



**UNITED
DISABLED
PERSONS
OF KENYA**



**FROM AFFIRMATION TO PRACTICE: ASSESSING A
DECADE OF IMPLEMENTING THE CONSTITUTION
OF KENYA 2010 FOR PERSONS WITH DISABILITIES**

Uraia

Kenya National Civic Education Programme

**FROM AFFIRMATION TO PRACTICE: ASSESSING A DECADE
OF IMPLEMENTING THE CONSTITUTION OF KENYA 2010
FOR PERSONS WITH DISABILITIES**

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Prepared for the United Disabled Persons of Kenya

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Abbreviations and Acronyms

CAJ:	Commission on Administrative Justice;
CPC:	Criminal Procedure Code;
'CRPD' or 'Convention':	Convention on the Rights of Persons with Disabilities;
DRI/KAIH:	Disability Rights International and the Kenya Association of the Intellectually Handicapped;
DPOs:	Disabled persons organisations;
Ill-treatment:	Cruel, inhuman or degrading treatment or punishment;
IEBC:	Independent Electoral and Boundaries Commission;
KNCHR:	Kenya National Commission on Human Rights;
	Marrakesh Treaty: Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled;
NCPD:	National Council for Persons with Disabilities;
NGEC:	National Gender and Equality Commission;
UDPK:	United Disabled Persons of Kenya.

1.0 Introduction

This study, which was commissioned by the United Disabled Persons of Kenya (UDPK), focuses on a decade of implementation of the Constitution of Kenya 2010 for persons with disabilities. Its overall aim is to assess the extent and character of implementation of the Constitution since its promulgation in 2010 in relation to persons with disabilities.

The specific objectives of the study are:

- i. To describe the provisions in the Constitution which anchor the inclusion of persons with disabilities in all spheres of life;
- ii. To establish the extent and practice of the policy, legislative and other measures which have been deployed to support the inclusion of persons with disabilities in all spheres of life during the past decade;
- iii. To establish the hurdles which have undermined more effective implementation of the Constitution for persons with disabilities during the last decade;
- iv. To highlight the role played by persons with disabilities and their representative organisations in the implementation of relevant Constitutional provisions; and
- v. To make recommendations on how to better implement the Constitution for persons with disabilities.

The study has been generated through desktop research which identified and reviewed key publications from the Government, laws enacted by Parliament, judicial determinations, publications from Constitutional Commissions and Independent Offices, and publications from civil society organisations and disabled persons organisations (DPOs). Electronic or hard copies of these various materials were collected and used for purposes of writing a draft paper which was submitted for stakeholder review prior to its finalisation.

The study covers the extent to which the Bill of Rights established in chapter four of the Constitution has been realised for persons with disabilities in the past decade. Implementation of the Bill of Rights is supported by various State organs, including the Executive, the Judiciary, Constitutional Commissions and Independent Offices, and devolved governments. Implementation of the Bill of Rights also anticipates interventions by individuals as well as non-State actors such as DPOs and more generally civil society organisations.

The study's assessment is anchored on the human rights approach to disability which focuses on the inherent dignity of the human being while also emphasising diversity, pluralism and human difference as part of humanity. The study's premise is that while the Constitution affirmed persons with disabilities as human beings with dignity, a decade's worth of policy, legislative and other measures has tarnished the implementation of that affirmation. Yet the Constitution remains a veritable platform for anchoring the hopes and aspirations of persons with disabilities. The study's temporal scope is the period August 2010 to August 2020.

The study is segmented into this introduction and four other sections. Section two sets out some contextual and conceptual clarifications. Section three of the study assesses the key institutions which are enjoined to implement the Constitution's affirmation of persons with disabilities by ensuring their inclusion in society. Section four of the study assesses the status of implementation of the Bill of Rights which spearheads the Constitution's engagements with persons with disabilities in various spheres of life. Section five of the study makes some key conclusions.

2.0 Contexts and Concepts

2.1 The human rights approach to disability

The human rights approach to disability is the conceptual paradigm that guides the assessments undertaken in this study. Prior to the revolution heralded by the Convention, persons with disabilities had over time been expected and even required to conform to hegemonic mores and common ways of doing things even where their impairments made quiescence difficult or nigh impossible. Society's domineering and patronising approach placed disabled people in strait-jackets of diseased bodies craving healing or helpless souls praying for charity and redemption. Far too often, society was content or complicit to confine or cleave out those diseased bodies or minds through killing, infanticide, eugenic sterilisation, mockery, institutionalisation and medicalisation.¹ This situation of discrimination and stigma was a historical and global phenomenon, and was quite in character in the 1926 case of *Buck v Bell* where Justice Oliver Wendell Holmes justified the eugenic sterilisation of a woman with intellectual disability who had sought redress before the US Supreme Court, stating that:

*... It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. ... Three generations of imbeciles are enough.*²

This is not unlike framings in the Old Testament which, as Arie Rimmerman explains, disqualified any person or priest with a physical blemish from performing sacrificial rituals on the basis that disabled persons were unholy.³

To counter the above paradigm, which is referred to variously as the medical model of disability or the charity model of disability, persons with disabilities then embraced what is referred to as the social model of disability. As this author has explained elsewhere, persons with disabilities:

*...contend that it is society rather than their bodies which makes them disabled. It is not the disabled person that bears the pathology: it is not the diseased ear, eye, leg or mind that disables. It is society that carries the pathology: it is society that disables by its stigma, prejudice and discrimination.*⁴

¹ Arie Rimmerman *Social Inclusion for Persons with Disabilities: National and International Perspectives* (Cambridge, Cambridge University Press) 2013, 9–21.

² *Buck v Bell* 274 U.S. 200 (1927) [https://scholar.google.com/scholar_case?q=Buck+v.+Bell.+274+U.S.+200+\(1927\).&hl=en&as_sdt=806&case=1700304772805702914&scilh=0](https://scholar.google.com/scholar_case?q=Buck+v.+Bell.+274+U.S.+200+(1927).&hl=en&as_sdt=806&case=1700304772805702914&scilh=0) accessed 20 September 2020.

³ Arie Rimmerman *supra* 10. Rimmerman cites the following injunction issued by God to Moses in Leviticus chapter 21: 'No man of your offspring throughout the ages who has a defect shall be qualified to offer the food of his God. No one at all who has a defect shall be qualified: no man who is blind, or lame, or has a limb too short or too long; no man who has a broken leg or a broken arm; or who is a hunchback, or a dwarf, or who has a growth in his eye, or who has a boil-scar, or scurvy, or crushed testes. No man among the offspring of Aaron the priest who has a defect shall be qualified to offer the Lord's offering by fire; having a defect, he shall not be qualified to offer the food of his God. He may eat of the food of his God, of the most holy as well as of the holy; but he shall not enter behind the curtain or come near the altar, for he has a defect. He shall not profane these places sacred to Me, for I the Lord have sanctified them.'

⁴ Lawrence M Mute 'Difference and Distinct Identities: Are Constitutional Provisions for Persons with Disabilities Being Implemented?' *The Elephant*, August 20, 2020 <<https://www.theelephant.info/reflections/2020/08/20/difference-and-distinct-identities-are-constitutional-provisions-for-persons-with-disabilities-being-implemented/>> accessed 20 September 2020.

Finally, the human rights approach to disability developed from the social model of disability following the adoption of the United Nations Convention on the Rights of Persons with Disabilities ('CRPD' or 'Convention').⁵ This approach validates human dignity as the anchor norm of human rights. It focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics.⁶ The human rights model of disability emphasises diversity, pluralism and human difference as part of humanity. It recognises persons with disabilities as actors and rights holders. The compulsion is on society to adapt and become accessible to all on an equal basis. Legislation, social policies and environments should reflect the full diverse range of abilities that exist in society.⁷

The human rights approach to disability identifies the following six factors which shall guide this paper's assessment of the extent to which the Bill of Rights has succeeded in ensuring the rights of persons with disabilities:

- i. The human rights model of disability includes principles and values that acknowledge the human dignity of persons with disabilities. Human dignity posits that each human being possesses an intrinsic worth that should be respected and that some behaviours are inconsistent with respect for this intrinsic worth.⁸
- ii. The human rights model of disability focuses on the validity of the full gamut of human rights for persons with disabilities – from civil, political, economic, social and cultural rights.⁹
- iii. It acknowledges experiential elements, such as the importance of impairment in people's everyday lives and the pain some people may experience, and demands that these are considered. The human rights model of disability clarifies that impairment does not derogate human dignity nor does it encroach upon the disabled person's status as a rights-bearer.¹⁰
- iv. The human rights model of disability allows space for identity politics. It '... gives consideration to different layers of identity. It acknowledges that disabled persons may be male or female, non-whites, disabled, children or migrants.'¹¹
- v. It recognizes the need for health prevention services in the context of the human right to health.¹²
- vi. Finally, the human rights model of disability seeks to achieve social justice. It '... offers a roadmap for change.'¹³

5 Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006; signed by Kenya on 30 March 2007 and ratified on 19 May 2008 <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> accessed 16 November 2020.

6 Gerard Quinn and Theresia Degener 'The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in Gerard Quinn and Theresia Degener (eds) *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments* (New York, United Nations) 2002, chapter 1.

7 Sarah Arduin 'Article 3: General Principles' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou *the UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford, Oxford University Press) 2018, 84-105.

8 Theresia Degener 'A Human Rights Model of Disability' in Peter Blanck and Eilíonóir Flynn (eds) *Routledge Handbook of International Law and Human Rights* (Oxford, Routledge) 2017, 35.

9 Ibid, 36.

10 Ibid, 41.

11 Ibid, 43.

12 Ibid, 45.

13 Ibid, 47.

2.2 The triple milestones of progress

Three events in the last two decades signify recent endeavours to enhance the life chances of persons with disabilities in the country.

First, in 2003, Kenya enacted the Persons with Disabilities Act¹⁴ which for the first time established a specific normative and institutional framework for anchoring the inclusion of persons with disabilities. The statute initiated a raft of entitlements for persons with disabilities in a variety of areas, including health and education. It also established devices such as tax exemptions for persons with disabilities as well as adjustment orders to enhance accessibility for persons with disabilities. Further, it created two critical institutions – the National Council for Persons with Disabilities (NCPD) to oversee the statute’s implementation, and the National Fund for Persons with Disabilities to provide a resource basket for addressing basic concerns of persons with disabilities.

Then, in 2008, Kenya became party to the CRPD which affirmed disability as a social rather than medical phenomenon. This philosophical shift held particular relevance for Kenya whose policy and law-making had previously treated persons with disabilities as objects of charity and medical intervention rather than as subjects with rights. Illustratively, this is what the first post-independence State-commissioned report on education, the 1964 Kenya Education Commission Report (Ominde Report), stated while recommending the use of special education for disabled children:

There are however many children whose handicap is less severe and who are quite able to receive their education and training in normal institutions provided that some sympathetic consideration is given to their problems by the teachers concerned. ... it is necessary to realise that many disabled persons are apt to suffer from a measure of psychological maladjustment arising out of their handicap. This ... does call for understanding treatment from teachers ... Teachers should also be given a rudimentary acquaintance with the possible connection between physical handicap and backwardness.¹⁵

In the same vein, the Kenya Society for the Blind Act¹⁶ was enacted five years before Kenya’s independence to provide charity and healing for blind persons. The Act’s objects, which were framed using the language of welfare rather than that of rights, included:

- i. Promoting the welfare, education, training and employment of the blind;
- ii. Assisting the Government, society, other institutions or any person in all matters relating to the blind; and
- iii. Awakening public interest in the welfare of the blind and in all matters relating to blindness.¹⁷

¹⁴ Persons with Disabilities Act No. 14 of 2003 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2014%20of%202003>> accessed 16 November 2020.

¹⁵ The Kenya Education Commission Report (Ominde Report, 1964, para. 507, cited in Kenya National Commission on Human Rights Objects of Pity or Individuals with Rights: the Right to Education for Children with Disabilities (Nairobi, 2007) <https://www.knchr.org/Portals/0/Disability%20Publications/Occasional_Study-Objects%20of%20Pity.pdf?ver=2018-06-03-173436-393> accessed 16 November 2020.

¹⁶ Kenya Society for the Blind Act Cap. 251 http://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/KenyaSocietyfortheBlindAct_Cap251.pdf accessed 16 November 2020.

¹⁷ Ibid Section 4.

Finally, the people promulgated the Constitution of Kenya 2010¹⁸ with great anticipation that it would transform the society and their lives. The Constitution affirmed, profiled and prioritised the concerns of persons with disabilities with significant depth, as we shall show throughout the paper.

The approach on disability in the 2010 Constitution is markedly different from the formulation in the Repealed Constitution¹⁹ whose Section 82 did not list disability as a prohibited ground of discrimination. Further, section 34 (c) of the Repealed Constitution made the bizarre provision that for one to be nominated to stand for a parliamentary seat the person had to ‘... be able to speak and, unless incapacitated by blindness or other physical cause, to read the Swahili and English languages well enough to take an active part in the proceedings of the National Assembly’.²⁰ As this author has commented elsewhere: ‘this provision, it seemed, did not countenance that a blind or physically disabled person could read English or Swahili; and indeed at least one blind candidate’s application to vie for a parliamentary seat was declined on that basis.’²¹

It is also significant that Section 33 of the Repealed Constitution provided for 12 members of the National Assembly to represent special interests, nominated by parliamentary parties on the basis of their proportion in Parliament to be determined after a general election. These seats were however invariably used to benefit the cronies of the political establishment. Preceding the 2010 Constitution, only the Eighth Parliament (1998-2002) had included two nominated Members of Parliament who self-identified as persons with disabilities: Richard Leakey and after him Josephine Sinyo. The pre-2010 Judiciary indeed set an enduring precedent on representation when the Ilchamus community petitioned the High Court successfully on their representation under Section 33 as a minority ethnic community. The Court understood the reference to ‘special interests’ as follows:

... special interests ... include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words, the special interests mean those interests which the normal electioneering process has failed to capture and represent. ... a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on their own make any difference to the outcome of the election has obviously a special interest in the minority. It is a democratic principle that the minorities should be fully embraced to enable them to become a majority. It is also a vital interest in terms of democracy to protect their rights so that they are never overwhelmed by the majority. The minorities empowerment to participate fully in the entire democratic process and the organs of a democratic society achieves even greater integration in terms of vision, programs and goals whereas on the contrary denying them participation leads to isolation. ... No doubt each age will have its fair share of minorities and special interest groups but in our time, they include the blind, the deaf, the physically disabled and the youth ...²²

¹⁸ Constitution of Kenya 2010 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>> accessed 16 November 2020.

¹⁹ Constitution of Kenya, Revised Edition 2008 (2001) <https://www.kttc.ac.ke/images/Constitution_of_Kenya.pdf> accessed 12 December 2020.

²⁰ Ibid.

²¹ Lawrence M Mute The Elephant supra.

²² *Rangal Lemeiguran and Others v Attorney-General and Others*, High Court at Nairobi (2006) eCLR <<http://kenyalaw.org/caselaw/cases/view/80436>> accessed 12 December 2020.

3.0 Normative and Institutional Arrangements for Implementing the Constitutional Affirmation of Persons with Disabilities

This section of the paper provides an assessment of the key institutions which are enjoined to implement the Constitution's affirmation of persons with disabilities by ensuring their inclusion in society. This affirmation is anchored in the national values and principles of governance as well as the Bill of Rights, and it is executed by Parliament, the National Executive, the Judiciary, County Governments, and Constitutional Commissions and Independent Offices. The affirmation is also validated by the effective participation of persons with disabilities.

3.1 Constitutional affirmation of persons with disabilities

The 2010 Constitution vocalised the normative and institutional directions for supporting the inclusion of persons with disabilities in all spheres of life in the following ways:

- i. It recognised the peculiar languages and communication formats of persons with disabilities. Kenyan Sign Language would henceforth be used alongside English and Kiswahili in official forums such as the National Assembly, while communication formats and technologies such as Braille would also be used.²³
- ii. Persons with disabilities were identified as vulnerable members of society whose needs would be addressed specifically by State organs and public officers.²⁴
- iii. The State as well as persons were prohibited from direct or indirect discrimination on the basis of disability.²⁵
- iv. The electoral system would ensure fair representation of persons with disabilities and take account of their special needs.²⁶
- v. Persons with disabilities would have specific representation in the National Assembly, Senate and County Assemblies.²⁷
- vi. The values and principles of public service would afford persons with disabilities adequate and equal opportunities for appointment, training and advancement at all levels of the public service.²⁸
- vii. The Constitution also established a corpus of entitlements for persons with disabilities. They were to be treated with dignity; they were to access integrated educational institutions and facilities; they were to have reasonable access to public transport and information; and they were to access materials and devices to overcome constraints arising from their disabilities.²⁹
- viii. The State was obligated to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies would be persons with disabilities.³⁰

23 Article 7 of the Constitution, *supra*.

24 *Ibid* Article 21(3).

25 *Ibid* Article 27.

26 *Ibid* Articles 81 and 82.

27 *Ibid* Articles 97, 98 and 177.

28 *Ibid* Article 232.

29 *Ibid* Article 54 (1).

30 *Ibid* Article 54 (2).

- ix. Finally, the Constitution provided a basis for its essential symbiotic relationship with the CRPD. The CRPD shaped vital minimum normative standards on matters of disability not otherwise articulated in the Constitution. The Constitution in turn created the gateway via which those norms became applicable in the country by providing that international conventions and treaties ratified by Kenya formed part of the country's laws.³¹ Kenyan courts have indeed made multiple substantive judgements drawing on CRPD standards through the Article 2(6) provision.³²

Only in one significant instance did the Constitution abide with the status quo by legislating the discrimination of persons with mental disabilities, when it provided that persons of unsound mind could neither vote nor stand for elective office.³³ As we shall show in section four of the paper, concerns indeed remain that the Constitution failed to specifically affirm that persons with disabilities have legal capacity on an equal basis with other persons.

Attempts to align the definition of disability with the understanding established in the CRPD were also unsuccessful. The CRPD bases its understanding of disability on the barriers in society which undermine an individual's ability to interact optimally with society, while the Constitution locates the 'problem' that engenders disability in the person rather than in society. It defines disability as including '... any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.'³⁴ Conversely, the CRPD's Preamble recognises that '... disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.' Article 1 of the Convention then explains that persons with disabilities include '... those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

The imperative of defining disability clearly cannot be understated. As a matter of fact, misunderstanding of what disability is has resulted in absurd judicial decisions. In one instance,³⁵ the claimant who did not know how to read and write was made by his supervisor to put his thumb-print on a letter whose contents were not explained to him but which transpired to be a notice of resignation apparently written by him. The Industrial Court cited the definition of disability in Section 2 of the Employment Act³⁶ which states

31 Ibid Article 2(6).

32 For example, see *Linnet Nyakeriga v Ben Njoroge* [2014] eKLR; *Wilson Siringi v Republic*; *Paul Anupa v Attorney-General* [2012] eKLR; *Cabinet Secretary for Transport & Infrastructure Principal Secretary & 5 others exparte Kenya Country Bus Owners Association & 8 others* [2014] eKLR; *Anthony Sang v Attorney General* [2014] eKLR; *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya* [2015] eKLR; *Okiya Omtatah Okiiti & 3 others v Nairobi City County & 5 others* [2014] eKLR; and *The National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* [2013] eKLR.

33 Article 83(1)(b), 99(2)(e) and 193(2)(d) of the Constitution, supra.

34 Ibid Article 260.

35 *Stephen Miheso v Kaimosi Tea Estate Limited*, Industrial Court at Nakuru (2014 eKLR <http://kenyalaw.org/caselaw/cases/view/95539/> accessed 16 November 2020).

36 Employment Act No. 11 of 2007 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202007>> accessed 17 November 2020.

that disability is ‘... a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on a person’s social and economic participation.’ The Court then stated:

The court holds that a person with illiteracy like the claimant is a person with disability and is entitled the (sic) rights of persons with disabilities as protected in the constitution and the relevant statutes. The court further holds that under section 5 (3) (a) of the Employment Act, 2007, the claimant was entitled to freedom from harassment by the respondent on account of the disability of illiteracy and in particular, under the section the claimant was entitled to freedom from harassment in respect of termination of employment or other matters arising out of the employment relationship. ... It is the further holding of the court that the claimant being a person with illiteracy, he was entitled to other appropriate means of communication (other than writing and reading) as provided for in Article 54(1) (d) of the Constitution. In particular, the claimant was entitled to verbal explanations of applicable terms and conditions of service in a language that the claimant understood in view of the employment relationship.³⁷

3.2 Normative anchors

The Constitution establishes national values and principles which it enjoins all State organs and officials as well as public officers and indeed all persons to abide by when applying or interpreting the Constitution, when enacting, applying or interpreting statutes, or when making or implementing public policy decisions. These are:

- i. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- ii. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- iii. Good governance, integrity, transparency and accountability; and
- iv. Sustainable development.³⁸

These national values and principles of governance have particular relevance for persons with disabilities. Devolution of power, for example, offers better opportunities for persons with disabilities to engage on governance issues within their own communities without facing the inconveniences of traveling long distances to seek out the National Government’s bureaucracy. As well, the principle of participation offers a veritable basis for persons with disabilities to be included in decision-making on matters that impact their lives. Human dignity is a counterweight to all the indignities that persons with disabilities have faced in the social, economic and political spheres, while implementing the principle of non-discrimination is critical too.

The Bill of Rights is an integral part of Kenya’s democratic State and it is the framework for social, economic and cultural policies. The recognition and protection of human rights

³⁷ Supra Stephen Miheso.

³⁸ Article 10 of the Constitution, supra.

and fundamental freedoms aims to ‘... preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.’³⁹ This purpose bears particular relevance for persons with disabilities who had over the years faced multiple indignities and injustices without credible constitutional recourse. Indeed, a person with disability or a third party may institute court proceedings against an actual or perceived denial, violation, infringement or threat to a fundamental right or freedom. The remedies that one may seek include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of a law, an order for compensation, and an order of judicial review.⁴⁰ It should be noted that the Bill of Rights applies to all persons, including a company, association or other body of persons whether incorporated or unincorporated. This is particularly important for persons with disabilities since entities such as companies are prime abusers of their rights.⁴¹

3.3 Institutional anchors

The Constitution vests Parliament with legislative authority to manifest the diversity of the nation, represent the will of the people, and exercise their sovereignty.⁴² In the past decade, the National Assembly and the Senate have taken multiple actions bearing positive or negative impacts on the lives of persons with disabilities. As we shall show in section four, Parliament has enacted laws, passed motions, questioned the Executive, processed petitions and undertaken committee work with impacts on the lives of persons with disabilities. The symbolism of legislators with disabilities in the National Assembly and the Senate has been ground-breaking;⁴³ yet the full beneficial impact of their parliamentary presence for persons with disabilities has not been studied yet.

Many of the statutes enacted by Parliament in the last decade have included some form of affirmation for persons with disabilities. Provisions have established legal requirements that persons with disabilities should be accorded equal opportunities in appointments to policy-making as well as technical positions. Illustratively, the selection panel and Cabinet Secretary is required, while appointing members of the Energy and Petroleum Tribunal which determines disputes under the Energy Act, to ‘ensure equal opportunities for persons with disabilities and other marginalized communities’⁴⁴ Analogous provisions are included in quite disparate statutes, such as the Media Council Act,⁴⁵ the Public Audit Act,⁴⁶ the Office of Attorney-General Act,⁴⁷ and The National Drought Management Authority Act.⁴⁸ Although studies need to be undertaken on the beneficial impacts of these provisions, failure to implement them does not attract any sanctions and it is

39 Ibid Article 19.

40 Ibid Articles 22 and 23.

41 For example, Stephen Miheso’s claim (supra) was against a tea-growing company.

42 Article 94 of the Constitution supra.

43 Pursuant respectively to Articles 97(1)(c) and 98(1)(d) of the Constitution, *ibid*.

44 Section 26(16)(b) of the Energy Act No. 1 of 2019

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%201%20of%202019> accessed 16 September 2020.

45 Sections 7(14)(b), 20(2) and 29(2) of the Media Council Act No. 46 of 2013

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202013> accessed 17 September 2020.

46 Section 17(4) of the Public Audit Act No. 34 of 2015

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2034%20of%202015> accessed 19 September 2020.

47 Section 25(4) of the Office of the Attorney-General Act No. 49 of 2012 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2049%20of%202012> accessed 16 September 2020.

48 Section 13(3) (c) of the National Drought Management Authority Act No. 4 of 2016 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202016> accessed 17 September 2020.

quite likely that the provisions are largely disregarded. Legislation has also sought to provide protection for persons with disabilities. Illustratively, unconscionable practices which may amount to unfair representations under the Consumer Protection Act include instances where the person making the representation or their employer or principal knows or ought to know 'that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement ...'⁴⁹

Perhaps Parliament's most significant legislative failing is that legislation to replace the Persons with Disabilities Act has still not been enacted despite concerted technical and advocacy interventions by DPOs and others. Bills to amend or repeal the Act have been tabled in Parliament several times to no positive end. As we shall show in section four of the paper, Parliament has also legislated matters of disability on the basis of grave misapprehensions of the support which persons with disabilities require in areas such as prevention of torture, legal capacity, marriage and access to justice.

Executive authority is exercised by the President and Cabinet, and the Constitution requires the President to promote respect for the diversity of the people and communities of Kenya, and ensure the protection of human rights and fundamental freedoms and the rule of law.⁵⁰ The National Executive has taken notable measures towards ensuring implementation of the Constitution in relation to persons with disabilities. In obedience to the Constitution which requires the President to submit to Parliament an annual report on the progress made in fulfilling Kenya's international obligations,⁵¹ the President reported the following key milestones in implementation of the country's treaty obligations under the CRPD as of 2019:

- That the Government was implementing the concluding observations and recommendations made to Kenya by the Committee on the Rights of Persons with Disabilities under the aegis of a national action plan.
- That the National Policy on Disability had been reviewed for alignment to the Constitution and the CRPD, and it was awaiting Cabinet approval.
- That the Persons with Disabilities Act had been aligned to the Constitution and the CRPD and a bill had been approved by Cabinet and was awaiting enactment.
- That a cash transfer programme for persons with severe disabilities benefited 47,000 households.
- That persons with disabilities benefited from the Government's policy of reserving 30 percent of procurements for persons with disabilities, women and youth.
- That persons with disabilities benefited from tax exemptions on income and the extension of retirement age to 65 years.

49 Section 13(2)(a) of the Consumer Protection Act No. 46 of 2012 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202012> accessed 16 September 2020.

50 Constitution of Kenya Article 131 supra.

51 Ibid Article 132 (1) (c) (iii).

- That the sunscreen programme of the NCPD had registered 3,156 persons, and that the 2019 Kenya Population and Housing Census included a specific question to collect data on persons with albinism.⁵²

As will become apparent in this paper, the successes listed in the presidential report card are quite overstated in a number of regards. Notably, the Cabinet did not approve the Persons with Disabilities Bill until 2018 despite many years of concerted technical inputs and advocacy, and the Government has still not tabled the Bill before Parliament two years later. The Executive has also still not approved the new Disability Policy. The President has also been quite reticent to appoint persons with disabilities to high government offices such as the Cabinet.⁵³ As well, the Taskforce on the Building Bridges Initiative, which has propose changes to the Constitution with significant implications for persons with disabilities, did not include a member who self-identified as a person with disability,⁵⁴ leaving persons with disabilities to decry the absence of their participation as a violation of the Constitution and the CRPD.⁵⁵

Perhaps the most urgent matter on disability which the Executive needs to address in support of policy making and implementation is the question of accurate data. Although it was anticipated that the 2019 Population and Housing Census would finally detail data on persons with disabilities, its results have been quite inconclusive. The prevalence of disability was determined at 2.2 percent, an apparent sharp drop from the 2009 Kenya Housing and Population Census which found that 3.5 percent of the population had a disability, and the Kenya National Survey of Persons with Disabilities of 2008 which found that 4.6 percent of Kenyans had a disability. This also compares unfavourably with the global prevalence of disability which is estimated at around 15 percent. As we have already indicated, the 2019 Census used the Washington Group Short Set of Questions to collect data on disability, and it is thought that the format was not properly calibrated or executed.⁵⁶ The Government needs to ensure that reliable disaggregated data on persons with disabilities is available.

Judicial authority is exercised by the courts and tribunals established by the Constitution.⁵⁷ The Judiciary has arguably been in the vanguard of defending the Constitution.⁵⁸ As this study will show, persons with disabilities have sought redress in the courts during the last ten years far more than ever before. Courts have been amenable to recognising the particular needs of litigants with disabilities, yet they have not always been able to provide sought redress.

52 Republic of Kenya, 7th Annual Report on Progress Made in Fulfilling the International Obligations of the Republic of Kenya (Nairobi, Executive Office of the President 2020) paras 688–701 <http://www.parliament.go.ke/sites/default/files/2020-11/L%20889%20INTERNATIONAL%20OBLIGATION%20FINAL_0.pdf> accessed 7 December 2020.

53 Memorandum to the National Steering Committee on Implementation of the Building Bridges Initiative Taskforce Report, prepared by Caucus on Disability Rights Advocacy and United Disabled Persons of Kenya, 18 February 2020.

54 See Presidential Taskforce on Building Bridges to Unity Advisory, Building Bridges to a United Kenya: From a Nation of Blood Ties to a Nation of Ideals (Nairobi, October 2019) <http://kenyalaw.org/kenyalawblog/building-bridges-initiative-kenya/> accessed 9 December 2020.

55 Memorandum to the National Steering Committee on Implementation of the Building Bridges Initiative Taskforce Report, supra.

56 Status of Disability in Kenya: Statistics from the 2019 Census <https://devinit.org/resources/status-disability-kenya-statistics-2019-census/#:-:text=The%202019%20census%20recorded%202.2,of%20women%20had%20a%20disability.> accessed 10 November 2020.

57 Constitution supra Article 159.

58 For example see Waikwa Wanyoike, 'Is the Kenyan Constitution on its Deathbed?' *The Elephant* September 5 2020 <<https://www.theelephant.info/features/2020/09/05/is-the-kenyan-constitution-on-its-deathbed/>> accessed 8 September 2020.

The Constitution establishes devolved governments in order to promote democratic and accountable use of power, to recognise diversity, and to enhance people's participation in the exercise of the powers of the State. Devolution also seeks to protect and promote the interests and rights of minorities and marginalised communities.⁵⁹ Devolution has succeeded for persons with disabilities in relation to limited appointments to high county offices such as Chief County Officers; employment in lower level or contract positions; specific business opportunities (such as street vending); and access to county enterprise funds.⁶⁰ Some Counties have enacted disability legislation, including Nairobi, Turkana, Machakos and Nakuru. These successes have however quite often remained superficial rather than deeply embedded and concerns remain that many offices and officials do not take with seriousness the full participation of persons with disabilities in matters of development.⁶¹

Finally, ten Constitutional Commissions and two Independent Offices are established with the threefold functions of protecting the sovereignty of the people, securing the observance by all State organs of democratic values and principles, and promoting constitutionalism.⁶² A number of these Commissions and Offices have played significant roles towards the inclusion of persons with disabilities. As we shall discuss in section four of the paper, the Auditor-General undertook a comprehensive audit on mental health management. Yet it is the Kenya National Commission on Human Rights (KNCHR) and the National Gender and Equality Commission (NGEC) that have made the most interventions on matters of disability. The Constitution mandates the two Commissions (along with the Commission on Administrative Justice [CAJ]) to promote respect for human rights, to promote the protection and observance of human rights, and to monitor and report on the observance of human rights.⁶³ KNCHR is specifically vested with the role of monitoring realisation of the rights of persons with disabilities pursuant to Article 33(2) of the CRPD which requires Kenya to establish or designate an Independent Mechanism to monitor the Convention's implementation.⁶⁴ KNCHR and NGEC have received complaints on matters of disability, issued reports on matters of disability and similarly litigated on matters of disability.

A note on appointments to Constitutional Commissions and Independent Offices should be made here. Persons with disabilities have by and large not been appointed onto the majority of the Chapter 15 Institutions. Of the three Article 59 Commissions, the NGEC and the CAJ have had Commissioners with disabilities, while KNCHR has not.⁶⁵ The National Land Commission has also had a Commissioner with disability.

59 Article 174 of the Constitution supra.

60 Lawrence Mute Guide on Disability-Inclusive Legislation, Planning and Budgeting in Counties (Nairobi, UDPK 2020) chapter 6.

61 Ibid.

62 Article 249 of the Constitution supra.

63 Ibid Article 59(2).

64 Miriam Nthenge 'Promotion, Protection and Monitoring: Implementing Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities' *East African Law Journal*, Special Issue on Disability Rights (Nairobi, University of Nairobi 2016/2017) 50-67 <<http://rodra.co.za/images/countries/kenya/research/East%20African%20Law%20Journal%20-%20Special%20issue%20on%20disability%20rights%202017-2017.pdf>> accessed 21 November 2020.

65 When KNCHR was first established in 2003, it had one Commissioner with disability, while from 2007 it had two Commissioners with disabilities.

3.4 Participation by persons with disabilities

The next issue we wish to highlight is the participation of persons with disabilities in ensuring their full inclusion in society.

The successful enactment of the Persons with Disabilities Act, the adoption and ratification of the CRPD and the promulgation of the Constitution were underpinned by the substantive participation of persons with disabilities. The Persons with Disabilities Act was drafted by a taskforce which included persons with disabilities following multiyear national consultations initiated in 1993 by then Attorney-General Amos Wako. Kenya's delegation to the Working Group which negotiated the CRPD from 2003 to 2006 included persons with disabilities who played central roles in crafting and arguing the country's positions, subsequent to which they lobbied Kenya to become party to the Convention. As well, the 2003-2004 National Constitutional Conference (usually known as the Bomas of Kenya Conference) which wrote the disability normative and institutional elements that were eventually retained in the 2010 Constitution included a strong representation of delegates with disabilities.

The past decade has witnessed continued proactive engagements of persons with disabilities with various State organs and agencies covering diverse policy and law-making fields. These engagements have been undertaken by initiatives of individual organisations or coalitions of organisations, with particular spearheads being the UDPK and the Caucus on Disability Rights Advocacy. This participation is consistent with the motto of persons with disabilities of 'nothing about us without us'. This clarion call is given legislative bearing in Article 3(3) of the CRPD which obligates Kenya to closely consult with and involve persons with disabilities through their representative organisations in the development and implementation of legislation and policies to implement the Convention.⁶⁶ The next section of the paper will from time to time allude to the contributions that persons with disabilities made to various policy and legislative debates in the past decade.

3.5 Moving from statements to actions

As already discussed in this section and as shall be further illustrated in section four of the paper, Kenya has established many constitutional, statutory and policy commitments towards ensuring inclusion for persons with disabilities. Additionally, the government has made or reaffirmed like commitments in various international forums.

Most recently, in 2020, Kenya affirmed its commitments on matters of disability when it participated in its third Universal Periodic Review (UPR) before the Human Rights Council. The Government agreed to implement 17 disability-specific recommendations made by its peer States covering the breadth of disability issues. These included that it should enact outstanding disability-relevant legislation; collect and analyse disaggregated data on

66 For authoritative interpretation of the participation of persons with disabilities, see Committee on the Rights of Persons with Disabilities, General Comment No. 7 (2018) on the Participation of Persons with Disabilities, Including Children with Disabilities, through their Representative Organisations, in the implementation and Monitoring of the Convention <<https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>> accessed 12 December 2020.

discrimination of women on the basis of disability; ensure high-quality healthcare for women with disabilities; ensure adequate access to education for girls with disabilities; promote inclusive education for students with disabilities; and establish an awareness-raising strategy on combatting discrimination for persons with disabilities.⁶⁷ While the UPR process has incredible value, it is the case that many of its recommendations can be quite generic. Of particular note, though, is the recommendation which the Government declined to commit to – that it should accede to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.⁶⁸

This refusal coincides with the Government's reluctance to become party to human rights instruments that enable individuals to seek redress before international human rights tribunals. This means that Kenyans with disabilities cannot seek redress before the Committee on the Rights of Persons with Disabilities when they deem that their rights under the Convention have been violated or abused and the domestic legal system has failed to provide appropriate/timely redress.

Earlier, in 2018, Kenya's commitments at the Global Disability Summit⁶⁹ covered the following six areas:⁷⁰

- i. Raising public awareness on disability rights and supporting the involvement of persons with disabilities and/or their representative organizations in the process to address stigma and discrimination.
- ii. Developing and implementing costed inclusive education sector plans that focus on equipment, infrastructure and teacher training. This would be done by allocating and ring-fencing funds for equipment, infrastructure and teacher training for inclusive education, enhancing the capacity of the Educational Assessment and Resource Centres to identify, assess and place children with disabilities in appropriate learning institutions, and modernizing vocational rehabilitation centres to offer persons with disabilities quality rehabilitation and training.
- iii. Improving the lives of persons with disabilities and enhancing opportunities for the development of their economic potential. This would be done by institutionalising disability-inclusive budgeting at the national and county levels, enforcing the 30 percent quota allocation of government procurements for persons with disabilities, and reviewing targeted criteria for social assistance programmes for persons with disabilities to include more vulnerability.

67 Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, Kenya <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/KEindex.aspx>> accessed 17 November 2020.

68 Ibid.

69 The Global Disability Summit brought together world leaders, government officials, civil society organisations, the private sector, the donor community and Disabled People's Organisations to share experiences, ideas and aspirations for development and humanitarian work inclusive of people with disabilities. The Summit celebrated the achievements and rights of people with disabilities and highlighted the role that innovation and technology can play to improve their lives. The summit established global and national level commitments on disability inclusion covering four themes – ensuring dignity and respect for all; inclusive education; routes to economic empowerment; and harnessing technology and innovation. The Summit also addressed the cross-cutting themes of women and girls with disabilities, conflict and humanitarian contexts, and data disaggregation. Global Disability Summit 2018 – Summary of Commitments https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731878/Global-Disability-Summit-Summary-Commitments_2.pdf accessed 16 November 2020.

70 Government of Kenya, 23 July 2018 <<https://www.gov.uk/government/publications/national-governments-global-disability-summit-commitments/government-of-kenya>> accessed 16 November 2020.

- iv. Finalizing and implementing the national disability policy on assistive devices and support services including by ensuring that innovated or imported assistive devices meet set minimum standards.
- v. Promoting the collection of accurate data disaggregated by gender, age, disability and geographic location for use in planning including by using the Washington Group Short Set of Questions on Functioning⁷¹ in the 2019 National Population and Housing Census and other surveys.
- vi. Initiating the process of ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.⁷² This Protocol, which was adopted by the African Union in 2018, complements the CRPD by providing Africa-specific normative aspects not covered in the Convention.

An assessment of adherence to the Global Disability Summit commitments found that Kenya had launched its national action plan for implementing its commitments, and that it had developed an advocacy toolkit for strengthening dignity and respect for all. Plans were also afoot to use the Washington Group Short Set of Questions on Functioning in the 2019 National Population and housing census.⁷³

Kenya had also established an interagency coordinating committee comprising State and non-State actors to facilitate effective implementation of the disability agenda in the country. The Committee's specific objectives are:

- i. To promote multi-sectoral collaborative action directed at the inclusion of disability concerns in all mainstream development policies, programmes and projects;
- ii. To promote policies and legislation for the protection of the rights of persons with disabilities, in consonance with existing regional and global mandates;
- iii. To Strengthen inter-organisational coordination and operational linkages at all levels to include persons with disabilities as visible target participants and beneficiaries in development programmes and projects for all social groups;
- iv. To promote joint action, including contributing substantive funding and other resources, in support of the planning, organisation and conduct of major regional events for the full participation and equality of persons with disabilities;
- v. To promote inter-country technical cooperation in support of building national and local capabilities on disability-related concerns; and
- vi. To share experiences, information, challenges and best practices in the sectors.⁷⁴

71 The Washington Group Short Set on Functioning (WG-SS) <<https://www.washingtongroup-disability.com/question-sets/wg-short-set-on-functioning-wg-ss/>> accessed 17 November 2020.

72 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Disability Rights Protocol), adopted by the African Union Assembly in January 2018 https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf accessed 17 November 2020.

73 Equal International 'One Year On: Accountability Report' (September 2019) <https://www.internationaldisabilityalliance.org/sites/default/files/gds18-one-year-on-report.pdf> accessed 7 December 2020.

74 Letter appointing members of the Committee from the Principal Secretary, Ministry of Labour and Social Protection, dated 7th February 2019 (Ref ML & SP/SP 9/43).

Earlier still, in 2017, a national action plan⁷⁵ was prepared by the Government in a multi-stakeholder process to address the Concluding Observations and Recommendations issued to Kenya by the Committee on the Rights of Persons with Disabilities⁷⁶ following the country's presentation of its initial periodic report to the Committee pursuant to Article 35 of the CRPD.⁷⁷ No assessments have been made on the extent to which this Plan is being implemented in fact.

This section of the paper, therefore, has illustrated that various relevant State institutions have indeed sought to deliver the promise behind the constitutional affirmation of persons with disabilities, but that these endeavours have also been tarnished by underlying institutional incapacities and dearth of willingness.

⁷⁵ Ministry of East African Community, Labour and Social Protection, National Plan of Action on Implementation of Recommendations Made by the Committee on the Rights of Persons with Disabilities in Relation to the Initial Report of the Republic of Kenya, September 2015- June 2022 (Nairobi, 2016) <<https://laboursp.go.ke/wp-content/uploads/2018/05/National-Action-Plan-FINAL-draft-from-printer.pdf>> accessed 17 November 2020.

⁷⁶ Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Kenya adopted at the Committee's 14th Session, 17 August- 4 September 2015, para 17 <<https://digitallibrary.un.org/record/811095?ln=en>> accessed 13 November 2020.

⁷⁷ Kenya's Initial Report Submitted under Article 35 (1) of the United Nations Convention on the Rights of Persons with Disabilities, 31 August 2011 <<https://www.ohchr.org/en/hrbodies/crpd/pages/spreports.aspx>> accessed 13 November 2020.

4.0 Status of Implementation of the Constitution for Persons with Disabilities

This section of the paper assesses the extent to which the rights of persons with disabilities have been protected and promoted in the past decade to support their inclusion in various spheres of life. The paper focuses specifically on the civil, political, economic, social and cultural spheres enunciated in the Bill of Rights.

4.1 Right to life

Article 26 of the Constitution guarantees every person the right to life. This provision is buttressed for persons with disabilities by Article 10 of the CRPD which obligates Kenya to ‘... take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.’

In the past decade, the right to life of persons with disabilities has continued to be undermined in a number of regards. Of particular concern are the dangers to life and limb which children with disabilities and persons with albinism continue to face.

An investigation undertaken by Disability Rights International and the Kenya Association of the Intellectually Handicapped (DRI/KAIH Investigation) between 2016–2018 covering 21 orphanages across Kenya found that parents continue to be pressured into killing children with disabilities. Citing instances where parents killed their disabled children, the investigation reported the common belief that children born with a disability are cursed, bewitched and possessed; that disability is a punishment for the sins of the mother; and that if the firstborn has a disability the baby should be killed if the parents want to have more children.⁷⁸

Exercise of the right to life by persons with albinism remains tenuous. Infants with albinism have been killed for being perceived as a bad omen and as a disgrace to the family, while other persons with albinism have faced ritual rape or they have been killed, kidnapped or trafficked for their body parts which are assumed to have magical potions.⁷⁹ In 2015, a 56-year old man with albinism from Vihiga County died a few days after being attacked by a gang of unknown people. He had sustained injuries on his head, neck and hand, with his kin saying the attackers had sought his body parts to sell in Tanzania.⁸⁰

In the meantime, though, Kenya has taken positive measures in acknowledgement of the intersection between the attainment of the highest state of health and the right to life. This holds particular significance for persons with albinism who face life-threatening illnesses such as skin cancer. On her advocacy visit to Kenya in 2018, the Independent

⁷⁸ Priscila Rodríguez et al *Infanticide and Abuse: Killing and Confinement of Children with Disabilities in Kenya* (Washington, Disability Rights International and Kenyan Association for the Intellectually Handicapped 2018) 4 <<https://www.driadvocacy.org/wp-content/uploads/Infanticide-and-Abuse.pdf>> accessed 23 October 2020.

⁷⁹ Joint submission on the human rights of persons with albinism in Kenya, submitted to UN Office of the High Commissioner for Human Rights, June 30 2014 <uprdoc.ohchr.org/uprweb/downloadfile> accessed 26 October 2020.

⁸⁰ ‘Albino Earlier Attacked by Unknown People in Vihiga Dies’, Nation–On–Line, Tuesday September 22 2015, <<http://www.nation.co.ke/counties/albino-vihiga-dies/-/1107872/2880190/-/xris7bz/-/index.html>> accessed 12 November 2020.

Expert on the Enjoyment of Human Rights by Persons with Albinism noted that The State had taken important measures in this regard by providing annual budgeting to support the purchase and distribution of sunscreen lotions, adaptive devices such as glasses and monoculars, and awareness-raising to sensitise the public on albinism and to combat harmful practices. More than 1,000 persons with albinism had been provided with prescription glasses and other optical devices, while skin cancer protection kits (including sunscreen, after-sun care products, lip bums and occasionally protective clothing) were available in more than 190 hospitals across the country.⁸¹

This is the context within which the Committee on the Rights of Persons with Disabilities called on Kenya to investigate cases of violence against persons with albinism, to create safe spaces and redress services for victims of attacks, and to undertake advocacy and awareness-raising on the rights and dignity of persons with albinism.⁸² In the same vein, the African Commission on Human and Peoples' Rights has identified the fourfold interventions of effective protection of persons with albinism, effective investigations of attacks on them, elimination of discrimination including through education and awareness, and effective monitoring and reporting.⁸³

In summation, therefore, policy and law-making as well as implementation should continue its focus on ensuring the right to life for persons whose lives are endangered on account of disability, including vulnerable children with disabilities and persons with disabilities. Although Kenya is not party to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, State apparatus should heed the seminal point on the right to life made in the Protocol which highlights the direct nexus of the inherent right to life and integrity for persons with disabilities with their ability to access '... services, facilities and devices to enable them to live with dignity and to realise fully their right to life.'⁸⁴ Effective realisation of the other discussed rights therefore supports fuller realisation of the right to life of persons with disabilities.

4.2 Freedom from torture and other cruel, inhuman or degrading treatment or punishment

Article 29 of the Constitution guarantees every person the right to freedom and security of the person. In particular, every person has the right not to be subjected to physical or psychological torture, or to be treated or punished in a cruel, inhuman or degrading manner (ill-treatment). The CRPD enhances this protection with its Article 15 provision enjoining Kenya to '... take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.'

⁸¹ Human Rights Council, 40th Session, 25 February–22 March 2019, Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism on her Visit to Kenya, Para. 41.

⁸² Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Kenya adopted at the Committee's 14th Session, 17 August–4 September 2015, para 17 <<https://digitallibrary.un.org/record/811095?ln=en>> accessed 13 November 2020.

⁸³ 'Resolution on the Prevention of Attacks and Discrimination against Persons with Albinism' ACHPR/Res.263(LIV)2013 <https://www.achpr.org/sessions/resolutions?id=283> accessed 21 November 2020;

Also see 'Resolution on the Regional Action Plan on Albinism in Africa (2017-2021)' ACHPR/Res.373(LX)2017 <<https://www.achpr.org/index.php?url=sessions/resolutions&id=415>> accessed 9 December 2020.

⁸⁴ Article 8 of the Disability Rights Protocol, *supra*.

Violation of the right of persons with disabilities to be free from torture or ill-treatment has continued to be manifest in a number of ways in the past decade. A study undertaken by the Independent Medico-Legal Unit covering in-patients with mental and/or psychosocial disabilities in a sample of nine hospitals found the prevalence of torture at 38.9 percent, with the most common forms of abuse being assault by other patients and by hospital staff. Patients had also faced violations in other institutions, including police stations, prisons, schools and home settings. 20.4 percent of the patients had been assaulted with batons; 21.2 percent had been beaten on the buttocks, head or back; 10.2 percent had been exposed to unpleasant heat, darkness, light or cold; 9.3 percent had been coerced to obedience and humiliation; 7.5 percent had been deprived of social contact; 7.5 percent had been forced to undress before others or witness sexual abuse; and 4.4 percent had been sexually assaulted. Only 10.6 percent of the patients had received counselling, treatment or legal redress, while only 14.6 percent of the patients felt safe in the hands of their care givers.⁸⁵

The DRI-KAIH Investigation found that children with disabilities in orphanages lived in overcrowded and filthy conditions. They spent lengthy periods in restraints and isolation rooms,⁸⁶ circumstances which conform with conditions which may give rise to claims of torture or ill-treatment.⁸⁷

Parliament took an essential measure for addressing torture when it enacted the Prevention of Torture Act.⁸⁸ The Act defines torture as an act where severe physical or psychological pain is inflicted on a person. An act becomes torture where it is perpetrated by or at the behest or acquiescence of a public officer or their agent with the intent of obtaining information or a confession, punishing the victim, intimidating or coercing the victim, or perpetrating discrimination. The breadth of this definition may cover coercive acts such as might be performed by health professionals on persons with psychosocial disabilities.

The Act establishes protection for vulnerable witnesses including vulnerability on account of 'intellectual, psychological or physical impairment'.⁸⁹ The court may allow such witnesses to give evidence through an intermediary, directing that the proceedings should not take place in open court, or introducing any other just and appropriate measure. The Act establishes detailed protocols on how an intermediary should undertake their responsibilities. Notably, an intermediary may:

- i. Convey the general purport of any question to the witness;
- ii. Inform the court that the witness is fatigued or stressed; and
- iii. Request for a recess.⁹⁰

85 Independent Medico-Legal Unit Traumatic Experiences and Victimisation among People with Mental and or Psychosocial Disabilities in Kenyan Public Hospitals (Nairobi, Independent Medico-Legal Unit 2012).

86 Priscila Rodríguez et al supra 6.

87 Human Rights Council, 22nd Session, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf accessed 12 December 2020.

88 Prevention of Torture Act No. 12 of 2017 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202017>> accessed 3 November 2020.

89 Ibid Section 16.

90 Ibid.

The Act also enjoins the court to have regard for a witness's circumstances even as it oversees the roles of an intermediary, including having regard for the witness's views, the views of a knowledgeable person who has interacted with the witness, the need to protect the dignity of the witness and safety and protect the witness from trauma, and the need to ensure the witness's evidence may be tested effectively by a contesting party. A further way in which the Act seeks to protect vulnerable witnesses is its requirement that an accused person without legal representation should put questions to a vulnerable witness by addressing the court which then repeats the question to the victim.⁹¹ This particular provision should in fact have been a bolder protection of victims even where the accused has legal representation.

The most notable interventions seeking to protect persons with disabilities from torture or ill-treatment have been spearheaded by the courts. This has been particularly the case in relation to persons with psychosocial disabilities and intellectual disabilities. In 2018, the High Court declared Section 166 of the Criminal Procedure Code (CPC) unconstitutional in *Republic v Som*.⁹² Section 166 of the CPC provides that where a court finds an accused guilty but insane, the convict shall be detained in a mental hospital, prison or other institution at the President's pleasure until such time as the President decides to discharge or otherwise deal with the detainee. The effect of this provision is to cede sentencing discretion from the courts to the President who is left to determine the conditions under which a convict deemed insane would either serve sentence in a mental institution or prison or whether the convict would be discharged. Earlier, in 2016, the High Court declared Section 167 of the CPC unconstitutional in *Hassan Hussein Yusuf v Republic*.⁹³ Section 167 of the CPC provides that a person with intellectual disability (what the provision refers to as an 'accused (who) though not insane, cannot be made to understand the proceedings') shall, if convicted, be detained during the President's pleasure. The High Court determined thus, in the words of Kiarie Waweru Kiarie (J):

*A sick person's place is at the hospital and not in prison. I find section 167 of the Criminal Procedure code discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. This offends articles 25 and 29 (f) of the Constitution... It is my opinion that keeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment.*⁹⁴

Following on these decisions, the current approach by courts is to substitute indeterminate sentences with determinate sentences which may then be served while the convict is receiving treatment in a mental hospital.⁹⁵

91 Ibid.

92 *Republic v Som*, High Court at Kisumu (2018 eKLR <<http://kenyalaw.org/caselaw/cases/view/152606/>> accessed 3 November 2020.

93 *Hassan Hussein Yusuf v Republic*, High Court of Kenya at Meru (2016) eKLR <<http://kenyalaw.org/caselaw/cases/view/121892/>> accessed 12 November 2020.

94 Ibid.

95 For example see *Stephen Mwangi Maina v Republic*, High Court of Kenya at Embu (2020) eKLR <http://kenyalaw.org/caselaw/cases/view/199475/> accessed 9 November 2020.

Finally, the High Court has determined that torture may happen to persons with disabilities in faith-based settings. In *Rose Ajwang' and KNCHR versus Holy Ghost Coptic Church and others*,⁹⁶ a student with psychosocial disability was taken by his father to a Coptic church for faith healing where he was detained for 25 months. The Court determined that the student's confinement violated his right to be free from psychological torture since the confinement meant he could not sit for his Kenya Certificate of Secondary Examination. The Court also found that the confinement violated the student's right to education and his right to movement.

In summation, realisation of the right of persons with disabilities to be free from torture or ill-treatment has received valuable legislative and judicial leverage. This requires to be sustained moving forwards particularly in relation to persons with psychosocial disabilities and intellectual disabilities who have faced peculiar forms of medicalised and legalised torture. This right also coincides with other rights and interventions to be discussed covering matters such as access to justice and legal capacity.

4.3 Freedom of expression and access to information

Article 33 of the Constitution guarantees every person the right to freedom of expression. Article 35 guarantees every citizen the right to access information held by the State, and information held by another person and required for the exercise or protection of any right or fundamental freedom. Further, Article 35 guarantees every person the right to the correction or deletion of untrue or misleading information that affects the person. It also obligates Kenya to publish and publicise any important information affecting the nation. The CRPD in Article 21 obligates Kenya to '... take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice ...'⁹⁷

Manifestations of violations and abuses of the right to freedom of expression and access to information for persons with disabilities were highlighted in a study undertaken by Article 19 Eastern Africa on the implementation of Article 21 of the CRPD which made a number of findings. The study⁹⁸ found that:

- i. Persons with disabilities were not able to effectively participate in decision making and policy development processes due to lack of access to information.
- ii. Although devolution was meant to bring government closer to citizens, persons with disabilities did not effectively participate in civil society and governance issues because county governments had largely failed to put in place structures that would ensure that persons with disabilities had access to information.

⁹⁶ *Rose Ajwang' and KNCHR v Holy Ghost Coptic Church and others*, High Court at Kisumu (2020) eKLR <<http://kenyalaw.org/caselaw/cases/view/202305>> accessed 9 December 2020.

⁹⁷ For authoritative guidance on the rights to freedom of expression and access to information, see Declaration on Freedom of Expression and Access to Information in Africa, adopted by the African Commission on Human and Peoples' Rights in 2019 <<https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia.>> accessed 12 November 2020.

⁹⁸ Article 19 Eastern Africa Closing the Gap in Civic Participation for Persons with Disabilities in Kenya: A National Level Analysis Concerning the Implementation of Article 21 of the Convention on the Rights of Persons with Disabilities (Nairobi, Article 19 Eastern Africa 2017).

- iii. Persons with disabilities were hindered from holding government to account on issues of public finance because the Integrated Financial Management System (IFMIS) was accessible only to those with requisite Alternative and Augmentative Communication software.
- iv. Mass media and public broadcasters were not fully accessible to persons with different kinds of disabilities. Print media was not accessible for visually impaired persons; and online media was accessible to only those with access to computers. The study found that of over 16 television stations whose programming included regular newscasts, only six provided Sign Language insets during newscasts, with the rest using subtitles whose reliability was doubtful. Indeed, we should state that even where Sign Language interpretation is availed, it is limited to prime newscasts exclusive of most other programming, and it is projected on a small part of the screen, making it difficult for users.
- v. Consumers with disabilities were not enabled to access information on products and services, or facilitated to provide customer feedback.
- vi. Persons with disabilities were unable to access information regarding opportunities for employment within the public service as job opportunities published either in the print media or online were often not in accessible formats.
- vii. Finally, lack of access to information had impacted negatively on the right of access to justice by persons with disabilities. Courts did not readily provide Sign Language interpreters to assist those with hearing disabilities during court proceedings; and there were no physical guides to assist those with visual and other physical impairments around court precincts.⁹⁹

Kenya has taken a number of legislative and regulatory measures to enable persons with disabilities to access information. Section 5 of the Access to Information Act¹⁰⁰ obligates public entities in their dissemination of information to take 'into consideration the need to reach persons with disabilities.' Section 8 requires an information access officer of a public entity to ensure that a person with disability may request information 'in a manner that meets their needs.' Pursuant to Section 11, it is an offense for an information access officer to fail to take reasonable steps to make information available in a form that is capable of being read, viewed or heard by a requester with disability.

The Communications Authority of Kenya has established the Programming Code for Broadcasting Services in Kenya¹⁰¹ to set standards for the time and manner of programmes to be broadcast by licensed broadcasters. The Code establishes specific guidelines covering accessibility for persons with disabilities to programming. Broadcasters are required to take specific steps to include persons with disabilities in different programmes. They should air programmes focusing on persons with disabilities with a view to improving

⁹⁹ Ibid.

¹⁰⁰ Access to Information Act No. 31 of 2016 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2031%20of%202016> accessed 6 November 2020.

¹⁰¹ Programming Code for Broadcasting Services In Kenya, 2019 (Nairobi, Communications Authority of Kenya) <<https://ca.go.ke/wp-content/uploads/2019/03/Programming-Code-for-broadcasting-Services-in-Kenya-March-2019.pdf>> accessed 12 November 2020.

their general welfare and wellbeing. They should use closed captioning, subtitling and sign language inserts during news and current affairs programmes, emergency announcements and during programming of national interest such as national events. Broadcasters should avoid humour based on physical, mental or sensory disability, even where no malice is present. They should include reference to disability where relevant to the context, and gradually increase the amount of programming made accessible to persons with disabilities.¹⁰²

On a positive note, persons with disabilities successfully lobbied the State to support access to information for persons with print disabilities by becoming party to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled¹⁰³ (Marrakesh Treaty). The Marrakesh Treaty establishes normative standards on access to information for persons with print disabilities by requiring that limitations and exceptions in national copyright laws should grant persons with print disabilities access to copyrighted works. Moving forwards, it is imperative that Kenya domesticates and implements the Treaty including by amending its copyright legislation accordingly to remedy the book famine which persons with print disabilities continue to endure.

The courts have not made notable interventions towards ensuring the right to freedom of expression and access to information for persons with disabilities. Legacy media such as television broadcasters have indeed resisted broadening their reach notably to deaf persons. As a matter of fact, NTV appealed successfully on a technical ground¹⁰⁴ against a High Court decision which had found it liable for the indirect discrimination of deaf persons by refusing to institute Sign Language interpretation pursuant to Section 39 of the Persons with Disabilities Act. The Act obligates television stations to provide sign language insets or subtitles in newscasts, educational programmes and programmes covering events of national significance. In the High Court, NTV had made what in our view are quite implausible arguments. It contended that Section 39 of the Persons with Disabilities Act did not apply to it because it was a private company. It was also entitled to broadcast in any language of its choice and it could not be obligated by the State to broadcast in a particular language. Making it to do so amounted to control and interference which was prohibited in Article 34 of the Constitution. Finally, NTV argued that the State could not delegate its obligation of addressing the needs of vulnerable groups to private entities. The Court however determined that private entities too had obligations under the Constitution. Private entities had a duty to address the needs of vulnerable groups in relation to their services.¹⁰⁵

¹⁰² Ibid.

¹⁰³ Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, adopted on 27 June 2013; ratified by Kenya on 2 June 2017 <https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_30.html> accessed 12 December 2020.

¹⁰⁴ *Nation Media Group Limited v CRADLE – The Children’s Foundation suing through Geoffrey Maganya*, Court of Appeal of Kenya at Nairobi (2016) eKLR <<http://kenyalaw.org/caselaw/cases/view/117547>> accessed 6 November 2020.

The Court of Appeal found the High Court erred by converting the case from judicial review to a constitutional petition.

¹⁰⁵ *CRADLE – The Children’s Foundation v Nation Media Group Limited*, High Court of Kenya at Nairobi (2012) eKLR.

In summation, implementation of the right to freedom of expression requires continuing public-private partnerships and collaborations. While the State may establish minimum regulatory standards, both the public and private sectors must initiate reasonable levels of investments to enable persons with disabilities to access media. Disabled persons too have to take proactive advocacy measures to stake their presence in media. In this regard, the dramatic growth of social media and its diverse applications is providing persons with disabilities far greater opportunities than ever before of expression and communication devoid of mediation by third parties who tend to edit their content. Finally, in respect of access to information, implementation of the Access to Information Act remains largely unrealised. As the responsible authority, the Commission on Administrative Justice should initiate dialogue with the disability constituency towards establishing access to information protocols responsive of disability-specific concerns.

4.4 Participation in political and public life

Article 38 of the Constitution guarantees every citizen the freedom to make political choices, and the right to free, fair and regular elections. Furthermore, every adult citizen has the right to be registered as a voter, to vote by secret ballot in any election or referendum, and to be a candidate for public office and, if elected, to hold office. Article 54 (2) requires the State to progressively ensure that five percent of elective and appointive positions are held by persons with disabilities. Article 29 of the Convention obligates Kenya to ‘... guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others ...’

Multiple studies on the effectiveness of the political representation of persons with disabilities have been undertaken in the last decade,¹⁰⁶ and there is no space in this study to detail those assessments. What should be stated is that while persons with disabilities have gained significant political representation, the following grave concerns remain:

- i. Registration centres and polling stations remain inaccessible for persons with disabilities on account of architectural barriers such as stairs and narrow doorways.
- ii. Balloting continues to be undertaken using formats inaccessible to persons with different types of disabilities.
- iii. Disability-based voting restrictions also remain on the statute-books. These restrictions are predicated on the basis that persons with disabilities do not have legal capacity, which is the ability to hold rights and duties and to exercise those rights and duties.¹⁰⁷ This is how the Users and Survivors of Psychiatry in Kenya explain the dilemma:

¹⁰⁶ For example, United Disabled Persons of Kenya ‘From the Margins to the Centre: A Roadmap to the 2022 General Elections’ (Nairobi, 2018); United Disabled Persons of Kenya ‘Post-2017 General Elections Audit: Examining the Level of Disability Inclusion’ (Nairobi, April 2018); United Disabled Persons of Kenya ‘Towards the 2017 General Elections: Nuts and Bolts for Ensuring Effective Inclusion and Participation by Persons with Disabilities in Kenya’s Politics’ (Nairobi, 2013). Also see Lawrence Murugu Mute ‘Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities in Kenya’ *Thought and Practice* (Nairobi, Philosophical Association of Kenya 2 {2} 2011) 1-18 <<https://philpapers.org/rec/MUTSTG-2>> accessed 12 December 2020.

¹⁰⁷ For a perspective on barriers to political participation of persons with disabilities, see Helene Conbrinck ‘Everybody Counts: The Right to Vote of Persons with Psychosocial Disabilities in South Africa’ (2014) *ADRY* 4 <http://www.saflii.org/za/journals/ADRY/2014/4.html> accessed 13 October 2020.

... persons with psychosocial disabilities have the right to vote. Yet a lot of publicity communicates the message that persons of unsound mind cannot vote. Individuals with psychosocial disabilities have been discouraged from participating in the polls by such messaging.¹⁰⁸

The disability constituency is also greatly concerned that the number of legislators with disabilities has reduced in the National Assembly, Senate and County Assemblies during the 2017 general elections cycle as compared with the preceding 2013 elections cycle. After the 2013 general elections, the National Assembly had nine members with disabilities, being 2.6 percent of legislators in the Assembly. The Senate had three senators with disabilities, being 4.4 percent of the Senate.¹⁰⁹ Following the 2017 general elections, the National Assembly has only four legislators with disabilities, being 1.4 percent of the Assembly, while the Senate has two senators with disabilities, being 1.9 percent of the Senate.¹¹⁰ Following the 2017 general elections, the number of County Assemblies with no legislators with disabilities increased from four to seventeen.¹¹¹ During the past decade, Parliament has enacted or amended a number of laws on political participation and elections to conform to constitutional dictates. A number of inadequacies with these laws are apparent.

First, the Political Parties Act¹¹² provides for what it refers to as special interest groups, which include women, persons with disabilities, youth, ethnic minorities and marginalised communities. This phrasing is far too amorphous as a category with attendant legal obligations. It blurs the specific identities and consequent particular needs of persons with disabilities. While indeed the phrasing is derived from the Constitution, its effect is to exclude persons with disabilities who it is assumed are covered simply because they fall in the established category of special interest groups. Furthermore, distribution of the Political Parties Fund established in the Political Parties Act is not linked specifically enough to disaggregated-targets, notably tying a specific proportion of the Fund to the number of candidates elected to Parliament and County Assemblies.¹¹³

Second, the registration of voters under the Elections Act¹¹⁴ undertaken by the Independent Electoral and Boundaries Commission (IEBC) does not capture disability-disaggregated data on the register of voters. Furthermore, persons with different types of disabilities continue to find it relatively difficult to register as voters. The IEBC also quite often establishes registration centres in places which are not barrier-free for persons with mobility disabilities; or it fails to provide its officials with capacities and material to

108 Users and Survivors of Psychiatry in Kenya 'Ensuring a participatory and Inclusive Electoral Environment for Persons with Psychosocial Disabilities During the 2017 General Elections' (Nairobi, Users and Survivors of Psychiatry in Kenya 2017) <<https://www.uspkenya.org/wp-content/uploads/2017/08/Advisory-Brief-USP-K-on-Inclusive-Elections.pdf>> accessed 15 October 2020.

109 United Disabled Persons of Kenya 'Towards the 2017 General Elections: Nuts and Bolts for Ensuring Effective Inclusion and Participation by Persons with Disabilities in Kenya's Politics' (Nairobi, UDPK 2013).

110 United Disabled Persons of Kenya 'Post-2017 General Elections Audit: Examining the Level of Disability Inclusion' (Nairobi, UDPK April 2018).

111 Ibid.

112 Political Parties Act, No. 11 of 2011 <<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202011>> accessed 10 October 2020.

113 United Disabled Persons of Kenya 'Towards the 2017 General Elections: Nuts and Bolts for Ensuring Effective Inclusion and Participation by Persons with Disabilities in Kenya's Politics' supra.

114 Elections Act No. 24 of 2011 <<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202011>> accessed on 13 October 2020.

support the registration of persons with visual disabilities and hearing disabilities; or it fails to recognise the specific support that persons with intellectual and psychosocial disabilities require for their efficient registration as voters.¹¹⁵

Third, the nomination of party list members for election to the National Assembly, Senate and County Assemblies continues to raise concerns. Stakeholders have contended that the IEBC has failed to take effective regulatory charge of political parties as they prepare and place candidates on party lists. However, following the 2013 general elections, in *National Gender and Equality Commission v Independent Electoral and Boundaries Commission*,¹¹⁶ the High Court determined that the responsibility of the IEBC to conduct and supervise elections under Article 90 of the Constitution is limited to the allocation of party list seats from the lists submitted to it by political parties by ensuring that such lists comply with the Constitution, Elections Act and the regulations made thereunder and other relevant statutes. Hence, the law did not require the IEBC to oversee the actual nomination process of each political party. This understanding was reaffirmed after the 2017 elections to the effect that the role of adjudicating the nomination process for party lists candidates is vested exclusively in political parties and that the IEBC's role is to ensure compliance with relevant laws and regulations.¹¹⁷ Stakeholders have urged that the IEBC should be enabled to exercise the option of supervising nominations for party lists seats not unlike provisions in the Election Act which similarly empowers the IEBC to oversee the primaries of parties which so request.

Persons with disabilities have sought electoral legal redress from the courts with great gusto but yet with quite mixed results. Most recently, the High Court declined to make any orders that might have ensured better realisation of representation by persons with disabilities. The High Court determined that publication by the IEBC of the gazette notice listing party nominees to the Senate, National Assembly and County Assemblies has the same effect as the declaration by the IEBC of a candidate as having been elected. Regarding a declaration that legislative bodies which do not include legislators with disabilities should be deemed improperly constituted, the Court essentially determined that for a petition of this nature to succeed, a petitioner would have to enlist as parties to the petition all political parties as well as all members of the impugned legislative assemblies.¹¹⁸ The Court of Appeal also frowned on the IEBC's attempt after the 2013 polls to ensure that the two reserved seats for senators with disabilities would be allotted to candidates with different types of disabilities, determining that the IEBC in a closed list system has no power to rearrange party lists submitted to it by political parties or pick out from such lists a candidate apart from the candidate ranked highest by the political party.

¹¹⁵ Ibid.

¹¹⁶ *National Gender and Equality Commission v Independent Boundaries and Electoral Commission and Another*, High Court at Nairobi (2013) eKLR <<http://kenyalaw.org/caselaw/cases/view/87523>> accessed 12 December 2020.

¹¹⁷ *Aden Noor Ali v Independent Electoral and Boundaries Commission and 2 Others*, Court of Appeal at Nairobi (2018) eKLR <http://kenyalaw.org/caselaw/cases/view/154268/> accessed 14 October 2020.

¹¹⁸ *National Gender and Equality Commission v Independent Electoral and Boundaries Commission and 3 Others*, High Court at Nairobi (2018) eKLR <<http://kenyalaw.org/caselaw/cases/view/151912/>> accessed 21 November 2020.

The IEBC had argued that it had the power to pick candidates other than the prioritised ones for purposes such as achieving a diversity of disabilities for representation in the Senate. The IEBC's failing in this regard, as pointed out by the Court of Appeal, was that its guidelines were insufficient as a basis for ensuring diversity of representation of persons with disabilities in the Senate and other legislatures. While IEBC guidelines provided for regional and ethnic diversity, they did not provide for diversity on the basis of disability.¹¹⁹

Following the 2017 general elections, the IEBC successfully used its discretion to choose the first candidate on the Jubilee Party list who was male and the second listed candidate on the ODM Party list who was female to avoid a situation where the Senate's slate of legislators with disabilities would be exclusively male. In this instance, the High Court stated as follows:

... the 1st Respondent had a duty to take a decision in this matter. It was faced with two party lists that were valid and which listed a man in position one. It had to make a decision to start designating the one nominee from one party list and to start with the party list with majority seats was not irrational but was guided by belief that the party with majority seats takes priority over the other(s) given the formula in Regulation 56. ... the decision by the 1st Respondent to pick the first male candidate from the Jubilee party list and the second candidate, a female, from the ODM party list, is logical, practical and objective in the absence of any law that guides the manner of dealing with this type of situation.¹²⁰

Courts have declined to enforce claims for the appointment of persons with disabilities in county cabinet portfolios. In one instance, the High Court determined that Article 54 (2) of the Constitution establishes a principle on how to implement the five percent requirement and that the provision does not establish a right. The Court rather stressed it was incumbent on appointing authorities to take more positive steps to make persons with disabilities aware of advertisements for statutory positions for purposes of realising the five percent principle.¹²¹

A quite seminal disability-related decision declared as unconstitutional a provision which purported to allow political parties to nominate their losing Presidential and Deputy Presidential candidates into Parliament using party list seats in terms of Section 34 (9) of the Elections Act. Citing Article 97 (1) (c) of the Constitution which establishes special interest seats in the National Assembly, the Court of Appeal determined that the special interest groups provided for in Section 34 of the Act cover categories such as persons with disabilities, youth, minority ethnic groups and others:

... as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. ... The youth, persons with disabilities and workers clearly fall in the category

¹¹⁹ *Linnet Kemunto Nyakeriga and Another v Ben Njoroge and 2 Others*, Court of Appeal at Nairobi (2014) eKLR <http://kenyalaw.org/caselaw/cases/view/93687> accessed 21 November 2020.

¹²⁰ *Harold Kimuge Kipchumba v Independent Electoral and Boundaries Commission and Another*, High Court of Kenya at Nairobi (2017) eKLR <http://kenyalaw.org/caselaw/cases/view/147649> accessed 14 October 2020.

¹²¹ *Northern Nomadic Disabled Persons Organisation (NONDO) v Governor, County Government of Garissa and Another*, High Court at Garissa (2013) eKLR <http://kenyalaw.org/caselaw/cases/view/93578> accessed 9 November 2020.

of the marginalized, the disadvantaged and the vulnerable – those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed out of the centre and off the field unless special affirmative and protective measures be taken to aid them.¹²²

In other regards, courts have been ready to intervene where explicit provisions requiring the representation of persons with disabilities in public bodies have been violated. This was the case where a person with no disability was appointed to represent persons with disabilities in the Hamisi National Government Constituency Development Fund Committee constituted under the National Government Constituencies Development Fund Act.¹²³ The High Court has also made the finding that the differential treatment occasioned by amendments to the Kisii County Assembly Standing Orders that barred nominated members of county assemblies from ever becoming the heads of ward delegations violated constitutional provisions on equality and non-discrimination.¹²⁴

In summation, we highlight the High Court's erudite statement clarifying the implementation of Article 54 (2) of the Constitution which needs to be taken to heart by the disability constituency. This is what Mumbi (J) said:

... realization of the rights of persons with disabilities to participate in public affairs does not mean that every time a person with a disability is removed from an office, he must be replaced with another person with disability. ... such an approach would have the effect of limiting the participation of persons with disabilities, and in a sense, stereotyping certain jobs or positions as the only ones which persons with disabilities can handle. ... the proper approach should be to consider the entire spectrum of public appointive and elective positions on the basis of clear evidence and assess the participation of persons with disabilities holistically. ... it cannot be proper to assert that certain jobs or positions should be curved out or limited to persons with disabilities. What is important is to ensure that in the public service and other state organs, there is representation of persons with disabilities to meet or surpass the 5% provided for under the Constitution.¹²⁵

¹²² *Commission for Implementation of the Constitution v Attorney-General and 2 Others*, Court of Appeal at Nairobi (2013) eKLR <<http://kenyalaw.org/caselaw/cases/view/97844>> accessed 10 October 2020.

¹²³ *Victor Shiribwa Mwangi and 2 Others v National Government Constituencies Development Fund Board*, High Court at Kisumu (2016) eKLR <<http://kenyalaw.org/caselaw/cases/view/126368>> accessed 9 November 2020.

¹²⁴ *Karen Nyamoita Magara and 14 Others v Kisii County Assembly Services and 2 Others*, High Court of Kenya at Kisii (2019) eKLR <<http://kenyalaw.org/caselaw/cases/view/182133>> accessed 9 November 2020.

¹²⁵ *Abel Odhiambo Onyango v Cabinet Secretary Ministry of Health and 2 Others*, High Court of Kenya at Nairobi (2014) eKLR <http://kenyalaw.org/caselaw/cases/view/97430> accessed 10 November 2020.

4.5 Freedom of movement and residence

Article 39 of the Constitution establishes every person's right to freedom of movement as well as their right to leave Kenya. It also guarantees every citizen's right to enter, remain in and reside anywhere in Kenya. Article 18 of the CRPD obligates Kenya to '... recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence ...and to a nationality, on an equal basis with others ...'

Persons with disabilities continue to find difficulties in obtaining documentation of nationality such as identity cards. Adults with multiple disabilities face immense physical and social barriers which make it difficult for them to go to designated offices to apply for identity cards or indeed passports. A study undertaken by the National Gender and Equality Commission covering women, youth, persons with disabilities and marginalised groups determined that only 51.1 percent of persons with disabilities had an identity card. This had the consequent effect of leaving them facing adverse difficulties of registering to vote and participating in elections.¹²⁶ Persons with disabilities have also found it difficult to access the disability cards issued by the NCPD.¹²⁷

At the same time, persons with disabilities have been confined or shackled by members of their families for various reasons. In one malign instant, a 68-year-old person with mobility disability was rescued after being confined for five years in a room by his brother who was unhappy with the victim's decision to entrust his land to his daughter.¹²⁸ We have already highlighted the instance where a student was confined in a church with his father's acquiescence for 25 months purportedly so that he could be healed from his psychosocial disability through prayer.¹²⁹ More benign situations also arise where unwitting circumstances force a parent to leave her disabled child in their locked home for long hours while she is out looking for food.

Yet still, persons with disabilities have been stopped from exercising their right to movement by overzealous airline personnel who either find it inconvenient that a person with mobility disability should embark onto their planes or make traveling with an assistant a condition-precedent for a person with disability to fly on their airline. In one instance, an airline pilot reportedly stopped a woman with mobility disability from boarding the plane because she was taking too long to climb the stairs.¹³⁰ In another instance, a passenger with disability was stopped from boarding a plane to the United States, with one official telling him that "We don't have a provision for a disabled person who is traveling alone."¹³¹

No specific policy or legislative interventions have been made in respect of the freedom of movement of persons with disabilities.

126 National Gender and Equality Commission *Status of Equality and Inclusion in Kenya* (Nairobi, National Gender and Equality Commission 2016) <https://www.ngeckkenya.org/Downloads/Status%20of%20Equality%20and%20Inclusion%20in%20Kenya.pdf> accessed 15 October 2020.

127 Mathare Social Justice Centre *Tuna Haki Pia: Disability Justice for Nairobi's Informal Settlements* (Nairobi, 2020). <https://www.matharesocialjustice.org/uncategorized/tuna-haki-pia-report-disability-justice-for-nairobi-informal-settlements/> accessed 18 November 2020.

128 'Five Years in Darkness: MP Sankok, Cops Rescue Disabled Man Caged by Brother Over Land' <<https://www.the-star.co.ke/news/2020-08-30-mp-sankok-cops-rescue-disabled-man-caged-by-brother-over-land/>> accessed 21 November 2020.

129 *Rose Ajwang' and KNCHR v Holy Ghost Coptic Church and others*, High Court at Kisumu (2020) eKLR <http://kenyalaw.org/caselaw/cases/view/202305/> accessed 9 December 2020.

130 'Kenya: Disabled Passenger Alleges Discrimination by Fly540 Personnel; Airline Refutes Allegations' <<https://www.business-humanrights.org/en/latest-news/kenya-disabled-passenger-alleges-discrimination-by-fly540-personnel-airline-refutes-allegations/>> accessed 12 November 2020.

131 'Kenyan Wheelchair User Abandoned by Ethiopian Airlines at JKIA' BBC, August 29 2019 <<https://www.standardmedia.co.ke/business/article/2001339894/airline-flies-into-row-over-rights>> accessed 12 November 2020.

4.6 Work

Article 30 of the Constitution guarantees to every person the right not to be held in slavery or servitude, and the right not to be required to perform forced labour. This provision is magnified in Article 28 (2) of the CRPD which requires Kenya to ‘... ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.’ At the same time, Article 41 of the Constitution guarantees every worker the right to fair remuneration, to reasonable working conditions, to form, join or participate in the affairs of a trade union, and to go on strike. This provision is affirmed for persons with disabilities by Article 27 of the CRPD which proceeds to obligate Kenya to ‘... safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation ...’

Persons with disabilities continue to face stiff difficulties in getting gainful employment in the public as well as private sectors. Public institutions with best percentage employment for persons with disabilities average only around 1 percent staff with disabilities, and public employers are therefore far from attaining the five percent employment milestone for persons with disabilities anticipated in Article 54 (2) of the Constitution.¹³² The private sector contends that persons with disabilities may not have the labour market skills which the private sector requires, and that basic and tertiary education should be reframed to provide them with requisite skillsets. It also calls for a supportive policy and legal environment where benefits are provided to employees with disabilities to cover their extra costs.¹³³ Persons with disabilities in formal employment now enjoy standardised entitlements covering tax exemptions on a percentage of their income and allowances to pay for assistive support. Some employers also provide reasonable accommodations, for example in the instance of the Judiciary which during the period 2018-2019 provided such staff with wheelchairs, a white-cane, hearing aid and a laptop with JAWS software.¹³⁴ The Salaries and Remuneration Commission also provides directions on payable allowances for personal guides of employees with disabilities.¹³⁵ Persons with disabilities also endeavour to undertake businesses in the informal sector which, however, receive little recognition and support from established government structures. Of note though is the Access to Government Procurement Opportunities Programme which in terms of Section 53 of the Public Procurement and Asset Disposal Act¹³⁶ reserves at least 30 percent of public procurements for women, youth and persons with disabilities. However, concerns remain that persons with disabilities do not in fact benefit from the reserved procurement quota which is ring-fenced at 2 percent.¹³⁷

¹³² United Disabled Persons of Kenya, Webinar Report on Reflections on a Decade of Implementation of the Constitution of Kenya for Persons with Disabilities, 26 August 2020.

¹³³ Jacqueline Mugo ‘Disability Shouldn’t Lock One Out’ *Nation* (November 11 2020) <<https://nation.africa/kenya/blogs-opinion/opinion/disability-shouldn-t-lock-one-out--3018036>> accessed 12 November 2020.

¹³⁴ State of the Judiciary and Administration of Justice Report 2018-2019 (Nairobi, Judiciary of Kenya) <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> accessed 18 November 2020.

¹³⁵ For example communication from the Salaries and Remuneration Commission to State bodies and departments SRC/TS/NCPWD/3/18 (80) of 26 August 2019.

¹³⁶ Public Procurement and Asset Disposal Act No. 33 of 2015 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2033%20of%202015> accessed 18 November 2020.

¹³⁷ Statement by Abdul Ali Bahari Jillo, Chief Administrative Secretary, Ministry of Labour and Social Protection of the Republic of Kenya, during the 12th Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, June 11-13 2019, file with author.

The constitutional prerogative that employers should progressively ensure that five percent of their workforces are persons with disabilities is not translated into policy in the National Employment Policy.¹³⁸

The philosophy that drives the Policy continues to bear unhelpful charity overtones, for example when it declaims the need for ‘... an effective and integrated social protection system to leverage their (special interests groups) likely burden on the active segment of the labour force.’¹³⁹ Indeed, deep policy gaps remain, covering unclear budget allocations to guide work and employment strategies for persons with disabilities, ensuring physical and information accessibility in the workplace, and feeble enforcement of policies.¹⁴⁰

In March 2018, the Public Service Commission issued a draft Disability Policy and Guidelines for the Public Service. It is however not certain if this Policy has been adopted. In fact, a far better instrument was adopted by the Public Service Commission in 2010, a few months before the Constitution was promulgated. The Public Service Commission Code of Practice on Mainstreaming Disability¹⁴¹ provides guidelines towards mainstreaming disability in the Public Service. The Code understands mainstreaming as ‘... a strategy through which concerns, needs and experiences of persons with disabilities are made an integral part or dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that persons with disabilities benefit equally and inequality is not perpetuated’.¹⁴²

The Policy’s specific aims include:

- i. Ensuring persons with disabilities have equal opportunities in the Public Service;
- ii. Improving employment prospects in the Public Service for persons with disabilities by facilitating recruitment, return to work, job retention and opportunities for advancement;
- iii. Promoting a safe, accessible and healthy workplace conducive to the needs of persons with disabilities;
- iv. Maximising the contributions which public officers with disabilities can make to the Government;
- v. Facilitating persons with disabilities including learners with special educational needs to access the workplace in the Public Service for the purpose of internship and attachment; and
- vi. Ensuring that the needs of persons with disabilities are catered for in the discharge of human resource functions and management in the public service.

138 Republic of Kenya, Sessional Paper No. 4 of 2013 on Employment Policy and Strategy for Kenya (Nairobi, Ministry of Labour, Social Security and Services) <<https://nea.go.ke/web/wp-content/uploads/2020/03/SESSIONAL-PAPER-NO-4-ON-EMPLOYMENT-POLICY-AND-STRATEGY-FOR-KENYA.pdf>> accessed 12 November 2020.

139 Ibid.

140 United Disabled Persons of Kenya ‘Labour Market Situation in Kenya: Promoting Right to Work and Employment for Persons with Disabilities’ (Nairobi, Bridging the Gap Policy Brief 004/2017) <https://www.udpkenya.or.ke/wp-content/uploads/2020/05/Policy-Brief-on-Work-and-Employment_21.pdf> accessed 29 October 2020.

141 Republic of Kenya, Public Service Commission Code of Practice on Mainstreaming Disability, adopted on 10 March 2010 <https://www.health.go.ke/wp-content/uploads/2015/09/psck_guidelines_on_mainstreaming_the_rights_of_persons_with_disabilities.pdf> accessed 24 October 2020.

142 Ibid.

The Code establishes quite progressive guidelines covering recruitment, interviewing and testing, orientation and inducting, work experience and trials, training, job retention, accessibility and safety, workplace conduct, deployment, internship and attachment, confidentiality, and etiquette. Preparation of the Code quite clearly benefited from the CRPD's definitions and principles as well as its Article 27 provisions on the right to work. It for the first time incorporates essential disability principles such as reasonable accommodation which the Code defines as: '... appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer, and in which case, the burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of a public service entity'.

Courts have been steadfast in protecting the right to work for employees with disabilities and have established important jurisprudence in this regard. In *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya*,¹⁴³ the Industrial Court used the Convention to reach the conclusion that the government had failed to enable the claimants to exercise their right to work and employment.¹⁴⁴ The Court noted that the Convention is part of the laws of Kenya under Article 2 [6] of the Constitution and Kenya therefore recognises the right of Persons with Disabilities to work. The Court then proceeded to state the following:

*State Parties have the obligation to safeguard and promote the realization of the right to work of Persons with Disabilities... Article 27 demands that the State shall promote employment opportunities and career advancement for Persons with Disabilities in the labour market, as well as assist Persons with Disabilities in finding, obtaining, maintaining and returning to employment... The State is required to achieve these objectives through legislation and other measures. The Convention is clear the State must promote job retention and return to work programs for Persons with Disabilities.*¹⁴⁵

This decision was however overturned on appeal on the technical basis that the High Court had established legal obligations on the Government when it had in fact not been a party to the claim.¹⁴⁶

More success has however been realised in the courts. The Employment and Labour Relations Court has ordered the reengagement of a claimant who had been retired on medical grounds by the National Intelligence Service on account of mobility disability,¹⁴⁷ and determined that retiring a police officer with disability on medical grounds amounted to discrimination since the claimant could have been redeployed to perform

¹⁴³ *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya*, Industrial Court at Mombasa [2015] eKLR <<http://kenyalaw.org/caselaw/cases/view/107143/>> accessed 13 December 2020.

¹⁴⁴ Elizabeth Kamundia 'Kenya' in Lisa Waddington & Anna Lawson (eds) *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (Oxford, Oxford University Press 2018).

¹⁴⁵ *Supra Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya*, paras 28, 29, 30 and 32.

¹⁴⁶ *Association for the Physically Disabled of Kenya v Kenya Union of Domestic, Hotels, Educational, Hospital and Allied Workers Union and Another*, Court of Appeal at Mombasa (2018) eKLR <<http://kenyalaw.org/caselaw/cases/view/152693/>> accessed 13 December 2020.

¹⁴⁷ *Samuel Langat Tanui v Director-General National Intelligence Service*, Employment and Labour Relations Court at Eldoret (2017) eKLR <<http://kenyalaw.org/caselaw/cases/view/145156/>> accessed 6 November 2020.

other duties.¹⁴⁸ The High Court has also made an award against the Teachers Service Commission for retiring a teacher with visual disability at 55 years instead of 60 years as then required in the Persons with Disabilities Act.¹⁴⁹ It has also stopped the Public Service Commission from retiring a claimant at 60 years who on account of her disability was entitled to retire at 65 years.¹⁵⁰ Further, in a claim where the employer declined to allow an employee with visual disability the use of assistive technology, the Court affirmed in line with Article 5 of the CRPD that denial of reasonable accommodation for an employee with disability amounts to discrimination. The Court's opinion indeed was that the achievement of reasonable accommodation entailed modification or adaptation of the general employer's operational requirements, systems and policies, over and above the adaptation of the devices, tools, equipment and other physical infrastructure of the work environment:

It was not open for an employer to invoke the general employer's operational requirements, systems or policies as a ground for denying the requested reasonable accommodation without an established consideration of possible modification of such general employer's operational requirements, systems or policies, and then, without establishing a reasonable justification or hardship that would make the adaptation inimical in the circumstances of the case.¹⁵¹

IN summation, the public and private sectors should have better acknowledgement and implementation of the principle of reasonable accommodation for employees with disabilities which in turn will raise productivity while also ensuring the livelihoods of persons with disabilities and their communities.

4.7 Highest attainable standard of health

Article 43 of the Constitution guarantees every person the right to the highest attainable standard of health. This right includes the right to health care services, including reproductive health care. Article 25 of the CRPD obligates Kenya to '... take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.'

A sexual and reproductive health rights inquiry undertaken by KNCHR found that persons with disabilities faced massive stigma and discrimination when they sought to access sexual and reproductive health services. Women with disabilities who sought sexual and reproductive health services were stigmatised as asexual, unmarriageable and ill-able to take care of children and manage a home.

148 *Duncan Otieno Waga v Attorney-General*, Industrial Court of Kenya at Mombasa (2014) eKLR <<http://kenyalaw.org/caselaw/cases/view/97123>> accessed 10 November 2020.

Also see *Anthony Kipkorir Sang v Attorney-General*, Industrial Court of Kenya at Nairobi (2014) eKLR <<http://kenyalaw.org/caselaw/cases/view/94831>> accessed 10 November 2020; *Frederick Gitau Kimani v Attorney-General and 2 Others*, High Court of Kenya at Nairobi (2012) eKLR <<http://kenyalaw.org/caselaw/cases/view/81883>> accessed 20 November 2020.

149 *Silas Rukungu Karanja v Teachers Service Commission*, Industrial Court of Kenya (2012) eKLR <<http://kenyalaw.org/caselaw/cases/view/86746>> accessed 10 November 2020.

150 *Mary Kerubo Osoro v Public Service Commission*, Employment and Labour Relations Court at Nairobi (2017) eKLR <<http://kenyalaw.org/caselaw/cases/view/140722>> accessed 6 November 2020.

151 *Juliet Mwangeli Muema v Smollan Kenya Limited*, Employment and Labour Relations Court at Nairobi (2019) eKLR <<http://kenyalaw.org/caselaw/cases/view/170665>> accessed 7 November 2020.

Pregnant women with physical disabilities faced abuse from health providers who showed 'sympathy' with the women's 'double tragedy' of being disabled and pregnant. The inquiry also found that health workers performed medical procedures on persons with disabilities without first obtaining their informed consent. Furthermore, sexual harassment had been perpetrated on them by health workers. Deaf patients complained they had been slapped by nurses in the labour wards because of not following instructions. Further, persons with physical disabilities found it difficult to access health facilities: ramps were either absent or unsuitable; the distances between service areas within health facilities were also huge; and they also had to contend with high examination couches and delivery beds. At the same time, persons who were blind, deaf or with psychosocial disabilities faced serious challenges in accessing information. Health providers did not have information in accessible formats and indeed they did not even have sign language interpreters. No sexual and reproductive health programmes focused on persons with disabilities specifically tackling issues such as sexually transmitted diseases, family planning and maternal health. Finally, despite the reality that people with disabilities also tend to be extremely poor, no concerted measures were in place to reduce the cost of health services for persons with disabilities.¹⁵²

A human rights audit of mental health care undertaken by KNCHR identified as inhibitions entrenched stigma and discrimination against mental illness and persons with mental disorders as well as low levels of awareness on mental health. The mental health sector was severely neglected and persons with mental disorders were abandoned in mental health facilities by family, friends and the community. Basic mental health services, facilities and goods were unavailable or inaccessible to the majority of the population. Failure to effectively integrate mental health in community and primary health care had led to huge gaps in the standards of care for mental health compared to physical health.¹⁵³ This assessment was confirmed by an audit on mental health undertaken by the Auditor-General which, among other things, found that as of December 2014, mental healthcare services were available only in 10 percent of the total facilities in level 4 and above (29 of 284 hospitals) and 0.7 percent of 3,956 government-owned health facilities. Hence these services were not available to the majority of Kenyans.¹⁵⁴

This was the context within which the Mental Health Taskforce was constituted in December 2019, following a Cabinet directive, with its primary mandate being to study the status of mental health in Kenya, related determinants and contributing risk factors to ill mental health, and recommend transformative solutions to reform mental health systems.¹⁵⁵ The Taskforce accordingly made a raft of recommendations to address the country's mental health concerns covering administrative as well as reforms to the criminal justice system.

¹⁵² Kenya National Commission on Human Rights *Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality?* (Nairobi, Kenya National Commission on Human Rights 2012) <http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf> accessed 30 October 2020.

Also see Lawrence Mute 'Persons with Disabilities Too Have Sexual and Reproductive Rights' (*The Standard* June 2 2012) <<https://www.standardmedia.co.ke/commentary/article/2000059159/persons-with-disabilities-too-have-sexual-reproductive-health-rights>> accessed 30 October 2020.

¹⁵³ Kenya National Commission on Human Rights *Silenced Minds: The Systemic Neglect of the Mental Health System in Kenya* (Nairobi, Kenya National Commission on Human Rights 2011) https://www.knchr.org/Portals/0/Disability%20Publications/Silenced%20Minds_The%20Systemic%20Neglect%20of%20Mental%20Health%20System%20in%20Kenya_2011.pdf?ver=2018-06-03-175158-530 accessed 28 October 2020.

¹⁵⁴ Auditor-General, Performance Audit Report on Provision of Mental Health Care in Kenya (Nairobi, 27 February 2018).

¹⁵⁵ Ministry of Health, The taskforce on mental health <<https://mental.health.go.ke/mental-health-taskforce/>> accessed 9 October 2020.

It also called for investments to eliminate the dehumanising facilities that are a feature of mental health institutions such as Mathare Referral Hospital.¹⁵⁶ It should however be noted that the recommendations made by the Taskforce still fall short of the necessary minimum standards for ensuring mental health. In particular, it has been pointed out that they do not address the widespread incarceration or deprivation of liberty of persons with mental illness or persons with psychosocial or intellectual disabilities. Furthermore, the recommendations include dubious proposals such as the establishment of mental health courts to screen and link offenders with mental health conditions to care.¹⁵⁷ The effect of establishing mental health courts would be to entrench stigma and discrimination on persons with mental health conditions or those with psychosocial or intellectual disabilities. Indeed, such specialised courts would propagate differentiated treatment in disregard of the principle that all persons should be treated equally under the same laws and processes. Practice in such courts might even deemphasise due process for an accused in favour of providing access to or forcing treatment.¹⁵⁸

The Kenya Health Policy, 2014- 2030, addresses disability-adjusted life-years and the causes of disability, but neither specifically establishes disability stakeholder engagements on policy-implementation nor establishes enforcement and compliance procedures to ensure persons with disabilities enjoy the right to the highest attainable standard of health.¹⁵⁹ It has indeed been recommended that the National Health Implementation Plan should provide a framework for addressing the health concerns of persons with disabilities which should be matched with actual implementation and resources. Enforcement and compliance mechanisms should ensure persons with disabilities are provided with appropriate health care services.¹⁶⁰

The Health Act¹⁶¹ frames the State's duty of respecting, promoting and fulfilling the right to the highest attainable standard of health as including realization of the health related rights and interests of vulnerable groups within society, including persons with disabilities.¹⁶² The Act anticipates the establishment of universal health coverage, and it enjoins the Ministry of Health to establish a collaborative framework for securing healthcare for vulnerable groups and indigents.¹⁶³ The Act however does not address specific concerns of persons with disabilities, including free health services to cover disability-related aspects of their health, thereby broadening coverage from persons with albinism who already access free health-care specific to their disability.

156 Taskforce on Mental Health in Kenya, *Mental Health and Wellbeing: Towards Happiness and National Prosperity* (Nairobi, Ministry of Health 2020) <<https://mental.health.go.ke/download/mental-health-and-wellbeing-towards-happiness-national-prosperity-a-report-by-the-taskforce-on-mental-health-in-kenya/>> accessed 12 November 2020.

157 Civil Society Stakeholders' Forum on Mental Health 'Memorandum on the Report of the Ministry of Health "Mental Health and Wellbeing: Towards Happiness and National Prosperity, 2020"' <https://www.knchr.org/Portals/0/Stakeholders%20Memorandum%20on%20Mental%20Health%20Taskforce%20Report.pdf> accessed 28 October 2020.

158 For a critique of the use of mental health courts in the United States of America, see E. Lea Johnston 'Theorising Mental Health Courts', 89 Wash. U. L. Rev. 519 (2012) https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1014&context=law_lawreview accessed 12 December 2020.

159 United Disabled Persons of Kenya 'An Analysis of Health Policies and Persons with Disabilities in Kenya' (Nairobi, Bridging the Gap Policy Brief 003/2017) <https://www.udpkenya.or.ke/wp-content/uploads/2020/05/Policy-Brief-on-Health_11.pdf> accessed 29 October 2020.

160 Ibid.

161 Health Act No. 21 of 2017 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2021%20of%202017>> accessed 12 November 2020.

162 Ibid Section 4.

163 Ibid Section 87.

Finally, universal health coverage is one of the national priorities established by the Government. This initiative, which was piloted in four counties from 2018 to 2019, aims to provide quality health services to all people where and when they need them without facing financial adversity. The Government's key policy instrument in this regard however does not address the specific needs of persons with disabilities.¹⁶⁴ The initiative, whose nationwide coverage was launched in 2020,¹⁶⁵ should take better account of the needs of persons with disabilities.

4.8 Adequate standard of living and social protection

Article 43 of the Constitution guarantees every person the right to accessible and adequate housing, and to reasonable standards of sanitation. Further, every person has the right to be free from hunger, and to have adequate food of acceptable quality. As well, every person has the right to clean and safe water in adequate quantities. Finally, Article 43 of the Constitution establishes every person's right to social security. More specifically on disability, Article 28 of the CRPD enjoins Kenya to: '... recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and ... (to) take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.' This article frames the right to social security more broadly by obligating Kenya to '... recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and ... (to) take appropriate steps to safeguard and promote the realization of this right ...'

The Social Protection Policy¹⁶⁶ defines social protection as '... policies and actions, including legislative measures, that enhance the capacity of and opportunities for the poor and vulnerable to improve and sustain their lives, livelihoods, and welfare, that enable income-earners and their dependants to maintain a reasonable level of income through decent work, and that ensure access to affordable healthcare, social security, and social assistance.' The overarching goal of social protection is to ensure that all Kenyans live in dignity and exploit their human capabilities for their own social and economic development.¹⁶⁷ In the short-term, the National Social Protection Policy¹⁶⁸ seeks to provide a basic minimum social protection package, whose elements include enabling persons with disabilities to enjoy income security through pensions and transfers granted at least up to the poverty line level.

164 Sessional Paper No. 7 of 2012 on the Policy on Universal Healthcare Coverage in Kenya, (Nairobi, Ministry of Medical Services 2012) http://publications.universalhealth2030.org/uploads/sessional_paper_no_7_-_universal_coverage.pdf accessed 16 November 2020.

165 Amos Otara 'It is not Too Late to Review Universal Health Coverage' *Nation* November 6 2020 <https://nation.africa/kenya/blogs-opinion/blogs/it-is-not-too-late-to-review-universal-health-coverage-2731936> accessed 16 November 2020.

166 Republic of Kenya, Social Protection Policy, 2011 (Nairobi, Ministry of Gender, Children and Social Development) <http://www.africanchildforum.org/cfr/policy%20per%20country/kenya/kenya_socialprot_2011_en.pdf> accessed 30 October 2020.

167 Ibid.

168 Ibid.

The Social Assistance Act¹⁶⁹ establishes mechanisms for rendering social assistance to persons in need who under the Act include persons with disabilities.¹⁷⁰ They are eligible for assistance under the Act:

- i. If ‘... they suffer from severe mental or physical disability’;
- ii. Their disability renders them incapable of catering for their basic needs; and
- iii. They have no known source of income.¹⁷¹

The Government however seems determined not to implement the Act and it has indeed initiated a bill to repeal the statute. The Social Assistance (Repeal) Bill¹⁷² purports that the Act’s onerous functions can be performed under the Public Finance Management Act.¹⁷³ Stakeholders have remained extremely concerned by the arising assumption that matters of social assistance are centrally about financing when in fact finances simply facilitate the far more critical matter of rendering social support. The Government is intent on using the behemoth Public Finance Management Act to oversee various funds, in this instance the Public Finance Management (Social Assistance Fund).

A study undertaken for Social Action Protection Forum covering cash transfers for persons with severe disabilities found that the quota system used to allocate beneficiaries across constituencies results in inclusion as well as exclusion errors, while the community-based targeting mechanism introduces biases, leading to inefficiencies and dilution of the social protection objectives of the Programme.¹⁷⁴ Clearly, disqualifying an applicant with disability from social assistance on the basis they had an income failed to appreciate the fact that income could be inadequate in relation to a person’s disability. The study indeed recommended that the Programme should be reoriented and broadened. Inclusion criteria should be reviewed entailing the definition of severe disability. The definition and classification of poverty should also be reviewed for purposes of refining inclusion and exclusion criteria. Geographic targeting using constituency-derived quotas should be reviewed, and the number of beneficiaries should be determined based on more specific parameters such as the population of persons with disabilities, poverty levels and levels of need. Cash-transfer amounts should take better account of inflation and additional disability related costs.¹⁷⁵

Indeed, the Committee on the Rights of Persons with Disabilities urged Kenya to take steps to extend the coverage of social protection schemes beyond persons with severe disabilities to ensure an adequate standard of living to all persons with disabilities who are not currently eligible for social protection schemes, and ensure that support services and social assistance for persons with disabilities are distributed on a regular basis and that progress in the living conditions of persons with disabilities is monitored. Kenya was

169 Social Assistance Act No. 24 of 2013 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.%2024%20OF%202013>> accessed 12 November 2020.

170 Ibid Section 17.

171 Ibid Section 23.

172 Social Assistance (Repeal) Bill, 2020 <<http://www.parliament.go.ke/sites/default/files/2020-06/Social%20Assistance%20%28Repeal%29%20Bill%2C%202020.pdf>> accessed 12 November 2020.

173 Public Finance Management Act No. 18 of 2012 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2018%20of%202012>> accessed 12 November 2020.

174 John Mutua and Job Orina ‘Review of the Persons with Severe Disability Cash Transfer Targeting Approach: Is Geographic Targeting Appropriate in a Country with High Poverty and Inequality Levels?’ (Nairobi, Social Protection Actors Forum 2015).

175 Ibid. Also see Krystle Kabare ‘Social Protection and Disability in Kenya’ Working Paper October 2018 <<https://www.developmentpathways.co.uk/wp-content/uploads/2018/10/Disability-Report-Kenya.pdf>> accessed 12 December 2020.

also urged to expand the coverage of the National Development Fund for Persons with Disabilities and facilitate the involvement of organisations of persons with disabilities in the formulation of their goals and priorities.¹⁷⁶

Concerns also remain on whether cash transfers for persons with disabilities should target households or whether they should target individuals. In this last regard, it is notable that the tax exemption programme initiated for persons with disabilities pursuant to the Persons with Disabilities Act¹⁷⁷ is effective only in respect of persons who are employed. This is despite the provisions of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations which set out support and reliefs for persons with disabilities pursuant to which a person with disability may apply for and obtain support and relief for:

- i. Purchase and repair of personal technical auxiliary devices;
- ii. Purchase and adaptation of personal vehicle and adaptation of parking place;
- iii. Tax relief for import or local purchase of a personal vehicle;
- iv. Restructuring of the home; and
- v. Escorts and interpreters for people with impaired sight and hearing.¹⁷⁸

Apart from the short-term interventions already discussed, it should be stressed that the Social Protection Policy also anticipates longer-term measures that may impact the lives of persons with disabilities, covering interventions such as:

- i. Appraising the existing mandates requiring Government departments to provide free services and fee waivers to specific groups and measures to ensure these mandates are being put into practice in the provision of education, health and social services to specific groups;
- ii. Encouraging and supporting informal schemes that enhance welfare;
- iii. Investigating ways to extend social security and health insurance coverage to the self- and informally employed;
- iv. Introducing targeted subsidies to those unable to contribute to formal insurance schemes;
- v. Strengthening the provision of social welfare services to the poorest and most vulnerable;
- vi. Establishing employment guarantee schemes for the poorest families;
- vii. Providing safety nets and conditional transfers to those who remain unsupported and unemployed; and
- viii. Exploring the possibility of establishing broader child and/or family benefits.¹⁷⁹

In summation, it is imperative that the social protection sphere should operate from a human rights perspective rather than from the viewpoint of charity. Programmes should be framed to serve all persons with disabilities that require support.

¹⁷⁶ Committee on the Rights of Persons with Disabilities, Concluding Observations and Recommendations to Kenya, *supra*.

¹⁷⁷ Section 35 of the Persons with Disabilities Act, *supra*, and the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010, http://www.kenyalaw.org/LegalNotices/pop_in.php?file=377

¹⁷⁸ Regulation 7 of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 <[www.kenyalaw.org](http://www.kenyalaw.org/rest/subsidiary%20legislation/docs) › rest › subsidiary legislation › docs › accessed 10 November 2020.

¹⁷⁹ Kenya National Social Protection Policy (*supra*).

4.9 Education

Article 43 of the Constitution guarantees every person the right to education. Article 54 further provides that persons with disabilities are entitled to ‘... access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person’. These provisions are enhanced in Article 24 of the Convention which obligates Kenya to ‘... recognize the right of persons with disabilities to education ... (and to) ensure an inclusive education system at all levels and lifelong learning ...’¹⁸⁰

Some measures have been established towards aligning the country’s policy and legislative posture with its commitment on inclusive education. Yet policy documents and legal statutes continue to equivocate on the special education versus inclusive education dichotomy. Sessional Paper No. 1 on reforming education¹⁸¹ proclaims that the Government’s overall policy goal is to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all in order to give every Kenyan the right to education and training as provided in the Constitution. Yet the Paper establishes expansive actions on special education while addressing inclusive education more generally. In the same vein, the guiding principles of basic education established in the Basic Education Act¹⁸² include positive principles such as protection against discrimination on any ground; non-discrimination; and encouragement and protection of the marginalised, persons with disabilities and those with special needs. Yet, the Basic Education Act also requires the State to establish and maintain public special schools.¹⁸³¹⁸⁴

Finally, though, the Sector Policy for Learners and Trainees with Disabilities affirms that inclusive education shall be the key strategy in achieving education and training for learners and trainees with disabilities. The Policy then recognises that the shift to inclusive education should take account of the important role of other approaches such as special institutions of learning, special units in regular institutions of learning and home-based learning in providing education to learners with severe disabilities. It also provides that special schools should be maintained while striving to make the transition to inclusive education.¹⁸⁵ This approach addresses the realities that most schools are not configured to support learners with different kinds of disabilities. Indeed, the Policy anticipates a long transitional period when special education will continue to be supported even as inclusive education programmes are rolled out.

¹⁸⁰ For authoritative interpretation of Article 12 of the CRPD, see Committee on the Rights of Persons with Disabilities, General Comment No. 4 (2016) Article 24: Right to Inclusive Education https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGC%2f2%20Plain%20English%20version&Lang=en accessed 11 November 2020.

¹⁸¹ Republic of Kenya, Sessional Paper No 1 of 2019 on a Policy Framework Reforming Education and Training for Sustainable Development in Kenya (Nairobi, Ministry of Education 2019) <<http://www.knqa.go.ke/wp-content/uploads/2019/03/Session-Paper-No-1-of-2019.pdf>> accessed 18 November 2020.

¹⁸² Basic Education Act No. 14 of 2013 http://www.kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=NO.14.OF.2013#part_VI accessed 10 November 2020.

¹⁸³ Ibid Section 14.

¹⁸⁴ See William Aseka and Arlene S Kanter the Basic Education Act of 2013: Why it is One Step Forward and Two Steps Back for Children with Disabilities in Kenya’ (2014) *ADRY 2* <<http://www.saflii.org/za/journals/ADRY/2014/2.html>> accessed 21 November 2020; Mirriam Nthenge ‘The Basic Education Act of 2013 as a Tool for Advancing Early Childhood Development and Education for Children with Disabilities in Kenya (2017) *ADRY 2* <<http://www.saflii.org/za/journals/ADRY/2017/2.html>> accessed 21 November 2020.

¹⁸⁵ Republic of Kenya, Sector Policy for Learners and Trainees with Disabilities (Nairobi, Ministry of Education May 2018 https://planipolis.iiep.unesco.org/sites/planipolis/files/ressources/kenya_sector_policy_learners_trainees_disabilities.pdf accessed 26 October 2020.

In the past decade, notable educational infrastructural developments have taken place. The enrolment of learners with disabilities has grown from 20,000 in 2010 to 300,000 in 2020. During the same time, the number of special secondary schools has grown from four to 36, 78 integrated secondary schools and 3,000 integrated primary schools.¹⁸⁶ Yet ensuring the right to education for learners with disabilities remains fraught with many challenges, including the fact that realising inclusive education remains a distant hope for many children with disabilities. Exclusion of children from schools remains pertinent. Children with disabilities continue to be denied school admission on the basis that they are not toilet-trained, that they will disrupt learning, or that they will lower school mean grades.¹⁸⁷

A 2016–2017 survey on special education found there was no specific policy to guide implementation of inclusive education, capitation for children with disabilities was not disaggregated according to the type and severity of disabilities, the curriculum used in schools did not meet the needs of learners with disabilities and special needs in education, and there was inadequate staff trained in special needs education in assessment centres and schools. There was inadequate advocacy, sensitization and mobilization on children with disabilities and special needs in education at the grassroots and parents were not actively involved in education of their children with disabilities.¹⁸⁸ The Ministry of Education recognises that at 0.2 percent of the education budget, the education of learners with disabilities remains grossly under-resourced.¹⁸⁹ The annual capitation for each learner with disability in secondary boarding schools is 57,700 shillings, being 35,460 shillings more than the allocation for other learners.

The greater difficulty though is the gross under-funding of learners with disabilities under the Free Education Primary Programme where each learner's capitation amounts to 3,700 shillings.¹⁹⁰

One study summarised the following difficulties of balancing between making the principle of inclusive education genuinely operational while at the same time not undermining the education of children with disabilities:

- i. Children with disabilities must not be turned into guinea-pigs as they get moved from one type of institution to another when adequate facilities and services have not been put in place. Article 24 of the CRPD acknowledges that children with certain types of disabilities are best educated in particular environments.
- ii. Educating children in regular schools calls for investments to ensure necessary accommodations are in place and to train teachers on how to teach children with disabilities alongside other pupils.

¹⁸⁶ UDPK webinar, *supra*.

¹⁸⁷ *Ibid*.

¹⁸⁸ National Survey on Children with Disabilities and Special Needs in Education (Nairobi, Ministry of Education 2018) <https://www.researchgate.net/publication/339830401_National_survey_on_children_with_disabilities_and_special_needs_in_education_2018> accessed 14 November 2020.

¹⁸⁹ 'Magoha Pledges More Cash for Special Needs Schools' <<https://www.the-star.co.ke/news/2019-08-05-magoha-pledges-more-cash-for-special-needs-schools/>> accessed 12 November 2020.

¹⁹⁰ *Ibid*.

- iii. The impression that special schools will in due course be shut down also raises practical and emotional questions particularly in a society which assumes special schools are the best way of educating learners with disabilities.
- iv. Special schools which in many cases have a certain level of facilities could be turned into resource centres to continue servicing the education of children with disabilities.
- v. A national framework for providing reasonable accommodations for learners with disabilities in general primary schools is in many instances not in place. Public primary schools remain hugely under-resourced even for non-disabled children, and the idea of free primary education has increased the numbers of children in school without dealing with questions of quality.¹⁹¹

A more recent concern relates to the lately introduced competency-based curriculum whose premises include the proposition that different pathways will be created for children who do not fit into the main mode. This in itself may amount to segregated or indeed apartheid learning. Viewed positively, this could also amount to individualised learning.¹⁹²

Matters remain as difficult for learners in tertiary education institutions. A study which sought to assess the extent to which the learning environment at the University of Nairobi was inclusive of learners with disabilities made a number of notable conclusions:

- i. Some of the University's physical infrastructure had been renovated to take account of the accessibility needs of users with disabilities, while the design of new University infrastructure endeavoured to take account of the accessibility needs of persons with disabilities.
- ii. Some University departments and personnel had innovated to provide reasonable accommodation measures for students with disabilities on a need-basis in areas such as teaching and examination. Yet, inclusive learning was largely implemented on an ad hoc rather than systematic basis.
- iii. Key facilitators in the learning cycle, chiefly managers and lecturers, did not have full awareness of or capacity for delivering inclusive education.¹⁹³

Finally, the COVID-19 pandemic has highlighted the particular difficulties which learners with disabilities face as they endeavour to continue learning. Learners with disabilities have been excluded from online learning which has tended to be inaccessible because of the unavailability of adaptive equipment, material and training. Learners with disabilities have also been less able to access the internet on account of their relative poverty. Stakeholders have called on the Government to take better account of the virtual learning needs of persons with disabilities.¹⁹⁴

¹⁹¹ United Disabled Persons of Kenya 'Turning Intent into Action: Strategies and Priorities for Non-State Actors to Support Implementation of the Recommendations Made to Kenya by the Committee on the Rights of Persons with Disabilities' (Nairobi, 2016).

¹⁹² UDPK Webinar supra.

¹⁹³ Lawrence Mute et al Slides Speak to People Who Can See: Baseline Study on the Inclusiveness of the University of Nairobi to Learners with Disabilities (Nairobi, University of Nairobi 2020).

¹⁹⁴ Statement issued on 7 April 2020 by United Disabled Persons of Kenya and Caucus on Disability Rights Advocacy <<https://www.udpkenya.or.ke/wp-content/uploads/2020/05/UDPK-CDRA-COVID-19-Advisory-on-Protecting-PWDs.pdf>> accessed 18 November 2020.

This author indeed advised the University of Nairobi should take account of the following to ensure learning for learners with disabilities:

- i. The use of e-learning platforms should take account of the needs of learners with disabilities.
- ii. The needs of each learner with disability should be identified on a case-by-case basis, and it should not be assumed that one solution may apply to a number of learners simply because their disabilities are apparently similar.
- iii. Information on numbers of students with disabilities and their particular needs should be established and instructors and other technical staff accordingly notified.
- iv. The University should confirm that learners with disabilities have the hardware and software to support e-learning platforms such as websites and communication applications and hardware. The premise here is there is a close link between disability and poverty. In any case, specialist hardware and software is invariably more expensive.
- v. The University should be conscious that learners who require human assistance may find difficulties in light of the COVID-19 restrictions (social distancing etc.). Connecting to e-platforms may be difficult. Indeed, some platforms are easier to navigate than others.
- vi. Websites should be configured for accessibility (again on the basis of need – larger rather than small type; effective use of links or buttons; etc.)
- vii. Augmenting audio communication with textual or visual communication should be cognisant that some learners may have hearing impairments or visual impairments.
- viii. Learners with reduced mobility may require more time to beat the curfew, and this may impact when classes may be offered.
- ix. The University should take this opportunity to purchase full licenses of certain key software (such as the JAWS and Magic screen-reading software).¹⁹⁵

The courts have determined that educational institutions should take account of the particular needs of learners with disabilities. This is the context within which the High Court found the Council of Legal Education at fault in its insistence of enforcing Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009, which establishes three years as the maximum period by which a candidate must undertake bar exams. The petitioner had challenged the Council's decision to time-bar him from sitting the bar exams. The petitioner's inability to sit all his exams in the set time was occasioned by long periods of mental illness, and the Council's refusal to register him to sit his last exam out of time amounted to discrimination on the basis of disability.¹⁹⁶

In summation, while the bridge from special education to inclusive education remains tenuous, policy-making and stakeholders alike should recognise that difficult questions remain on how to frame inclusive education in ways that do not prejudice the education of children with particular kinds of disabilities. The ideal of inclusive education must be

¹⁹⁵ Email communication from Lawrence Mute, Team Leader of Disability Rights Project of the School of Law of the University of Nairobi to Dr Collins Odote, Chairperson of University of Nairobi Disability Mainstreaming Committee.

¹⁹⁶ *MMON v Council of Legal Education*, High Court of Kenya at Migori (2017) eKLR <http://kenyalaw.org/caselaw/cases/view/141640> accessed 10 November 2020.

tempered by the pragmatism of the country's realities as well as the support requirements of learners with disabilities.

4.10 Language and culture

Article 44 of the Constitution guarantees every person the right to use the language and to participate in the cultural life of the person's choice. Article 54 of the Constitution entitles persons with disabilities to use Sign Language, Braille or other appropriate means of communication. Article 30 of the CRPD obligates Kenya to recognise and support the specific cultural and linguistic identity of persons with disabilities, including sign languages and deaf culture.

The question of language and culture resonates with deaf persons and the reality that deaf culture and sign language have historically been underrated or unrecognised. Examples of deaf culture though are increasingly becoming acknowledged in Kenyan society, including with the institution of citizen-driven initiatives to support art and dance for the deaf.¹⁹⁷ As already discussed, media stations have increasingly used Kenyan Sign

Language particularly on prime news. In other regards, deaf persons remain extremely concerned that the Kenya Sign Language Bill¹⁹⁸ has still not been enacted despite concerted advocacy to that end.

The Bill seeks the full inclusion of the deaf community into society by addressing matters such as their right to access justice, right to education, access to public services, and right to work. However, there have also been concerns that deaf persons and their representative organisations did not sufficiently participate in the development of the Bill.

4.11 Family

Article 45 of the Constitution recognizes and protects the family as '... the necessary basis of social order ...' Furthermore, it provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Article 23 of the CRPD obligates Kenya to '... take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others ...'

A notable concern in this regard is that the right of persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses and indeed the right of spouses to remain married where one of them becomes disabled is not recognized fully. The Marriage Act¹⁹⁹ targets persons with psychosocial disabilities for differentiated treatment. First, it voids a marriage where a

¹⁹⁷ For example, see 'City Music Producer Helps the Deaf Listen to Songs' (*Nation*, 18 November 2020) <https://nation.africa/kenya/counties/nairobi/he-helps-the-deaf-listen-to-music-3202398> accessed 26 November 2020.

¹⁹⁸ Kenya Sign Language Bill, 2019 http://kenyalaw.org/ki/fileadmin/pdfdownloads/bills/2019/The_Kenyan_Sign_Language_Bill__2019.pdf accessed 12 November 2020.

¹⁹⁹ Marriage Act No. 4 of 2014 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202014>> accessed 11 November 2020.

party ‘... is suffering from any mental condition whether permanent or temporary, ... so as not to appreciate the nature or purport of the ceremony’.²⁰⁰ This provision presumes that persons with psychosocial and intellectual disabilities cannot consent to marriage, thereby undermining their right to marry and found a family. Second, the Act allows annulment of marriage on grounds that a person ‘suffers recurrent bouts of insanity’,²⁰¹ and third, it makes ‘insanity’ a ground of divorce.²⁰² These provisions legislate discrimination on the basis of disability and deny persons with disabilities their right to exercise legal capacity on a basis of equality in making the decision to marry and found a family. They amount to differential treatment on the basis of disability. One could contemplate a host of other circumstances where a party might not appreciate the purport of the marriage ceremony or where a spouse might become gravely ill, yet these provisions only target persons with disabilities. These sorts of provisions may be applied indiscriminately by officious bureaucrats to deny one the right to marry because they figure a person has mental disability or intellectual disability.²⁰³

Another perimeter considers whether persons with disabilities retain their fertility on an equal basis with others. As already discussed in this paper, medical personnel have sterilised women with disabilities without consulting them thereby denying them the right to have children. Further, the intersection between discrimination on the basis of disability and health has been highlighted where women with disabilities who also are HIV-positive have been sterilised.²⁰⁴ In summation, family is as important to persons with disabilities as to other persons and the law should not presume to treat persons with disabilities differentially.

4.12 Access to justice

Articles 48, 49, 50 and 51 of the Constitution are pertinent to the discussion on access to justice, as outlined below:

- i. Article 48 obligates the State to ensure access to justice for all persons. If any fee is required, it shall be reasonable and shall not impede access to justice.
- ii. Article 49 establishes the rights of an arrested person. These include the right to be informed promptly, in language that the person understands, of the reason for the arrest and the right to remain silent.
- iii. Article 50 affirms every accused person’s right to a fair trial. A number of rights established under this Article have particular significance for persons with disabilities. These include an accused’s right to be informed of the charge, with sufficient detail to answer it. An accused should also have adequate time and facilities to prepare a defence. An accused too has the right to adduce and challenge evidence. An accused has the right to have the assistance of

200 Ibid Section 11 (2) (c).

201 Ibid Section 73(1) (g).

202 Ibid section 66(6)(g).

203 Mental Disability Advocacy Centre ‘President Kenyatta Must Veto Legislation which will Deny Marriage Rights to Kenyans with Disabilities’ 1 April 2014 <<https://www.mdac.org/en/president-kenyatta-must-veto-marriage-legislation>> accessed 18 November 2020.

204 African Gender and Media Initiative ‘Robbed of Choice: Forced and Coerced Sterilisation Experiences of Women Living with HIV in Kenya’ (Nairobi, 2012) <<https://profiles.uonbi.ac.ke/kihara/files/report-on-robbed-of-choice-forced-and-coerced-sterilization-experiences-of-women-living-with-hiv-in-kenya.pdf>> accessed 18 November 2020.

an interpreter without payment if the accused person cannot understand the language used at the trial. In this last regard, Article 50 also provides that information shall be given to a person in language that the person understands. Furthermore, in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

- iv. Article 51 obligates Parliament to enact legislation providing for the humane treatment of persons detained, held in custody or imprisoned.

The context for persons with disabilities is established in Article 13 of the CRPD which requires that Kenya should ‘... ensure effective access to justice for persons with disabilities on an equal basis with others ... in order to facilitate their effective role as direct and indirect participants ... in all legal proceedings, including at investigative and other preliminary stages.’^{205 206}

In the past decade, the State has taken legislative measures in endeavours to actualise access to justice for persons with disabilities. Yet the Legal Aid Act²⁰⁷ does not focus specifically on persons with disabilities. eligibility for legal aid services is limited to an indigent resident who is a citizen, child, refugee, victim of human trafficking, internally displaced person or stateless person.²⁰⁸ It is not clear why the Act does not include persons with disabilities in this list, despite Section 38 of the Persons with Disabilities Act which obligates the Attorney-General in consultation with the NCPD and the Law Society of Kenya to make regulations on free legal services for persons with disabilities.

In compliance to Article 51 of the Constitution, Parliament enacted the Persons Deprived of Liberty Act²⁰⁹ which requires that persons with disabilities deprived of liberty shall be accommodated in facilities that adequately meet their personal needs, taking into account the condition and nature of their disability.

The Act also requires the authorities to take appropriate measures to facilitate humane treatment and respect for the privacy, legal capacity and inherent human dignity of persons with disabilities deprived of liberty.²¹⁰ The Act establishes the Consultative Committee on Persons Deprived of Liberty to deliberate on and resolve matters relating to persons deprived of liberty which includes representation from the NCPD.²¹¹ While these provisions are welcome, the Act also includes an extremely problematic provision which limits the right to privacy of a person deprived of liberty ‘where there is need for psychiatric treatment of persons with mental, or sensory disabilities’.²¹²

205 For guidelines on the right to access justice for persons with disabilities, see Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities (Geneva, 2020) <https://reliefweb.int/report/world/international-principles-and-guidelines-access-justice-persons-disabilities> accessed 11 November 2020.

206 For authoritative guidance on the rights of persons with disabilities in pretrial detention, see African Commission on Human and Peoples’ Rights, Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines) https://www.achpr.org/public/Document/file/English/conditions_of_arrest_police_custody_toolkit.pdf accessed 12 November 2020.

207 Legal Aid Act No. 6 of 2016 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202016>> accessed 11 November 2020.

208 Ibid Section 36.

209 Persons Deprived of Liberty Act No. 23 of 2014 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202014> accessed 11 November 2020.

210 Ibid Section 23.

211 Ibid Section 30.

212 Ibid Section 4 (e).

During the past decade, courts have sought to provide accommodations for persons with disabilities to ensure fair hearing. In one instance, the High Court provided a combo of options for how an accused charged with murder who had lost his speech while in remand could communicate with the Court. The Court stressed the importance of adopting appropriate measures to ensure an accused or witness with disability tendered intelligible evidence without compromising fair trial requisites. Those options included:

- i. The recording of his own statement in answer to pre-prepared questions in examination-in-chief by his counsel and in cross-examination by the prosecutor;
- ii. By signs and gestures like nodding his head in affirmation to a question and shaking his head in negation to a question put to him by his counsel in examination-in-chief or in cross-examination by the prosecutor;
- iii. The use of intermediaries;
- iv. The preparation of a special written oath to be administered by the Court Assistant who would read it to the accused who in turn affirmed the oath by nodding his head; and
- v. By scheduling a special sitting of the Court to listen to the accused's defence with necessary accommodations.²¹³

The High Court has also quashed convictions deemed unsafe because of the conduct of proceedings without regard for the language of the accused. In one instance, the conviction of an accused person for attempted defilement was quashed, with the High Court noting that while the trial court had sought to provide Kenyan Sign Language interpretation, it was clear the accused did not understand Sign Language since he had just become deaf recently. The accused therefore did not follow the proceedings and indeed did not cross-examine witnesses.²¹⁴ Elsewhere, where the appellant was sentenced to life imprisonment for the offense of defilement, the High Court quashed the conviction and sentence on the basis that the fair trial rights of the accused were violated. The Court found that the Sign Language interpretation provided to the accused was inadequate and the interpreter had insufficient command of Sign Language, thereby prejudicing the appellant and rendering the proceedings a mistrial.²¹⁵ Finally, the High Court quashed the conviction of an accused convicted of the offense of defilement, finding that the trial court had not taken due account of the appellant's circumstances as a blind person and that the appellant was not accorded reasonable opportunity and facilities to address the prosecution's evidence.²¹⁶ In quashing the conviction, the Court however noted as follows:

... This Court is not making a general finding on suspects who are blind. The decision to release the Appellant instead of ordering a retrial has been reached upon consideration of the peculiar circumstances of this case. I must say that blind people are also able to commit offences and the law squarely provides for how they be tried and punished if found culpable. It is my hope that the Appellant will abide by the law henceforth.²¹⁷

²¹³ *Republic v Elijah Weru Mathenge*, High Court of Kenya at Nairobi (2014) eKLR <http://kenyalaw.org/caselaw/cases/view/108706> accessed 10 November 2020.

²¹⁴ *Macharia Kiama v Republic*, High Court of Kenya at Nyeri (2019) eKLR <<http://kenyalaw.org/caselaw/cases/view/169651>> accessed 9 November 2020.

²¹⁵ *Kenga Hisa v Republic*, High Court of Kenya at Malindi (2020) eKLR <<http://kenyalaw.org/caselaw/cases/view/192899/>> accessed 9 November 2020.

²¹⁶ *S.K. v Republic*, High Court of Kenya at Migori (2020) eKLR <<http://kenyalaw.org/caselaw/cases/view/192386/>> accessed 9 November 2020.

²¹⁷ *Ibid.*

A decade following the Constitution's promulgation, persons with different disabilities continue to face various barriers in accessing justice. A study undertaken by the Kenya Association of the Intellectually Handicapped covering the disability specific barriers that persons with intellectual disabilities faced in using the criminal justice system identified the following five key barriers that limit or prevent access to justice for persons with intellectual disabilities:

- i. Persons with intellectual disabilities did not receive the procedural and other accommodations which they needed to equally participate in criminal justice processes as victims of crime. They were hindered from reporting offenses committed against them by communication barriers and absence of reasonable accommodations. Both at the police station and the court, questions were often asked in complex and technical language, and adjustments or adaptations were not made in communicating the notion of time, quantity, dates or place.
- ii. Negative attitudes and assumptions often resulted in persons with intellectual disabilities being viewed as unreliable, lacking credibility and being incapable of giving evidence or otherwise participating in criminal justice proceedings. The study noted that persons with intellectual disabilities face stereotypical attitudinal barriers in their role as witnesses which engendered the presumption that their testimony was intrinsically less reliable/of lower quality.
- iii. Key actors in the criminal justice system, including the police, prosecutors and magistrates, had limited understanding of intellectual disability, particularly in relation to its impact on adducing evidence and other aspects of participating in the criminal justice system. The study noted that actors in the justice system often failed to identify that the manner in which the justice system was set up negatively impacted upon victims of crime who had intellectual disabilities.
- iv. Delays in criminal justice proceedings affected all participants in the justice system but presented a unique challenge for persons with intellectual disabilities who may have had difficulty recalling information and sequencing events over a longer period of time.
- v. Finally, there was lack of victim support services for persons with intellectual disabilities who may not have had a supportive family. The study found that many offences committed against persons with intellectual disabilities were never reported. The perpetrators of the offenses may have been family members, or family members may not have been inclined to organise logistics and financing for the victim to file a complaint or attend court. Family members may have been disinclined to act as intermediaries.²¹⁸

Another study undertaken by the African Policing Civilian Oversight Forum, which assessed the impact of pre-trial detention on persons with disabilities with particular focus on correctional institutions, concluded that there was a dearth of procedural and substantive guarantees for detainees with disabilities which amounted to violation of the right to access justice. These access to justice violations included the following:

²¹⁸ Kenya Association for the Intellectually Handicapped 'Access to the Criminal Justice System by Persons with Intellectual Disabilities as Victims of Crime: Barriers and Opportunities' (Nairobi, 26 May 2017).

- i. Prisons provided various forms of reasonable accommodations for inmates with disabilities. The level and quality of accommodations though varied from prison to prison and also the type of disability.
- ii. Different prisons had different approaches on whether and the extent to which detainees with disabilities were allowed to keep mobility aids and auxiliary devices. Some prisons did not allow persons requiring such aids and devices to remain with crutches, callipers or even white canes and wheelchairs. Some prisons took away such aids and devices overnight. However, the study also found there were prisons where inmates were allowed to keep their aids and devices.
- iii. Some prisons had some accessible pathways, but others did not. While buses used to transport remandees were accessible, lorry transports were not accessible and some inmates with disabilities had to be carried onto the lorries.
- iv. Most prison officers did not know sign language, and deaf inmates communicated using what was referred to as 'village sign language', which entailed the repeated simulation and miming of certain actions and words.
- v. Finally, the law continued to oversee the arbitrary and sometimes indefinite incarceration of persons with psychosocial disabilities and those with intellectual disabilities, thereby failing to abide the principle that judicial authorities should only order pre-trial detention on clearly established grounds which do not constitute discrimination of any kind including disability.²¹⁹

In summation, realising guarantees of access to justice require concerted technical and resource investments as well as an appreciation of the fact that a person's difference should not prejudice their ability to access justice.

4.13 Accessibility

Article 54 of the Constitution establishes that persons with disabilities are entitled to reasonable access to all places, public transport and information. This provision is elucidated in Article 9 of the CRPD which requires Kenya to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications and to other facilities and services open or provided to the public.²²⁰

Policy intentions and legislative directions on accessibility have suffered greatly on account of feeble implementation exacerbated by institutional dithering. Despite making multiple national and international pledges, Kenya has still not implemented the National Action Plan on Accessibility and Disability Rights in Kenya²²¹ which was prepared collaboratively by the Ministry of Labour, Social Security and Services, the NCPD and other

219 African Policing Civilian Oversight Forum Pretrial Detention for Persons with Disabilities in Correctional Institutions (African Policing Civilian Oversight Forum and National Gender and Equality Commission 2017) <https://www.ngeckkenya.org/Downloads/APCOF%20PTD%20Kenya%20WEB.pdf> accessed 27 October 2020.

220 For authoritative interpretation of Article 9 of the CRPD, see Committee on the Rights of Persons with Disabilities, 11th Session, General Comment No. 2 (2014) Article 9: Accessibility https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=11 accessed 11 November 2020.

221 National Council for Persons with Disabilities, National Action Plan on Accessibility and Disability Rights in Kenya, December 2015.

disability stakeholders following a national conference on accessibility held in 2012. The goal of the Accessibility Plan is to spark action at the national and county levels and to carry out Kenya's international, regional and national obligations on accessibility and enhance the quality of life of persons with disabilities. The Plan establishes strategic objectives to be realised through awareness-raising, mobilisation of commitments and the allocation and management of resources to address disability matters. As a study by UDPK concludes, the Plan seems to have suffered the fate of many disability policy and legal initiatives which have become mired in the consultative stages for years either through lack of leadership or resources.²²²

Legislative directions have not been successful either. Even before promulgation of the Constitution, the Persons with Disabilities Act had already empowered the NCPD to serve an adjustment order to the owner of a premise or provider of a service or amenity when the Council considered such premise, service or amenity as inaccessible to persons with disabilities by reason of structural, physical, administrative or other impediment. Such an order would require the owner or provider to take specified steps to secure reasonable access by persons with disabilities to the premise, service or amenity. The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations require relevant State agencies:

- i. To ensure installation of auditory signals at red lights in the public roads for the benefit of persons who are visually impaired, to make kerb cuts and slopes in pavements for the easy access of wheel chair users, to engrave on the surface of pedestrian crossings and the edges of railway platforms for persons who are visually impaired, and to post appropriate symbols of disability; and
- ii. To provide suitable ramps in public buildings, to adapt all public toilets for wheel chair users and other persons with disability, to provide Braille symbols and auditory signals in elevators or lifts, and to provide ramps in hospitals, health centres and other medical care and rehabilitation institutions.²²³

To date, the NCPD has not issued adjustment orders against non-accessible public buildings.²²⁴ Clearly, the NCPD has not felt it had the legal and institutional wherewithal for enforcing adjustment orders.

A survey on accessibility in Nairobi undertaken by the Open Institute assessed 510 buildings and 58 streets. The survey assessed the extent to which these buildings and streets possessed basic accessibility features, using the scheme inaccessible, somewhat accessible, moderately accessible, accessible and very accessible. The survey found that 10 percent of the assessed buildings were inaccessible, while 32 percent were somehow accessible. 39 percent of buildings were moderately accessible while 17 percent of the buildings were accessible. Only 2 percent of buildings were very accessible. The trend indicated that older buildings were more likely to be inaccessible than newer buildings.

222 United Disabled Persons of Kenya Turning Intent into Action: Strategies and Priorities for Non-State Actors to Support Implementation of the Recommendations Made to Kenya by the Committee on the Rights of Persons with Disabilities (Nairobi, 2016) <<https://www.udpkenya.or.ke/wp-content/uploads/2020/05/turning-intent-into-action-final-strategies-and-priorities-paper1.pdf>> accessed 10 November 2020.

223 Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, *supra*.

224 'Statement of the Civil Society Organisations and Disabled Persons Organisations During the Private Meeting on Kenya at the 14th Session of the Committee on the Rights of Persons with Disabilities', on file with author.

The survey also found that of the 58 mapped streets, there was only one sonic light; that of the 58 mapped streets, only one street light was configured to allow pedestrians to cross safely; and that of 58 streets, there were only two allotted parking slots for persons with disabilities.²²⁵

Another survey, undertaken by Mathare Social Justice Centre, which assessed the accessibility of a number of public institutions found that:

- i. In the limited instances where ramps were available, they were steep and slippery.
- ii. More often than not, persons with mobility disabilities were expected to use back rather than front entrances.
- iii. Pathways invariably did not have appropriate ramps to enable users to move safely onto and from roadways.
- iv. Pavements were narrow and cracked, and hence a hazard for persons using assistive devices.²²⁶

It should also be stated that the barriers to free access become even greater aggravations for persons with disabilities who are ill-able to afford assistive devices. 59 percent of respondents in the survey undertaken in Mathare informal settlement could not afford mobility aids such as wheelchairs.²²⁷ Indeed, concerted campaigns for the white-cane to be recognised in law as a symbol of blindness remain unsuccessful.²²⁸

The courts have sought to provide a level of succour for persons with disabilities in relation to violations of the right to accessibility. One such litigation challenged the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013, which banned long-distance public service vehicles from bearing roof-mounting cargo carriers. The High Court agreed with the contention that the Regulations were discriminatory since their effect would be to bar people with disabilities who use wheelchairs which are stowed in the rooftop carriers from traveling conveniently. The Court determined that Regulations 11(e) and (f) were unconstitutional for subjecting persons with disabilities to differential treatment regarding their mobility via public transport.²²⁹

The High Court has indeed even found that the buildings in which judicial offices are sited are quite often inaccessible for persons with mobility disabilities, thereby undermining their right to access justice. The Court noted that the physical structure of the Milimani Law courts hindered justice seekers with mobility disabilities on account of the following:

- i. Restrictive access to the lobby which has a step to the reception area;
- ii. Restrictive access to witness stands which are raised by a platform of as much as 200mm from the general floor;
- iii. Parking bays set at a lower level to the general ground with concrete kerb stones; and

225 Crystal Asige and Kevin Kavai, 'White Paper on Universal Design in Nairobi City', the Open Institute, September 2019 <https://ability.or.ke/wp-content/uploads/2020/01/Ability-Programme-Report_-Sept-2019.pdf> accessed 10 September 2020.

226 Mathare Social Justice Centre supra.

227 Ibid.

228 For example see petition of July 2019 by the Open Institute calling on three public institutions to recognise the white-cane as a symbol of blindness (Kenya Roads Board, National Construction Authority and the National Safety and Transport Authority) <<https://www.change.org/p/national-transport-and-safety-authority-ntsa-petition-on-the-recognition-of-the-white-cane>> accessed 10 22 November 2020.

229 Republic v Cabinet Secretary for Transport and Infrastructure Principal Secretary and 5 Others Exparte Kenya Country Bus Owners Association and 8 Others, High Court of Kenya at Nairobi (2014) eKLR <<http://kenyalaw.org/caselaw/cases/view/101872/>> accessed 10 November 2020.

iv. Restrictive narrow court entrances.²³⁰

IN summation, barrier-free access for persons with disabilities is a prerequisite for their enjoyment of other rights. The measures that need to be put in place quite often entail universal design interventions which benefit all persons. We end this section of the paper with two interrelated matters which we have already encountered across various themes throughout this analysis – the guarantees of legal capacity, and equality and non-discrimination.

4.14 Legal capacity

A matter which has been alluded to from time to time in this paper concerns the legal capacity of persons with disabilities. Article 12 of the CRPD obligates Kenya to:

- i. ‘... recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.’
- ii. ‘... take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’
- iii. ‘... 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.’
- iv. ‘... 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.’²³¹

A study undertaken by KNCHR on the exercise of legal capacity²³² found that multiple barriers stopped persons with disabilities from exercising legal capacity on an equal basis with others. The study found that while formal guardianship is not widespread in Kenya, the exercise of the right to legal capacity is hindered by poverty and high unemployment rates among persons with disabilities, limited state support to persons with disabilities and their families, societal attitudes that continue to hold persons with disabilities as objects of care as opposed to rights holders, inaccessibility of the environment and lack of

²³⁰ *Paul Pkiach Anupa and Another v Attorney-General and Another*, High Court of Kenya at Nairobi (2012) eCLR <http://kenyalaw.org/caselaw/cases/view/85079> accessed 10 November 2020.

²³¹ For authoritative interpretation of Article 12 of the Convention, see Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) Article 12: Equal Recognition Before the Law <<https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>> accessed 16 November 2020.

²³² 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’ (Nairobi, Kenya National Commission on Human Rights and Open Society for Eastern Africa 2013) <http://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf> accessed 15 October 2020.

alternatives in the mental healthcare sphere. The study made a host of recommendations, many of which have not been implemented to date. Notably, it recommended the following:

- i. The development of a comprehensive policy on legal capacity that puts in place a supported decision-making paradigm suitable to the Kenyan context:
 - a. Defining legal capacity to include the capacity to hold a right and the capacity to act and exercise the right;
 - b. Recognizing the diversity of disability in tailoring support measures and in tailoring safeguards;
 - c. Establishing legal obligations of supporters and providing for checks and balances against abuse and offering remedies against the same; and
 - d. Establishing a database on persons currently under guardianship to facilitate alternative support measures consonant with Article 12 of the Convention.
- ii. The repeal of legislation that uses guardianship and partial guardianship to undermine the legal capacity of persons with disabilities, including the Mental Health Act; the Civil Procedure Act and the Civil Procedure Rules; and the Children Act.
- iii. The amendment of provisions in legislation that contravene Article 12 of the CRPD. Such provisions are found in The Age of Majority Act, the Marriage Act, the Sale of Goods Act, the Law of Succession Act, the Traffic Act, the Penal Code, the Criminal Procedure Act, the Sexual Offences Act, The Evidence Act, the Elections Act, the HIV and AIDS Prevention and Control Act, and the Persons with Disabilities Act. This is the context within which the constitutional provisions on unsoundness of mind would be amended too.

Courts have begun to recognise the central role which legal capacity plays in ensuring the overall rights of persons with disabilities. In *Wilson Murara Siringi v Attorney-General*,²³³ the appellant had been convicted of the offence of rape when in fact the evidence was that he had consensual sexual intercourse with a woman with mental disability. On appeal, the High Court 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. The Court relied on Sections 42, 43 (1) and (4) of the Sexual Offences Act²³⁴ which focus 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 medical evidence on the issue merely stated that the complainant was not 'mentally stable'. Evidence did not state the nature and extent of the complainant's mental illness, and so the court could not conclude that the complainant was unable to exercise her own free will. It was also quite clear that the prosecution had been agitated by the complainant's brother who had threatened her for having a sexual liaison with the

²³³ Wilson Morara Siringi v Attorney General, High Court at Migori (2014) eKLR <<http://kenyalaw.org/caselaw/cases/view/101502/>> accessed 12 December 2020.

²³⁴ Sexual Offences Act No. 3 of 2006 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202006>> accessed 12 December 2020.

appellant. The complainant, despite having mental illness, was in some instances able to make independent decisions, and 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. In conclusion, Majanja (J) stated as follows:

... 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, possessing legal capacity to act, on an equal basis with others... 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.²³⁵

So much more could be said about the vagaries of legal incapacity experienced by persons with disabilities in Kenya. We shall however conclude this discussion by citing a study on the right to own and manage property and finances by persons with psychosocial disabilities. The study concludes that the guardianship provisions in the Mental Health Act undermine introduction of the supported decision paradigm which is legislated in the CRPD. Further, the move from substituted decision-making to supported decision-making may entail intermediate actions to infuse human rights standards into judicial decisions relating to the property of persons with psychosocial disabilities. These bridging measures may include focusing far more on the roles of the individual against who guardianship is being sought.²³⁶ The study then makes this further conclusion which we deem captures the essence of the Kenyan discourse on legal capacity:

... 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 12.²³⁷

²³⁵ Wilson Siringi Morara supra.

²³⁶ Elizabeth Kamundia 'The Right to Own and Manage Property by Persons with Psychosocial Disabilities in Kenya', *East African Law Journal*, Special Issue on Disability Rights (Nairobi, University of Nairobi 2016/2017) 1-28 <http://rodra.co.za/images/countries/kenya/research/East%20African%20Law%20Journal%20-%20Special%20issue%20on%20disability%20rights%202017-2017.pdf> accessed 21 November 2020.

²³⁷ Ibid.

4.15 Equality and non-discrimination

Article 27 of the Constitution affirms that every person is equal before the law and that every person has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 27 also prohibits the State and other persons from direct or indirect discrimination on the ground of disability. This constitutional provision is fortified in respect of disability in Article 5 of the CRPD which obligates Kenya to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. Kenya is also enjoined to take steps to ensure reasonable accommodation is provided for purposes of promoting equality and non-discrimination. It should also put in place specific measures necessary to accelerate or achieve de facto equality of persons with disabilities.

Article 27's guarantees on equality and non-discrimination flow throughout the Bill of Rights. As we have seen, constitutional rights covering fields such as education, work, freedom of expression and indeed participation in political and public life are all anchored on the firmament of equality and non-discrimination. The fundamental value of Article 27 of the Constitution and Article 5 of the CRPD is that they establish an equality framework which underlies the whole discourse on the Bill of Rights. A number of parameters are pertinent²³⁸

First, persons with disabilities have the right to be protected by the law (equality before the law). Yet we have discussed instances where the law has treated persons with disabilities unequally and where the law has been applied differently on them, which amounts to discrimination. Second, persons with disabilities have the right to use the law for personal benefit (equality under the law). Again, we have discussed instances where disability-based denials, restrictions or limitations have been used to bar or limit persons with disabilities from establishing, maintaining and breaking legal relationships. Third, an equality framework demands that laws and policies that establish or maintain discrimination on persons with disabilities shall not be enacted or adopted (equal protection of the law). That is why the disability constituency is vigilant every time legislation on contentious issues like mental health is proposed since it is liable to violate this imperative. Forth, Barriers that undermine access of persons with disabilities to legal protections shall be eliminated to ensure equal opportunities (equal benefit of the law). On this score, the study has highlighted instances where positive measures covering accessibility, reasonable accommodation and individual supports have been instituted.

238 Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018): Article 5: Equality and Non-discrimination https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=11 accessed 18 November 2020.

5.0 Summation and Prospects

This paper has assessed a decade of implementation of the Constitution of Kenya 2010 for persons with disabilities. It has used the Bill of Rights to assess the extent to which the State has taken policy, legislative and other measures to ensure disability-inclusion in the past decade. A number of key conclusions can be drawn.

The Constitution remains a veritable platform for anchoring the hopes and aspirations of persons with disabilities. The Constitution in most regards establishes an apt basis for ensuring the inclusion of persons with disabilities.

Hundreds of policies, laws and regulations that impact persons with disabilities either positively or negatively have been put in place in the past decade. The value of many interventions remains contested. Despite concerted agitation and significant technical inputs, a law to replace the outdated Persons with Disabilities Act has still not been enacted. As well, a policy on disability has not been adopted to replace the 2006 Disability Policy whose philosophy and aims have long-since been overtaken in light of Kenya's international and constitutional obligations following its ratification of the CRPD and promulgation of the 2010 Constitution.

The Judiciary has been in the vanguard of defending the Constitution. Despite setbacks and disappointments, the disability sector and individual litigants with disabilities have benefited from judicial determinations. Some Constitutional Commissions, notably KNCHR and NGEC, have also played roles of note in facilitating the exercise of rights by persons with disabilities. The Executive and Parliament has voted funds to address disability-specific matters; and they have similarly enacted some laws and adopted some policies. The political willingness to take robust actions on issues of disability has however been missing, and it has taken the repeated advocacy of persons with disabilities to ensure that these organs even take minimal actions. Entities such as the NCPD require to be repurposed, while the disability portfolio in the Government should be strengthened with technical and financial resources, and the mainstreaming of disability across all departments should be realised.

Adhering to the dictates of the human rights approach to disability has been easy to proclaim and far more difficult to practise. First, policies, laws and institutional actions have sought to abide with the constitutionally-established principles and values that acknowledge the human dignity of persons with disabilities. The fact that each human being possesses intrinsic worth that should be respected has however quite often not been turned into practice and behaviours continue which undermine the human dignity of persons with disabilities. Second, key actors no longer deny that persons with disabilities should exercise the full gamut of human rights covering civil, political, economic, social and cultural spheres. Practice however continues to focus far more on the social sphere which paradoxically is synonymised with needs and assistance rather than rights.

The economic rights of persons with disabilities remain largely unrealised while the nascent implementation of their political rights is facing pushbacks manifested by the absence of legislators with disabilities in 17 County Assemblies following the 2017 general elections. Third, understanding and respecting the full implications of disability and the experiences of persons with disabilities remains superficial. The distinction between impairment and disability is patchy, a fact manifested by the obvious discomfort which officials and other individuals have in referring to persons with disabilities, rather opting to use euphemisms such as 'persons living with disabilities', 'challenged persons' and indeed even 'PWDs'.

Persons with developmental and mental impairments in particular continue to experience encroachment of their status as rights-bearers. Fourth, although space for identity politics for persons with disabilities was established in the Constitution, its practise has encountered difficulties both in the National Parliament and County Assemblies. A matter of particular concern, which was not in the temporal scope of this paper, is the proposed Building Bridges Initiative constitutional changes which may undermine the representation of persons with disabilities in Parliament while not providing better guarantees on their representation in County Assemblies. In the meantime, the organised participation of persons with disabilities has been robust although its results arguably remain token. Ultimately, the goal of social justice for persons with disabilities has still not been realised.

In the final analysis, it is quite apparent that persons with disabilities in Kenya enjoy an abundant surplus of commitments while they suffer a grave deficit of implementation. Policy-making and law-making are never-ending commitments which will remain a priority today as indeed a decade ago. Yet far more emphasis must be laid on implementation which must be accompanied by the full and effective participation of persons with disabilities.

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