:

ARLENE KANTER - *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS*

*William Oluchina**

‘Disability rights are human rights’ is the core message in this book by Professor Arlene Kanter. The author gives a historical perspective of how disability rights developed under international human rights law. This book essentially follows, step by step, how persons with disabilities have come to be protected under international law. The most insightful thing about this book is the account given by the author as an expert in the drafting process of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD). The narrative in this book clearly sets it apart from other disability rights books because of the personal experiences of the author. Hence, this book is a must-read for all scholars of disability rights.

Kanter gives an account of how the CRPD and its Optional Protocol was drafted and later adopted by the UN General Assembly. The CRPD was the first international human rights treaty of the 21st Century to come into force.¹ Furthermore, it was the first treaty in the history of the UN to garner more signatories on its opening day compared to other treaties.

Kanter argues that the CRPD has the potential to improve the lives of people with disabilities around the world, because it will make states and societies look at people with disabilities not as ‘victims of misfortune but as rights holders, entitled to all human rights on an equal basis with all others’.² Furthermore, the CRPD addresses ways in which all aspects of life must be adapted to ensure the inclusion and participation of person with disabilities. She also asserts that the CRPD has been able to transform negative rights into positive state obligations. For instance, it mandates state parties not only to guarantee equality but also the affirmative right to reasonable accommodation.³

The strength of this book lies in its universal perception—focusing on disability rights in the United States of America, Africa, Europe and the Middle East. Unfortunately, one can argue that Africa has not been adequately covered in this edition. Nonetheless, this book can be used as a reference or as a focus for cross-cultural studies on disability rights. By adopting a comparative perspective, the book explores the CRPD and its potential for achieving disability rights. Thus, it becomes significant to

* LLB (CUEA), LLM (SUCOL); Tutorial Fellow, University of Nairobi School of Law.

1 Arlene S. Kanter. *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Taylor and Francis 2014) p. 1.

2 Ibid p. 2.

3 Ibid p. 3.

researchers, policy makers, disability activists, students of international and comparative human rights law, discrimination law and disability studies.

The author divides the book into eight chapters with each chapter discussing one or more articles of the CRPD. However, some of the 50 articles of the CRPD are not covered. The author rather discusses those articles that have the greatest potential for impact towards persons with disabilities. The importance of Article 24 of the CRPD, which guarantees the right to education, cannot be overstated. The author notes how this article will transform the educational system and tackle the prejudice associated with educating persons with disabilities. However, the author notes that the analysis of Article 24 is being considered in another publication, and hence she does not consider it in this book.

Chapter 1 discusses the development of international human rights law with special focus on the CRPD.⁴ It documents how previous binding human rights treaties excluded persons with disabilities. The first part of the chapter discusses regional approaches towards persons with disabilities prior to the adoption of the CRPD. The second part of the chapter focuses on the principles associated with the CRPD. The author notes that the negotiations process of the CRPD by itself was a paradigm shift towards the belief that persons with disabilities are rights holders.

In the second chapter, the author argues on the right to live in the community.⁵ She opines that Article 19 of the Convention is arguably the precursor to all other human rights. Kanter gives examples of how people with disabilities have been denied the opportunity to live in the community in different countries. She approaches the definition of 'home' and 'community' from multi-disciplinary angles—architectural, anthropological, etymological, geographical, gerontological, environmental, psychological, sociological and legal angles. This approach makes the book not only relevant to law practitioners, but also a wider audience.

Chapter three focuses on the right to liberty and security as provided for under Article 14 of the CRPD.⁶ This chapter has a special focus on people with mental disabilities because of the extra challenges and uniqueness they face. The author starts by appreciating that the right to liberty and security is provided in other international human rights treaties, which protect persons with disabilities too. However, Article 14 of the CRPD establishes opportunities for persons with mental disabilities who more often than not are subjected to involuntary detention in psychiatric institutions. She argues that mental health laws in most countries are in violation of the right to liberty and security as provided for by Article 14 of the CRPD. This is because these laws single out people with mental disabilities for treatment and detention. She also argues that Article 14 fails to expressly and outrightly ban institutionalisation of people with mental disabilities. This essentially fails to live up to the standards of dignity, integrity and equality of all people, which the CRPD

4 Ibid pp. 21-63.

5 Ibid pp. 64-125.

6 Ibid pp. 12 -158.

promises. She concludes the chapter by appreciating that it will be difficult for countries to abolish mental health laws but that is the logical consequence of Article 14.

Kanter discusses the freedom from torture and cruel, inhuman or degrading treatment or punishment in chapter four.⁷ She questions what constitutes torture or other forms of ill treatment with special focus to involuntary treatment and detention. While Article 15 of the CRPD protects the right to freedom from torture and other forms of ill treatment, it fails to prohibit involuntary institutionalisation as torture. Furthermore, Article 15 fails to provide standards to determine what amounts to torture and ill treatment. Despite the inadequacy of Article 15, the author argues this article can be interpreted to support a finding that torture can arise in cases of involuntary treatment and detention.

Chapter 5 takes a twin approach with regard to protection of physical and mental health as provided for under Articles 17 and 25 of the CRPD. The author states that the CRPD is the first international treaty to protect the physical and mental integrity of people with disabilities. This right is qualified by informed consent about treatment of persons with mental disabilities. The author discusses the relationship between the right to informed consent and the right to health contained in ARTICLE 25 of the CRPD. She argues that there is no conflict between Articles 17 and 25 especially in cases of medical emergency for people with disabilities.

Chapter 6 addresses Article 13 of the CRPD on access to justice for people with disabilities. Kanter argues that access to justice is one of the foundations of any legal system and this encompasses the right to participate in the judicial system as witnesses, complainants and victims. The author discusses the barriers people with disabilities face in seeking access to justice on an equal basis with people without disabilities as articulated in Article 13 of the Convention.

The author discusses the right to legal capacity and supported decision making in chapter seven. Article 12 of the CRPD guarantees the right to equal recognition before the law and legal capacity for all persons with disabilities. She explains that Article 12 was one of the most contested provisions during the negotiations process, with countries objecting protection of the right to legal capacity for people with disabilities. Countries wanted certain limitations to apply to people with certain mental disabilities. The author asserts that Article 12 goes beyond any previous international human rights law by essentially calling for the end of laws that deny people with disabilities the right to legal capacity. Furthermore, Article 12 envisions the end of 'substituted decision making', which is present in laws on guardianship. Article 12 calls for supported decision making in place of 'substituted decision making'. Here, Kanter argues that supported decision-making is consistent with contemporary theories of interdependency. She states that the right to 'independence' in Article 12 is not the right to be 'left alone'; it is a paradigm shift towards ensuring the right of all people to adequate care and support. She concludes the chapter by setting out the implications of Article 12 towards people with and without disabilities to receive support in order to realise their full potential.

7 Ibid pp. 159-201.

The final chapter of the book discusses the CRPD in the context of international human rights theory. In my view, this is the most important chapter in the book since Kanter discusses whether the CRPD will make a difference to people with disabilities. She argues that the success of the CRPD is not by how many countries sign and ratify it or the process that led to its adoption. Its success will be adjudged by the internationalisation of disability rights in different countries. This should further be accompanied by the enforcement of the CRPD through the adoption of domestic disability laws. The author concludes the book by appreciating the existence of other texts on disability rights. However, as previously stated, this book is a one-stop-shop for all stakeholders in disability rights.

Important to this text is the provision of three convincing discussion points on how the CRPD is regarded as a significant international treaty that protects the rights of people with disabilities. First, Kanter points out that the CRPD does not specifically define a 'person with a disability' because the Ad Hoc Committee responsible for negotiating the Convention felt that this would have profiled the medical basis of disability. Rather, the committee agreed that the CRPD would categorically state its purpose in safeguarding the rights of people who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Second, Kanter states that the CRPD is unparalleled in its way of enforcement—an aspect she presented in her previous writings.⁸ The CRPD imposes stringent monitoring and reporting requirements. The author refers to Article 33 of the CRPD, which includes an extensive system of monitoring and national implementation. Article 33 requires each state party to establish one or more 'focal points' to ensure national level implementation of the Convention. Furthermore, Article 33 mandates state parties to designate 'a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention'. Kanter also presents Article 31 of the Convention, which requires state parties to collect data on disability in order to 'give effect to the present Convention'. She presents a very important point as she unpacks Article 31: the importance of not just collecting statistical data on the number of people with disabilities as this has its own challenges. The Article emphasises the need also to collect data on people with disabilities and their lives, including the various forms of barriers they face in accessing their rights. Kanter argues that no other treaty requires collection of data covering such a diverse range of issues. Thus, it becomes clear that Articles 31 (data collection) and 33 (reporting and monitoring) present the most detailed requirements for national level implementation and monitoring of any human rights treaty in the UN's history, making the CRPD a model for subsequent human rights treaties.

Finally, the CRPD's significance also relates to its adoption process. Unlike preceding human rights treaties, the CRPD was written by its beneficiaries. This made the principle of 'nothing about us

8 Arlene S Kanter. 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) 34 *Syracuse Journal of International Law and Commerce*, p. 287.

without us' a reality. Therefore, this promotes meaningful participation of all people with disabilities in important decision-making processes. This was not only a revolutionary process but also a first of its kind.

CASE REVIEW:

**CRIMINAL APPEAL NO. 17 OF 2014 ON THE
CAPACITY OF PERSONS WITH MENTAL
OR PSYCHOSOCIAL DISABILITIES TO
CONSENT TO SEX**

*Manyara Reginald Mworia**

I: INTRODUCTION

The Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations General Assembly on 13 December 2006, was signed and ratified by Kenya on 30 March 2007 and 19 May 2008 respectively. Consequently, it became part of Kenyan law pursuant to Article 2 (6) of the Constitution which domesticates regional and international instruments ratified by Kenya. The courts have subsequently begun using the norms established by the CRPD to make determinations on the rights of persons with disabilities. The case of *Wilson Morara Siringi v. Republic*¹ illustrates the progressive understanding and application of Article 12 of the CRPD.

II: FACTS OF THE CASE

The appellant, Wilson Morara Siringi, was convicted of the offence of rape in Criminal Case No. 681 of 2012 at the Senior Principal Magistrate's Court in Migori contrary to Section 3 (1) (b) and (3) of the Sexual Offences Act. He was sentenced to 15 years imprisonment.

The particulars of the offences were that on December 5, 2012, at an undisclosed location in Migori County, he intentionally caused his penis to penetrate the vagina of SMO without her consent.

Siringi appealed against the conviction and sentence, challenging his conviction on the grounds that he did not rape the accused; and that his alibi defence was plausible and well corroborated.

The State asserted that the conviction and sentence were grounded on evidence and that the prosecution had proved its case beyond reasonable doubt. The prosecution had called four witnesses. PW1, a brother-in-law of the complainant, PW2, testified that PW2 who was 'mentally retarded' had been taken to a traditional healer for treatment. The traditional healer was a brother to the accused. PW1 stated that on December 5, 2012, he was called and informed that PW2 had been

* LLB, University of Nairobi.

¹ *Wilson Morara Siringi v Republic* [2014] eKLR <<http://kenyalaw.org/caselaw/cases/view/101502/>> (accessed on 3 December 2016)

PW2, the complainant, testified that she was 34 years old and lived with PW1 who had married her sister. She stated that she knew the accused as he lived where she was being treated. She stated that the accused asked her if she could be his wife and that he would pay her medical bill. He also told her he would give her money if they slept together. She also stated that PW1 asked her why she had gone to the accused's home and he said he would beat her. She admitted that PW1 found her seated on the bed of the accused and that he took her to hospital.

PW3, a clinical officer at Migori District Hospital, produced a medical report on behalf of the doctor who examined PW2. He found her to be mentally unstable and confirmed that she had had sexual intercourse.

PW4, the investigating officer, stated that PW1 reported that PW2 had been raped on December 5, 2012 at about 7 p.m. He gave him a P3 form and arranged to arrest the accused.

III: ISSUES

The main issue in the case was whether lack of consent as an ingredient of the offence of rape as provided under Section 3 of the Sexual Offences Act had been proven.

According to Section 3 (1) of the Sexual Offences Act:

“A person commits the offence termed rape if -

- (a) He or she intentionally and unlawfully commits an act, which causes penetration with his or her genital organs;
- (b) The other person does not consent to the penetration; or
- (c) The consent is obtained by force or by means of threats or intimidation of any kind.”

From the evidence, it was clear that the accused had sexual intercourse with PW2. The testimony of PW2 indicated that she knew the appellant; and PW1 confirmed that he found PW2 in the accused's house. The evidence of PW2 was corroborated by the medical evidence, which proved that sexual intercourse took place. The court was therefore satisfied that penetration had been proven.

The ingredient of ‘lack of consent’ had also to be proven. In this regard, Section 42 of the Sexual Offences Act provides that:

“For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.”

Section 43 (1) further provides that:

“An act is intentional and unlawful if it is committed -

- (c) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.”

Section 43 (4) (e) further states:

“The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act –

(e) Mentally impaired;”

After analysing the evidence, the magistrate, in convicting the appellant, concluded as follows:

“At Section 43 of the Act an act is intentional and unlawful if it is committed *inter alia* in the circumstances whereby the person is incapable in law of appreciating the nature of the act ... if at the time of commission the person was mentally impaired. Even if the complainant was an adult, she was legally incapable of consenting due to mental illness. I therefore disagree with the accused when he states that she was capable of making a sound decision. I find the apparent consent was vitiated by the complainant’s mental illness.”

The prosecution evidence for lack of consent was that the complainant was mentally impaired.

On appeal, Majanja (J) stated that the issue was not whether the complainant was mentally impaired generally but rather whether the complainant was mentally impaired at the time when the alleged act of rape was committed. He relied on Section 42, 43 (1) and (4) of the Sexual Offences Act which focuses inquiry on whether the complainant exercised freedom and capacity to make the choice of having sexual intercourse and whether at the time the act took place the complainant was incapable of consenting by reason of mental impairment.

The Judge noted that while the testimony of PW1 and PW3 alluded to the fact that PW2 was mentally unstable, that alone did not assist the prosecution’s case. The medical evidence on the issue was sparse as the medical examination report merely stated that the complainant was not ‘mentally stable’. PW3, who testified on behalf of the doctor who examined the complainant, did not state the nature and extent of mental illness afflicting the complainant, and so the court could not conclude that the complainant was unable to exercise her own free will.

Before PW2 testified, the magistrate had conducted a *voir dire* and concluded that the complainant was intelligent. She was able to give coherent testimony and answer questions put to her on cross-examination. This fact, together with the lack of medical evidence to negate the fact the complainant was at any time so unable as not to appreciate the nature of the act or consent to it, tended to show that the complainant, despite having mental illness, was in some instances able to make independent decisions. Hence, it was possible that the complainant, being an adult, could make a decision as to whether or not to have sexual intercourse. It was the duty of the prosecution to prove beyond reasonable doubt that the complainant did not consent by reason of impairment at the time of commission of the felonious act. The prosecution case was also undermined by the complainant’s

testimony where she stated as follows:

“Hezbon asked why I had gone to the accused home. He said he would beat me. Hezbon took me.”

This testimony pointed that the complainant went to the accused’s house voluntarily and that PW1 threatened to beat her because of her decision.

The Judge drew the conclusion the case was agitated by PW1 rather than by PW2. He therefore found that the prosecution failed to prove the lack of consent beyond reasonable doubt and hence he quashed the conviction.

IV: LEGAL ANALYSIS

The aim of the CRPD is to eliminate discrimination against persons with disabilities so that they may enjoy full equality under the law. The CRPD challenges long held beliefs about disability and how they should be treated by the law and society as a whole. The significance of the *Siringi* decision may be appreciated better in light of the following context.

Kenya had already, prior to this decision, acknowledged that Article 12 of the CRPD was one of the most misunderstood provisions of the CRPD.² Civil society and the Kenya National Commission on Human Rights (KNCHR) had begun to sensitise and lobby government officials about Article 12. An event had been held to launch a report prepared by an international nongovernmental organisation on legal capacity³ in Nairobi in April 2014. The KNCHR had also prepared a briefing paper making recommendations on how to make Article 12 of the CRPD on legal capacity operational in the country.⁴

In his judgment, Justice Majanja stated:

“15. In conclusion, I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of Article 12 of the CRPD, which requires State Parties to recognise persons with disabilities as individuals before the law,

2 Committee on the Rights of Persons with Disabilities, Replies to the List of Issues: Kenya, 10 July 2015, CRPD/C/KEN/Q/1Add.1

3 Report available at < http://mdac.org/sites/mdac.org/files/mdac_kenya_legal_capacity_9apr2014_0.pdf> (accessed on 4 December 2016).

4 Kenya National Commission on Human Rights, ‘How to Implement Article 12 of Convention on The Rights of Persons with Disabilities regarding Legal Capacity in Kenya: A Briefing Paper’, 2014. <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj3hrPQjNzQAhXLWxoKHQBrsBQAQFggcMAA&url=http%3A%2F%2Fwww.knchr.org%2FPortals%2F0%2FGroupRightsReports%2FBriefing%2520Paper%2520on%2520Legal%2520CapacityDisability%2520Rights.pdf&usq=AFQjCNHiPJloXM8ZP9xm9dAtCjtrlrG5uw&sig2=I92e5QZnGX8qjPrVm2BD3g&cad=rja>> (accessed on 3 December 2015).

possessing legal capacity to act, on an equal basis with others...

“16. It is therefore improper and inconsistent with the Convention and an affront to the right of dignity of a person protected by Article 28 to label any person as mentally retarded and proceed on the basis that the person is incapable of making a free choice to engage in sexual intercourse. What the Sexual Offences Act, 2006, requires is that the prosecution must prove beyond reasonable doubt that at the time the act of penetration is committed, the complainant was incapable of consenting by reason of mental impairment. In this case, the prosecution failed to discharge that burden.”

This is clearly a revolutionary understanding of Article 12 by Kenyan Courts. If persons with disabilities—including those with mental or psychosocial disabilities—are seen to be incapable of making any decisions about their own lives, negative stereotypes about disability are reinforced, and these stereotypes continue to be a significant barrier to the inclusion and participation of persons with disabilities in society⁵.

Clearly, Article 12 of the CRPD restores the capacity of decision-making to persons with disabilities. Respecting individual wishes and preferences—whether through supported decision-making or otherwise—is a legal imperative⁶. Legal capacity goes beyond decision-making to the core of what it means to be human⁷. Without legal capacity, the freedom to make choices⁸ is greatly undermined, yet life choices are part of who we are⁹.

The CRPD Committee has clarified in its General Comment on Article 12 the difference between legal capacity and mental capacity. It states:

“Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors ... the concepts of mental and legal capacity have been conflated so that where a person

5 USP Kenya, KAIH and MDAC, DPO/NGO information to the 3rd Pre-sessional Working Group of the United Nations Committee on the Rights of Persons with Disabilities for consideration when compiling the List of Issues on the First Report of the Republic of Kenya under the Convention on the Rights of Persons with Disabilities, 20 April 2015.

6 World Health Organization, *World Report on Disability*, 2011 p. 138.

7 Kenya National Commission on Human Rights (n4).

8 This, according to para 8 of the General Comment No.1 on Article 12 by the CRPD Committee, leads to persons with disability being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en> (accessed on 3 December 2016).

9 Kenya National Commission on Human Rights (n4).

is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). ... In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity."

V: CONCLUSION AND RECOMMENDATIONS

The *Siringi* decision challenges the long held beliefs that persons with disabilities do not have the capacity to consent to sex, thereby holding them to a higher standard than the rest of the population who are not required to understand and appreciate the nature and consequences of their decision to engage in sexual activity. In this sense, the tests for the legal capacity of persons with disabilities can be viewed as indirect discrimination against them.¹⁰

The *Siringi* case also stresses the importance of involving the civil society in awareness-creation among judicial officers and the very importance of sensitising judicial officers on the CRPD.

10 Eilionoir Flynn, 'Legal Capacity and Consent to Sex – Reform for People with Disabilities' May 13, 2014 <<http://humanrights.ie/mental-health-law-and-disability-law/legal-capacity-and-consent-to-sex-reform-for-people-with-disabilities/>> (accessed 05 December 2016).
