

**THE KENYA'S PERSONS WITH DISABILITIES ACT, ACT NO. 14 OF 2003: A CASE
FOR COMPLIANCE OF THE ACT WITH THE CONSTITUTION OF KENYA, 2010
AND INTERNATIONAL LAW.**

By

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of the Master of Laws (LL.M) Degree of the School of Law, University of
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DECLARATION

In full cognizance of the University of Nairobi’s policy against plagiarism, I, **Joshua Mbinda Ngulu**, do hereby certify that this thesis represents my original work except in so far as I have borrowed from various sources in which every effort has been made to acknowledge the source of the information.

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ABBREVIATIONS AND ACRONYMS

APC: Act on Promotion of Convenience for the Disabled, Senior Citizens, and Pregnant Women

ARPDA: Anti-Discrimination against and Remedies for Persons with Disabilities Act

ASEPD: Act on Special Education for Persons with Disabilities

CBR: Community-Based Rehabilitation

CRPD: Convention on the Rights of Persons with Disabilities

DPA: Disability Pensions Act

EVDPA: Employment Promotion and Vocational Rehabilitation of Disabled Persons Act

KEAD: Korea Employment Agency for the Disabled

MHA: Mental Health Act

MITDA: Mobility Improvement for the Transportation Disadvantaged Act

NHRC: National Human Rights Commission of Korea

NHRCA: National Human Rights Commission Act

PCCDP: Policy Coordination Committee for Disabled Persons

PDEA: Promotion of Disabled Persons' Enterprise Activities Act

SECS: Special Education Steering Committee

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Customs and Excise Act, Cap 472, Laws of Kenya

Education Act, Cap 211, Laws of Kenya.

Elections Act, Act No. 24 of 2011, Laws of Kenya.

Employment Act, Act No. 11 of 2007, Laws of Kenya.

Evidence Act, Cap 80, Laws of Kenya.

Income Tax Act, Cap 470, Laws of Kenya.

Interpretation and General Provisions Act, Cap 2, Laws of Kenya

Mental Health Act, Cap 248, Laws of Kenya.

Penal Code, Cap 63, Laws of Kenya.

Public Health Act, Cap 242, Laws of Kenya

Radiation Protection Act, Cap 243, Laws of Kenya.

Sexual Offences Act, Act No. 3 of 2006, Laws of Kenya.

The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009.

The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations, 2009.

The Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010.

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The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,

The Convention on the Elimination of All Forms of Discrimination Against Women,

The Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

The International Convention on the Elimination of All Forms of Racial Discrimination,

The International Convention on the Rights of Persons with Disability,

The International Covenant on Civil and Political Rights,

The International Covenant on Economic, Social and Cultural Rights,

United Nations Convention on the Rights of Persons with Disabilities,

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ABSTRACT

This study is divided into five chapters. Chapter one is a broad overview and layout of the research. It outlines the research project. This provides an overview of the essence of the research. It covers the background of the research, the statement of the problem, justification of the study, objectives of the study, hypothesis of the study, theoretical framework, literature review, methodology to be used and the limitations of the study.

Chapter two provides an in-depth understanding of the International Convention on the Rights of Persons with Disabilities and its Optional Protocols. In addition, this chapter discusses the provisions of the Constitution of Kenya, 2010, touching on the rights of persons with disability.

Chapter three gives an overview of the Persons with Disabilities Act and also touches on other Kenyan major pieces of legislation with general provisions on disability rights in Kenya. This section will demonstrate the country's level of commitment to the disability cause and to portray how the disability human rights principle has been adopted locally.

Chapter four is comparative in nature and discusses the legal treatment accorded to persons with disabilities in the Republic of Korea, which is developed in the law and observance of the rights of persons with disabilities. This will demonstrate that Kenya lags behind in recognizing and implementing fundamental rights and freedoms, structures and mechanisms put in place to protect the rights and persons with disabilities. In addition, it gives key insights of how the Kenyan statute can be improved to comply with the Constitution of Kenya, 2010 and international instruments.

Chapter five is divided into two parts: the conclusion and the recommendations. The conclusion is a summary of the research findings. The main purpose of the conclusion is to demonstrate that the Persons with Disabilities Act has pronounced gaps and it can only safely be held so when it is

measured against the Constitution of Kenya, 2010 and the International Convention on the Rights of Persons with Disabilities as yardsticks. It also discusses Kenya's level and extent of compliance on disability laws as captured under the Constitution of Kenya, 2010 and international instruments.

The recommendations comprise of suggestions of legislative and institutional reforms, which are necessary in order to effectively deal or cater for the rights of the persons with disabilities in Kenya.

CHAPTER ONE

“Women and men with disabilities can and want to be productive members of society. In both developed and developing countries, promoting more inclusive societies and employment opportunities for people with disabilities require improved access to basic education, vocational training relevant to labour market needs and jobs suited to their skills, interests and abilities, with adaptations as needed. Many societies are also recognizing the need to dismantle other barriers-making the physical environment more accessible, providing information in a variety of formats, and challenging attitudes and mistaken assumptions about people with disabilities.”¹

1.1 Background of the Problem

The overall disability in Kenya is 3.5% of the population which translates to 1.330,312 million persons with disabilities. Of this, the largest proportion is physical impairment (413, 698 persons) followed by visual impairment (331,594).² The socio-economic situation of persons with disabilities in Kenya, the widespread economic hardship being experienced in the country does not auger well for persons with disabilities. Most persons with disabilities depend on their families for social, financial, material and psychological support. Therefore, under the current situation persons with disabilities are more likely to have less access to resources than other members of the family.

According to the Kenya Society for the Mentally Handicapped (KSMH), there is an established 3.5% of the total population³ living with disabilities in Kenya of which less than 1% are able to access care and rehabilitation services. Accordingly, out of the 3.5 Million people living with

¹ Adopted from the report, “Inclusion of People with Disabilities in Kenya” by International Labour Organization of October, 2009. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_115097.pdf (Last accessed on 11th September, 2012).

² According to the Kenya National Population Census Report, 2009. Available on <http://www.knbs.or.ke/Census%20Results/Presentation%20by%20Minister%20for%20Planning%20revised.pdf> (Last accessed on 11th September, 2012).

³ These statistics are available at <http://www.ksmh.org/> (Last accessed on 11th September, 2012).

disabilities only less than 1% are able to access services such as education⁴, rehabilitation services, voting and work. These people are not only segregated but they, together with their families are often not able to access any specialized support services. Without work, education and rehabilitation services, these people become fully dependent on third parties in order to access even the most basic needs⁵.

This confirms the sad plight of more than 3.5 Million persons with disabilities who are rejected by parents, families and abandoned to live in inhumane and abusive environments. Majority of the 3.5 Million persons with disabilities are orphaned and vulnerable because of high rate of divorce and separation of their parents. In addition, HIV/AIDS highly affects persons who are prone to rape, incest and other sexual violations and exploitations. Hardly any specialized support services are available to the persons with disabilities and their families, especially in the rural and urban slums where the majority live. Their rights are not recognized and their access to even the most basic of needs fully depends on support of a third party.⁶

Nevertheless, there are several laws recognizing or articulating on issues concerning persons with disabilities in Kenya. These include *inter alia*: the Constitution of Kenya,⁷ Persons with Disabilities Act,⁸ Sexual Offences Act,⁹ Penal Code,¹⁰ Criminal Procedure Code¹¹, Mental Health Act,¹² Evidence Act,¹³ Public Health Act,¹⁴ Radiation Protection Act,¹⁵ Education Act,¹⁶

⁴ Only 23,000 pupils (Aged between 10-30 years) are accessing basic education. The 48 small homes and private schools are currently caring for only 48 homes.

⁵See the Kenya Society for the Mentally Handicapped website <http://www.ksmh.org/component/content/article/88/238-current-situation> (Last accessed on 5th September, 2012).

⁶ *Ibid.*

⁷ 2010 edition.

⁸ Act No. 14 of 2003, Laws of Kenya.

⁹ Act No. 3 of 2006, Laws of Kenya.

¹⁰ Cap 63 Laws of Kenya.

¹¹ Cap 75, Laws of Kenya.

¹² Cap 248, Laws of Kenya.

¹³ Cap 80, Laws of Kenya.

Children Act,¹⁷ Witness Protection Act,¹⁸ Income Tax Act,¹⁹ Customs and Excise Act,²⁰ Employment Act,²¹ Civil Procedure Act and Rules²² and Elections Act²³. Additionally, apart from these laws, there are organizations that have been established with the view of dealing with matters concerning persons with disabilities.

On October, 12, 1993, the Kenya Government, through the Office of the Attorney General, under the Kenya Law Reform Commission²⁴, set up a Task Force to review and create where they did not previously exist, laws relating to persons with disabilities.

This paper draws a comparative study from the Republic of Korea.²⁵ It has taken a variety of measures, including enacting the legislation necessary for its implementation. It has enacted and implemented the legislation and the policies for persons with disabilities. Such efforts include the development of regulations to protect the rights of persons with disabilities and the Five Year Policy Development Plan of persons with disabilities at the pan-governmental level, which are

¹⁴ Cap 242, Laws of Kenya.

¹⁵ Cap 243, Laws of Kenya.

¹⁶ Cap 211, Laws of Kenya.

¹⁷ Act No. 8 of 2001, Laws of Kenya.

¹⁸ Cap 79, Laws of Kenya.

¹⁹ Cap 470, Laws of Kenya.

²⁰ Cap 472, Laws of Kenya.

²¹ Cap 226, Laws of Kenya.

²² Cap 21, Laws of Kenya.

²³ Act No. 24 of 2011.

²⁴ The Kenya Law Reform Commission (KLRC) is established by the Law Reform Commission Act, No. 2 of 1982, presently Chapter 3 of the Laws of Kenya. Presidential assent was given on 13th May 1982 and the Act came into force on 21st May 1982. From inception, the Commission has operated as a Department within the Office of the Attorney-General. However upon reorganization of Government Ministries and functions vide Presidential Circulars Nos. 1 of 2003 and 2008, the law reform function and the Kenya Law Reform Commission were administratively moved to the Ministry of Justice, National Cohesion and Constitutional Affairs. It is wholly funded by the Government but with regular support from Development Partners especially within the context of the Governance, Justice, Law and Order Sector Reform Programmes. Its Mission Statement is to, 'Facilitate law reform conducive to social, economic and political development'. Available on <http://www.klrc.go.ke/> (Last accessed on 27th March, 2012).

²⁵ The Republic of Korea signed the United Nations Convention on the Rights of Persons with Disabilities on 30th March, 2007 and was ratified by Parliament on 11th December, 2008 and was domesticated on 10th January, 2009.

substantial in keeping with the spirit of the Convention.²⁶ The Convention is part of Kenyan law.²⁷ Since the Republic of Korea has ratified the Convention and her legislative framework is largely in conformity with the provisions of the Convention, it is justified for this study to compare it with Kenya. It is prudent for Kenya to borrow from her good practices as far as her local pieces of legislation on disability rights are concerned. In addition, it will also inform this study on how her laws are in conformity with the Convention and the extent it has gone to implement them.

1.1.1 Meaning of Disability

There are diverse versions of attempting to define the word disability. Broadly speaking, what disability is and who may or may not be a person with disability are fairly contested matters. This may be so partly because unlike social distinctions, for example, colour, gender, race etc, disability has no singularly overarching trait which is obvious in all people who either are placed or claim belonging under that tag.

According to the World Health Organization's International Classification of Impairments, Disabilities and Handicaps of 1980²⁸, disability is a term which, in relation to an individual, describes a functional limitation (for performing tasks, skills and behavior) which he or she may have arising from physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions, or illnesses may be permanent or transitory in nature. This definition is founded on the 'medical' model of disability.

²⁶ *Infra* note 305.

²⁷ *Infra* note 76.

²⁸ World Health Organisation (1980): International Classification of Impairments, Disabilities and Handicaps, Geneva. Also available at <http://www.disabled-world.com/definitions/disability-today.php> (Last accessed on 5th September, 2012).

The International Convention on the Rights of Persons with Disabilities recognizes that ‘disability is an evolving concept and that disability results from the interaction between persons with impairment and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.’²⁹ This instrument defines persons with disabilities to 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.”³⁰

Under our municipal laws, the Persons with Disabilities Act³¹ defines disability as follows: “A physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity, which impacts adversely on social, economic or environmental participation.”³²

These definitions introduce several elements critical to the understanding of disability.

Disability arises consequent to impairment of an organ(s). This implies that it excludes medical conditions and illnesses except to the extent that such illnesses or conditions impair the functioning of organs. The types of disabilities range widely: Some disabilities are occasioned by impairments to the senses like hearing, sight etc, physical impairments and other disabilities are engendered by cognitive impairments covering disorders relating to mental processes of knowing, including awareness, attention, memory perception, reasoning and judgment.

²⁹Paragraph (e) to the Preamble of the International Convention on the Rights of Persons with Disabilities available at <http://www.un.org/disabilities/convention/conventionfull.shtml> (Last accessed on 5th September, 2012).

³⁰ *Ibid*, Article 1.

³¹ Act No. 14 of 2003, Laws of Kenya.

³² *Ibid*, Section 2.

Cognitive disabilities include intellectual disabilities, learning difficulties, acquired brain injury, dementia, neurological disorders and autism spectrum disorders.³³

The Persons with Disabilities Act introduces an element of functional limitations. This adversely impacts on the individual's social, economic or environmental participation relative to non-disabled people. Hence, while disability can result from an illness when disease reduces or nullifies the functionality of an organ, disability *per se* is chronic rather than temporary, and it is not a curable illness or disease.³⁴ What defines the presence or absence of disability is the extent to which a particular impairment reduces a person's ability to relate effectively with their everyday environment or surroundings. The everyday environment with which individuals live and act involve social, economic and political interactions.³⁵ This study adopts all these definitions of disability but lays a lot of emphasis on the provision of the International Convention on the Persons with Disabilities because this instrument appreciates that disability is an evolving concept.

1.2 Statement of the Problem

Persons with disabilities living in Kenya are a neglected and a suffering lot. Disability can take different forms ranging *inter alia* from acquired brain injury, autism spectrum disorder,

³³ Available at http://www.hreoc.gov.au/social_justice/cognitive_disabilities.doc (Last accessed at 5th September, 2012).

³⁴ See generally Whyte, Susan Reynolds and Ingstad, Benedicte (1995): "Disability and Culture: An Overview", in Ingstad, Benedicte and White, Susan Reynolds: *Disability and Culture*, University of California Press, 1995, p.3.

³⁵ It is for this reason that HIV-positive individuals cannot be referred to as persons with disabilities so long as their status has not affected their organs such as to reduce their ability to relate effectively with their everyday environment.

developmental delay, intellectual disability, physical disability, psychiatric disability, sensory disability...³⁶

Women and men with disabilities can and want to be productive members of society. Promoting a more inclusive society and employment opportunities for people with disabilities require improved access to basic education, vocational training relevant to labour market needs and jobs suited to their skills, interests and abilities with adaptations as needed. There is the need to dismantle barriers-making the physical environment more accessible, providing information in a variety of formats and challenging attitudes and mistaken assumptions about people with disabilities.

In order to address these problems suffered by the persons with disabilities, the Government of Kenya has adopted several laws and policies pertaining to people with disabilities, including their right to productive and decent work and basic services...These laws include *inter alia*: The Constitution of Kenya, 2010, the Persons with Disabilities Act and international law instruments especially the International Convention on the Rights of Persons with Disabilities.

The main subject of this piece of work is to interrogate the provisions of the Persons with Disabilities Act. Are they bold enough to address the plight of the persons with disabilities? Does the Act conform to the provisions of the Constitution of Kenya, 2010 and international law instruments on disability?

This research paper takes the approach that the Persons with Disabilities Act is not in conformity with the Constitution of Kenya, 2010 and international law instruments on disability which Kenya has already ratified. Secondly, it is regrettably, a piece of legislation which is a subject of

³⁶ For a further analysis of the definition of disability please visit <http://www.qld.gov.au/disability/community/facts-terms/types.html> (Last accessed on 31st October, 2012).

piece-meal implementation. This makes its impact lowly felt by the populace generally and the persons with disabilities, in particular. This has weakened Kenya's legal, administrative, structural and other mechanisms put in place to address the plight of persons with disabilities in Kenya. The Act therefore remains to a large extent a mere paper victory.

This research paper takes a journey of interrogating the provisions of the Persons with Disabilities Act and pointing out its weaknesses and shortcomings which should be addressed to make it a better law capable of addressing the plight of the persons with disabilities in Kenya.

1.3 Justification of the Study

In 2003, the government introduced the Persons with Disabilities Act which is an Act of Parliament to provide for the rights and rehabilitation of persons with disabilities; to achieve equalization of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities and for connected purposes. Kenya made a remarkable step in enacting a specific law on disability.

Subsequently, Kenya signed the International Convention on the Rights of Persons with Disabilities on 30th March, 2007 and ratified it on 19th May, 2008. The Convention's bold and courageous provisions addressing the rights of persons with disabilities need not be gainsaid. Countries that ratify the International Convention on the Rights of Persons with Disabilities must adopt appropriate legislation, amend/repeal laws that discriminate against disabled persons, including relevant policies and programs, and take all measures to prevent any discrimination against persons with disabilities. As far as the Persons with Disabilities Act is concerned, Kenya has not fully implemented this mandatory provision of the Convention.

In addition, Kenya promulgated the Constitution of Kenya, 2010 on 27th August, 2010. The Constitution dedicates several provisions to address the rights of persons with disabilities. These provisions are indeed progressive, bold and long-sighted in their nature in addressing the plight of the persons with disabilities.

Kenya promulgated and ratified the Constitution and the Convention respectively after 2003, the year when the Persons with Disabilities Act was adopted. Therefore the drafters of the Act did not have an opportunity to borrow and align the provisions with the relevant provisions of the Constitution and the Convention. Therefore, the provisions of the Act have been overshadowed by those of the Constitution and the Convention.

The limitations and the short-sightedness of the Persons with Disabilities Act are grave misgivings of the Act that have remained responsible for the malpractices and lack of concern that persons with disabilities in Kenya have to endure. There is a lot which needs to be done in order to internalize and cultivate the culture of mainstreaming disability concerns in Kenya. One of the main ways to realize this would be to interrogate the weaknesses in the Persons with Disabilities Act and pursue steps towards initiating necessary amendments to the Act which would remove the many limitations that risk compromising effective protection and betterment of the wellbeing of the persons with disabilities. This is the major reason of undertaking this study.

1.4 Objectives of the Study

This study is informed by the following objectives:

- a) To assess the extent to which Kenya's Persons with Disabilities Act is in conformity with the Constitution of Kenya, 2010.

- b) To assess the extent to which Kenya's Persons with Disabilities Act is in conformity with international instruments on disability and in particular the International Convention on the Rights of Persons with Disabilities.
- c) To assess whether and to what extent Kenya's policies, legal and institutional framework on disability rights conform to international human rights standards and norms.
- d) To interrogate Kenya's policy, legislative and administrative gaps which hinder realization of basic fundamental freedoms for persons with disabilities living in Kenya.
- e) To what extent can Kenya draw comparative parallels from the practices on disability rights in the Republic of South Korea?

1.5 Research Questions

This study will be guided by the following questions:

- a) Does Kenya have a comprehensive legislation to govern the commitment and fair treatment of persons living with disabilities?
- b) Are Kenya's legal, administrative and other mechanisms as provided under the Persons with Disabilities Act in compliance and/or in conformity with the Constitution of Kenya, 2010?
- c) Are Kenya's legal, administrative and other mechanisms to protect persons with disabilities in compliance and/or in conformity with the International Convention on the Rights of Persons with Disabilities?
- d) Has Kenya's Persons with Disabilities Act achieved its core objective of providing for the rights and rehabilitation of persons with disabilities, achieving equalisation of

opportunities for persons with disabilities and establishing the National Council for Persons with Disabilities?³⁷

- e) Has Kenya implemented fully the provisions aimed at protecting the rights of persons with disabilities as captured under the Constitution of Kenya, 2010, Persons with Disabilities Act and the International Convention on the Rights of Persons with Disabilities?

1.6 Research Hypothesis

This study is premised on the following assumptions:

- a) The Persons with Disabilities Act is not comprehensive and compliant to the International Convention on the Rights of Persons with Disabilities and the Constitution of Kenya, 2010, in addressing the rights of persons with disabilities.
- b) The provisions of the Persons with Disabilities Act have not been implemented fully in order to protect the rights of the persons with disabilities.

1.7 Theoretical framework

“Disability is a human rights issue! I repeat: disability is a human rights issue. Those of us who happen to have a disability are fed up with being treated by the society and our fellow citizens as if we did not exist or as if we were aliens from outer space. We are human beings with equal value, claiming equal rights! If asked, most people, including politicians and other decision-makers, agree with us. The problem is that they do not realize the consequences of this principle and they are not ready to take action accordingly.”³⁸

³⁷ Paraphrased from the Preamble to the Persons with Disabilities Act, Act No. 14 of 2003.

³⁸ Bengt Lindqvist, Special Rapporteur on Disability of the United Nations Commission for Social Development, Remarks at the 19th Congress of Rehabilitation International, Rio De Janiero (Aug. 25-30, 2000), in U.N. High Commissioner for Human Rights, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* at 13, U.N. Doc. HR/PUB/02/1 (2002) (prepared by

Persons with disabilities are human beings sharing human rights on an equal basis with, and to the same degree as other human beings. In the words of the Vienna Declaration and Programme of Action:

*“The place of disabled persons is everywhere. Persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers...which exclude or restrict full participation in society.”*³⁹

The Vienna Declaration further asserts that:

“Special attention needs to be paid to ensure non-discrimination and equal enjoyment of all human rights and fundamental freedoms by disabled persons.”

These special measures entail conscious and deliberate efforts and programmes aimed at identifying and removing those barriers that would otherwise impede effective realization and enjoyment of human rights by persons with disabilities.

Models of disability are like different lenses through which we see and understand disability. They influence how society responds to disability and what our approach to persons with disability is.

1.7.1 Medical Model

One of the traditional ways of thinking about disability was the so-called medical model. In the medical model, disability was seen as a medical need only.⁴⁰ Medical model of disability is based on the postulate that the problems and difficulties experienced by persons with disabilities

Gerard Quinn and Theresia Degener). Also available at <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/557/17PacRimLPolyJ497.pdf?se> (Last accessed on 12th November, 2012).

³⁹ See Paragraph 64 of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights of 1993.

⁴⁰ It regarded persons with disability as sick and the only solution to disability was seen in medical rehabilitation systems (for cure or treatment) and the creation of special services for persons with disability segregating them from society.

are directly related to their physical, sensory or intellectual impairments. This model defines disability in the clinical framework as diseases state, thus providing for major role for medical and paramedical professionals to cure these problems in such a way as to make them as normal as possible. The medical model supports the postulate that persons with disabilities are biologically and psychologically inferior to other able bodied counterparts. So they are not treated as fully human because they lack the competence to decide for themselves. This model reduces disability to impairment and sought to locate it within the body or mind of the individual while the power to define, control and treat disabled individual was located within the medical and paramedical professionals. This model restricts the rehabilitation efforts to medical treatment in terms of protection and cure.⁴¹

1.7.2 Charity Model

Another traditional way of viewing disability was the charity model. Under this model, persons with disability were looked upon with pity and charity. The initiative of individuals and organizations towards persons with disability under the charity model included temporary and unsustainable provision of goods, services and care with little or no regard for persons with disability to become independent beyond the present.⁴² This model is driven largely by the emotive appeals of charity. This model treats people with disabilities as helpless victims needing care and protection. It relies heavily on the charity and benevolence rather than justice and equality. This model accepts the act of exclusion of persons with disabilities from social

⁴¹ Kishor Bhanushali, "Changing Face of Disability Movement: From Charity to Empowerment". National Seminar on "Revisiting Social Work in the field of Health-A Journey from Welfare to Empowerment, 20-21 February, 2007, Faculty of Social Work, The Maharaja Sayajirao University of Baroda, Vadodara. Available at http://www.handicapinternational.fr/bibliographiehandicap/6SocieteCivile/Autonomisation/Changing_Face_of_Disability_Movement_From_Charity_to_Empowerment.pdf. (Last accessed on 12th November, 2012).

⁴² See generally <http://www.copower.org/models-of-disability/178-tragedycharity-model-of-disability.html> (Last accessed on 31st October, 2012).

arrangements and services in public domain. Charity model justifies the exclusion of persons with disabilities from the mainstream education and employment. Entitlement rights are substituted by relief measures creating an army of powerless individuals without any control or bargaining power, depending either on the state allocated fund or benevolent individuals. This model asks for social support mechanism for the benefit of persons with disability. Initial efforts of the government and individuals were based on this model. The government was allocating large chunk of fund for the welfare of persons with disabilities as direct benefit or support to voluntary organizations. At the same time, an army of non-governmental organizations working for the benefit of persons with disabilities also relies on the donations of the government grants.⁴³

1.7.3 Social Model

In contrast to medical model, which locates disability within the persons with disabilities, social model postulates that a person is disabled because of architectural, attitudinal and social barriers created by the society. The social model presents disability as a consequence of oppression, prejudice and discrimination by the society against disabled people. It is the society, which constructs economic, social, health, architectural, legal and cultural and other barriers in order to deliberately prevent people with impairments enjoying full benefits of social life. The social model shifts the emphasis from a disabled individual to the society and its disability attitudes and environment. People who believe on social model are of the view that handicap is made and not acquired. So the solution lies in social management by all necessary environmental modification.⁴⁴

⁴³ *Ibid.*

⁴⁴ *Ibid.*

1.7.4 Economic Model

The economic model tries to establish the linkages between the individual and society in term of their contribution to productive capabilities of the society. The emphasis here is on health related limitations on the amount and kind of work performed by persons with disabilities. This approach suggests that the employment problems of persons with disabilities stem from faulty economic system and deficiencies on the part of such disadvantaged individuals. The vocational rehabilitation programmes or income generation programmes are principal solutions to the problems faced by persons with disabilities. Existing policies play a greater role in condemning the disabled man and woman to a life of perpetual dependency thus providing low pay work and limited opportunities for all around development. Unlike other models, economic model suggests that the modification in the persons with disabilities in the form of education, training and employability rather than changing the environment and worksite changes or changes in the perception of employees is the most desirable means of fulfilling the social and economic needs of the disadvantages strata of the society.⁴⁵

1.7.5 Moral Model

Traditional and spiritual beliefs also play an important role in the understanding of cause of disability. Witchcraft, misfortune and mysterious causes were all linked to disability. Witchcraft could be carried out by a family member or an acquaintance: *“A relative may use magic power on another relative because of jealousy.”* Human or supernatural element may lead to misfortune and disability, *“may be human driven or spiritual when you are put in a state of misfortune, for example when fighting for land.”* When the disability cannot be attributed to genetics, the parents may have opposed a taboo in the past, for example, within a polygamous

⁴⁵ *Ibid.*

relationship, if the husband was supposed to sleep in the hut of the second wife, but sleeps in the hut of the first wife, they may have a child with a disability: *“If a child is not properly massaged when born to protect him and prevent disease by increasing temperature and relieving tight, save, muscles.”* Physical impairments were also linked to mystery, particularly when worries and problems were thought to be the cause of a disability that could not be explained any other way.⁴⁶

It has been argued that many communities attribute disability to witchcraft, curses resulting from parental violation of traditional norms, or a condition that originates from vengeful spirits. Hence there is usually a feeling of fear and pity, which may result in the isolation of those with disabilities.⁴⁷

Spiritual beliefs linked deformity and disability with causes relating to a higher being beyond human control. *“When people are born naturally disabled and the cause cannot be explained, it must be God’s plan. It cannot be any other way.”* Spiritual beliefs also described human behaviours as precipitants of reactions from God. *“Disability is driven by supernatural powers. God reacts differently to people based on behaviours.”*⁴⁸

1.7.6 Human Rights Model

These traditional approaches to disability have been increasingly criticized particularly by persons with disability, since they subject them to a very limited understanding of disability by society in general. As a result of the political movement of persons with disability and academic

⁴⁶ See Monk J. and Wee, J (2008) Factors shaping attitudes towards physical disability and availability of rehabilitation support systems for disabled people in rural Kenya. Asia Pacific Disability Rehabilitation Journal, 19(1), 93-113. Available at http://www.aifo.it/english/resources/online/apdrj/apdrj108/disability_kenya.pdf (Last accessed on 31st October, 2012).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

research, a human rights model of disability was developed which has slowly replaced previous models.

Over the past two decades, a dramatic shift in the perspective has taken place from an approach motivated by charity towards persons with disabilities to one based on rights. Disability is positioned as an important dimension of human culture by human rights model. According to this model, all human beings irrespective of their disabilities have certain rights which are unchallengeable. By emphasizing that the disabled are equally entitled to rights as others, this model builds upon the spirit of the Universal Declaration of Human Rights, 1948.⁴⁹ This model emphasize on viewing persons with disabilities as subjects and not as objects thus locating the problem outside the disabled persons and addresses the manner in which the economic and social processes accommodate the differences of disability or not, as the case may be.⁵⁰

This paper adopts the theory advanced by the human rights model of viewing and contextualizing disability. The human rights model is now the cornerstone of disability work around the world and the basis of the United Nations Convention on the Rights of Persons with Disability, 2006. The Convention and other legal framework on disability view disability as a principle with a human rights inclusion approach.⁵¹

This paper presents the philosophical and normative framework which has informed the marginalization and neglect of persons with disabilities, but at the same time which have also

⁴⁹ Article 1 provides, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Available at <http://www.un.org/en/documents/udhr/index.shtml#a5> (Last accessed on 12th November, 2012).

⁵⁰ *Supra* note 46.

⁵¹ See the Inclusion Guidelines on Disability and Mainstreaming for Development Programs in Kenya by Handicap International, September, 2010. Available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&ved=0CCkQFjAC&url=http%3A%2F%2Fudpkenya.org%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D5%26Itemid%3D94&ei=ldaQUNSyKePU0QWatoC4Bg&usq=AFQjCNFYxpSXa5KuPTTLMrWqpXA34svoKQ (Last accessed on 31st October, 2012).

been the drivers for pronouncing and raising the perception of persons with disabilities as subjects rather than objects of human rights.

The human rights model can be linked to the natural law theory. Natural law theories propose to identify principles or right action-moral principles-specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment.⁵² Among these principles is a respect for rights people possess simply by virtue of their humanity-rights which as matter of justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.⁵³

Theorists of natural law understand human fulfillment-the human good-as variegated. There are many irreducible dimensions of human well-beings.⁵⁴ By reflecting on the basic goods of human nature, especially those most immediately pertaining to social and political life, natural law theorists propose to arrive at a sound understanding of principles of justice, including those principles we call human rights.⁵⁵

Everybody has a moral right not to be enslaved and everybody an obligation as a matter of strict justice to refrain from enslaving others; governments have a moral obligation to respect and protect the rights and, correspondingly, to enforce the obligation.⁵⁶ This natural law understanding of human rights is connected with a particular account of human dignity. Under

⁵² See John Finnis, Joseph M. Boyle, Jr. & German Grisez, Nuclear Deterrence, Morality and Realism, 281-87 (1981). Also available at http://inkonet.net/downloads/Natural_Law_Vol31_No1.pdf (Last accessed on 29th November, 2012).

⁵³ See Robert P. George, Natural Law, Havard Journal of Law & Public Policy, Vol. 31, 1. Also available at http://inkonet.net/downloads/Natural_Law_Vol31_No1.pdf (Last accessed on 29th November, 2012).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

this account, the natural human capacities for reason and freedom are fundamental to the dignity of human beings-the dignity that is protected by human rights.⁵⁷

1.8 Literature Review

This study has been inspired and shall be enriched by a number of writings and publications on the subject of rights of persons with disability in Kenya. Several international publications and international instruments on disability and human rights will also be invaluable for this study.

The Kenya National Commission of Human Rights Report, *Objects of Pity or Individuals with Rights: The Right to Education for Children with Disabilities*⁵⁸ opines that persons with disabilities are human beings sharing human rights on an equal basis with, and to the same degree as, other human beings. This report appreciates that several statutes give the impression that Kenyan policy makers have made the conscious decision to develop disability-specific statutes to cover a variety of concerns which persons with disabilities have. In addition, the report notes that issues of disability have not been included in legislations of general application. This approach has the key advantage of ensuring that non-marginalisation or non-peripheralisation of disability issues. For example, while the Persons with Disabilities Act has overarching functions in the area of disability, its attendant institutions are so under-resourced that the purposes of the Act by and large remain unfulfilled. This is a very useful report in the writing of this research paper as it provides a good legal framework which will be consulted widely. However, the report is quite narrow on addressing the question of disability as it only focuses on the subject of the right to education for children with disabilities in Kenya. In

⁵⁷ *Ibid.*

⁵⁸ See generally, *Objects of Pity or Individuals with Rights: The Right to Education for Children with Disabilities: Kenya National Commission of Human Rights Occasional Report, 2007*, 16. Available at <http://www.knchr.org/Portals/0/Reports/Objects%20of%20Pity%20OR%20Individuals%20with%20Rights%20-%20Final%20April%202007.pdf> (Last accessed on 14th September, 2012).

addition, the paper was written during the subsistence of the repealed Constitution of Kenya where it borrowed heavily on its literature. This research paper is relevant as it fills in these gaps because it analyses the rights of persons with disabilities in the Kenyan legislation generally and projects them against international law lenses. Again, this research paper bases its arguments on the current Constitution of Kenya, 2010.

Lawrence Murugu Mute, *Shattering the Glass Ceiling: Ensuring the Rights to Vote for Persons with Intellectual Disabilities in Kenya*⁵⁹ states that persons with disabilities have the right to recognition everywhere as persons before the law. This is an affirmation that disability does not deprive a person of his or her personhood. Secondly, persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life: that legal capacity does not stop inhering in a person because of his or her disability and such enjoyment relates to all aspects of the lives of such individuals.⁶⁰ This article also notes that the exercise of the right to vote by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a

⁵⁹ See Lawrence Murugu Mute, *Shattering the Glass Ceiling: Ensuring the Right to Vote for Persons with Intellectual Disabilities in Kenya* National Commission on Human Rights, *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK) New Series, Vol.2 No.2, December 2010, pp.10-11* Available on <http://ajol.info/index.php/tp/index> (Last accessed on 9th September, 2012).

⁶⁰ Article 29 of the International Convention of the Rights of Persons with Disabilities states that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake: (a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by: (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; (b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels. Available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (Last accessed on 8th September, 2012).

ground for denying a person the right to vote or to hold office.⁶¹ This article explores persons with disabilities *vis-à-vis* the right to vote. While this research paper appreciates this aspect, it contends that the discussion is too narrow since it addresses only one aspect of fundamental rights and freedoms to be discussed by persons with disabilities in Kenya. This research paper is significant since it will address several disability rights critical to persons with disabilities. Efforts will also be made to measure how far we have implemented these rights as required under international law instruments and norms.

Kamau Esther, *The Extent of Compliance with Article 12 and 29 of the Convention on the Rights of Persons with Disabilities in Kenya with Specific Focus on Persons with Mental Disabilities*⁶² appreciates that several laws in Kenya provide provisions for recognition of the rights of persons with mental disabilities. For example, Persons with Disabilities Act, provides for general recognition of all persons with disabilities as partakers of rights on equal basis with others and even goes further to obligate the state to take steps to ensure effective realization of their rights⁶³. Similarly, the Constitution of Kenya, 2010, articulates this position by providing that the right of persons with disabilities includes the right to “access materials and devices to overcome constraints arising from the person’s disability.”⁶⁴ This article takes a narrow approach since it interrogates the provisions of Article 12 and 29 of the International Convention of the Rights of Persons with Disabilities only. This research paper will take into account all the provisions of

⁶¹ See generally, Human Rights Committee, General Comment No. 25, paragraph 4. Available at <http://www1.umn.edu/humanrts/gencomm/hrcom25.htm> (Last accessed on 31st October, 2012).

⁶² Available at http://www.kituogetheria.or.ke/index2.php?option=com_docman&task=doc_view&gid=94&Itemid=92. (Last accessed on 9th August, 2012).

⁶³ Section 11 of Persons with Disabilities Act provides that, “The Government shall take steps to the maximum of its available resources with a view to achieving the full realization of the rights of persons with disabilities set out in this Part.”

⁶⁴ Article 54(1) of the Constitution of Kenya, 2010.

this Convention and other related international instruments. The Persons with Disabilities Act should be in consonance with international law because it is part of the Kenyan law.⁶⁵ This research paper will therefore address the gaps evident in the Act holistically.

Handicap International Report, *Inclusion Guidelines on Disability and Mainstreaming for Development Programs in Kenya*⁶⁶ notes that following the world war II, the international community made human rights a central feature of its mutual efforts to bring peace, stability and prosperity to the world. The United Nations Charter-which is the treaty through which states become members of the United Nations stipulates that one of the ‘purposes’ of the United Nations is to promote and encourage respect for human rights and fundamental freedoms for all. The clause adds that no distinction should be made on grounds of ‘race, sex, language or religion’⁶⁷. This clause was to be the starting point for an elaborate clause in a binding human rights treaty towards the inclusion of rights of persons with disability. In addition, this article notes that the Persons with Disabilities Act recognizes that persons with disability face discrimination in various forms and that the government should take steps to the maximum of its resources to achieve the realization of rights by persons with disabilities set out in the Act. This is an important report to this research. However, it takes a descriptive approach and restricts itself to narrating the provisions of the Persons with Disabilities Act and the Convention on the Rights of Persons with Disabilities and their implications. This research paper proceeds on a critical approach and its main aim is to demonstrate that the Persons with Disabilities Act has evident gaps when viewed against international law lenses.

⁶⁵ Article 2(6) of the Constitution of Kenya, 2010, provides that, “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

⁶⁶ Handicap International Occasional Report of 1st September, 2010. *Supra* note 51.

⁶⁷ Article 1 (3) of the Charter of the United Nations states that one of the purposes of United Nations is to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Pia Korpinen, International Labour Organisation & Irish Aid Partnership Programme Report, *Inclusion of People with Disabilities in Kenya*.⁶⁸ This report narrates in a nut shell the legislative framework available in Kenya aimed at protecting the rights of persons with disabilities. This report falls short of appreciating that the legal framework at its current position has not achieved a lot due to the existing gaps. That is why this research paper is important because it will interrogate these gaps and propose a myriad of ways on how they can be solved.

Elizabeth Kamundia, *Independent Living for People with Disabilities in Kenya: Chatting the Way Forward*⁶⁹ appreciates the fact that the right (to legal capacity) acknowledges that people with disabilities have an innate capacity to decide their destinies for themselves-where to live, who to live with, what education or employment to pursue and to have those choices respected. If there is to be an intervention on the part of the State, the primary impulse should be to support a residuum of capacity and to intervene to support people to make decisions for themselves, with appropriate safeguards. While this Article makes a stride in discussing the legal infrastructure available in Kenya to address the plight of persons with disabilities, its main focus is on independent living in the community of persons with disabilities as captured under the International Convention on the Rights of Persons with Disabilities.⁷⁰ This research paper, while

⁶⁸See generally, http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_115097.pdf (Last accessed on 8th September, 2012).

⁶⁹Available at <http://www.google.co.ke/url?sa=t&rct=j&q=elizabeth%20kamundia%20independent%20living%20for%20people%20with%20disabilities&source=web&cd=1&sqj=2&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.nuigalway.ie%2Fmedia%2Fhousinglawrightsandpolicy%2FKamundia%2C-E---Independent-living-for-people-with-disabilities-in-Kenya.doc&ei=9RtLUIqzG46k0AWu3YGQBw&usg=AFQjCNEyKtWnS0kfUy7-RvA6cK1IWjF7Hg> (Last accessed on 8th September, 2012).

⁷⁰ Article 19 of the ICRPD states that States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; b) Persons with disabilities have access to a range of in-home, residential

addressing this fundamental right, will transcend to discuss the other rights and evaluate Kenya's level of compliance as expected under the Constitution of Kenya, 2010 and international law instruments, norms and practices.

George O Otieno Ochich, *Bold and Generous or Timid and Faint-Hearted? A Panoramic Assessment of Kenya's Persons with Disabilities Act, 2003*⁷¹ notes that disability legislation is a very recent development in Kenya. For a long time, Kenya did not have a comprehensive legislative framework on disability and disability concerns did not have direct expression as such in Kenya's official quarters. That lacuna, coupled with massive negative societal perceptions on disability, long exposed Kenya's persons with disabilities to many negative challenges and disadvantages including discrimination, neglect, marginalization and unequal opportunities in many spheres of life. This article argues that the Persons with Disabilities Act requires a lot of harmonization with other pieces of legislation on disability. The existence of parallel regimes of law relating to disability raises serious harmonization-related problems. There is still urgent need to harmonize the provisions of the Act with the provisions of other statutes⁷² that directly or indirectly relate to disability. In the absence of such harmonization, the provisions of this Act will be difficult to realize. Similarly, failure to adjust the Act to conform to the Constitution will make many disability rights guaranteed under the Act remain largely unenforceable. This article makes a bold step in interrogating the strength and weaknesses of the Persons with Disabilities Act. However, it is important to appreciate that it was written under the repealed Constitution of Kenya. Therefore, it is not abreast with the recent developments in Kenya's constitutional

and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

⁷¹ The Law Society of Kenya Journal Volume 4, 2008 No. 1 issue, at 93.

⁷² *Infra* note 220.

framework. In addition, the author does not view the article through international law lenses. This is why this research paper is important. It compares the strengths and the weaknesses of the Persons with Disabilities Act as against the Constitution of Kenya, 2010 and the international law instruments on disability.

Michael L. Perlin, *A Change is Gonna Come: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*⁷³ underscores that as recently as fifteen years ago, disability was not broadly acknowledged as a human rights issue. Although there were prior cases decided in the United States and in Europe that, retrospectively, had been litigated on a human rights perspective, the characterization of ‘disability rights’ (especially the rights of persons with mental disabilities) was not discussed in a global public, political, or legal debate until the early 1990’s. Instead, disability was seen only as a medical problem of the individual requiring treatment or cure. By contrast, viewing disability as a human rights issue requires us to recognize the inherent equality of all people, regardless of their abilities, disabilities, or differences, and obligates society to remove the attitudinal and physical barriers to equality and inclusion of people with disabilities. This article discusses at length the mental disability law as provided under the International Convention on the Rights of Persons with Disabilities (CRPD). However, it conceptualizes its theme on the situation in the United States of America. This research paper appreciates this academic discourse, but discusses the Kenyan context on the disability legal framework and views it against international law.

⁷³ Available at http://www.niupress.niu.edu/law/organizations/law_review/pdfs/full_issues/29_3/perlin.pdf (Last accessed on 8th September, 2012).

1.9 Methodology used

The research will be enriched through the use and review of Kenyan and Korean local statutes, subsidiary legislation, law reports and government policy papers.

In addition to primary sources of data, secondary sources are also used. These include *inter alia*: textbooks, local and international journals, articles, research papers, case law, newspapers and magazines, internet sources and other materials relevant to this study.

The University of Nairobi Law Library, Jomo Kenyatta Memorial Library, the Kenya National Commission on Human Rights Library, the Kenya Institute of Special Education Library and the National Council for Persons with Disabilities Library are the main places to undertake the research.

1.10 Limitations of the study

This research paper will not focus on the other pieces of legislation on disability although they are important. The main focus of this study is to demonstrate that the Persons with Disabilities Act has gaps and inconsistencies as compared to the relevant provisions of the Constitution of Kenya, 2010 and the International Convention of the Rights of Persons with Disabilities. However, this research paper appreciates that the Persons with Disabilities Act, 2003 codifies provisions applicable to all forms of disability and it exists alongside the prior-existing pieces of legislation touching on disability.⁷⁴ The research paper appreciates that disability law in Kenya is also contained in other pieces of legislation applicable to specific forms of disability. On the same breathe, there are also other international instruments touching on disability rights. All these will not fall under the purview of this study. In addition, this research will be limited to the

⁷⁴ *Infra* note 220.

qualitative approach of data collection. Due to time constraints, quantitative approach of data collection will not be adopted.

CHAPTER TWO

A REFLECTION OF THE CONSTITUTION OF KENYA, 2010 ON ITS PROVISIONS ON PERSONS WITH DISABILITIES AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL.

2.0 Introduction

This Chapter discusses the provisions of the Constitution of Kenya, 2010, which are specifically aimed at protecting and enhancing the rights of persons with disabilities. In addition, the Chapter interrogates the provisions of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol. This Chapter demonstrates that Kenya has made a bold step in enacting laws and ratifying international instruments aimed at safeguarding and enhancing the rights and freedoms of persons with disabilities. This Chapter is divided into two: Part I discusses the Constitution of Kenya and Part II discusses the provisions of the Convention and its Optional Protocol.

2.1 The Constitution of Kenya, 2010

Kenya is in a new constitutional dispensation.⁷⁵ The Constitution of Kenya, 2010 (“hereinafter referred to as the Constitution”) is the supreme law of the Republic and binds all persons and all State organs at both levels of government.⁷⁶ Any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.⁷⁷ This implies that all laws in the Republic should conform to the provisions of the Constitution lest they are declared

⁷⁵ The Constitution of Kenya, 2010, was promulgated on 27th August, 2010. Available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/Constitution_of_Kenya_2010.doc (Last accessed on 8th September, 2012).

⁷⁶ Article 2(1) of the Constitution.

⁷⁷ Article 2(4) of the Constitution.

unconstitutional. Due to the progressive nature of this basic and fundamental document, there is renewed hope in all fronts that with good governance, sound social and economic interventions, there will be an improved realization of human rights in Kenya.

The protection of human rights and fundamental freedoms, including economic and social rights, is safeguarded under the Constitution.⁷⁸ It sets out a progressive Bill of Rights enjoyable by all individuals in Kenya. The Constitution promotes equality and non-discrimination.⁷⁹

The Constitution further provides special safeguard on the protection of individuals or groups who may be discriminated and in this regard, among the national values and principles of governance which binds all State organs, State officers, Public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions,⁸⁰ should not divert from human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.⁸¹

The Constitution provides that general rules of international law shall form part of the law of Kenya⁸² and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.⁸³ Consequently, once ratified, international instruments can be directly applied by the courts, tribunals or administrative authorities in the absence of domestic

⁷⁸ For a comprehensive discussion on the Bill of Rights, look at Chapter Four of the Constitution.

⁷⁹ Article 27(1) and (2) of the Constitution provides that every person is equal before the law and 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.

⁸⁰ Article 10(1) of the Constitution.

⁸¹ Article 10 (2) (b) of the Constitution.

⁸² Article 2(5) of the Constitution.

⁸³ Article 2(6) of the Constitution.

legislation on the same. It is worth noting that Kenya has ratified a multiplicity of international instruments which are relevant to this study.⁸⁴

The rights of persons with disabilities have been given Constitutional recognition and safeguards. As opposed to the past Constitutions,⁸⁵ the current Constitution provides substantive provisions for the rights of persons with disabilities. It gives effect to the provisions of the United Nations Convention on the Rights of Persons with Disabilities and the text is couched in specific terms designed to minimize barriers to equalization of opportunities in all aspects of socio-cultural, economic and political life.⁸⁶

2.2 Definition of Disability under the Constitution

The definition of disability has been couched in the following words in the Constitution:

“...any physical, sensory, mental, psychological or other impairment, condition or illness that has or is perceived by significant sector of the community to have, a substantial or long term effect on an individual’s ability to carry out ordinary day-to-day activities.”⁸⁷

⁸⁴ Some of the treaties and conventions which deserve to be mentioned include *inter alia*: The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Rights of Persons with Disability, the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

⁸⁵ Especially the Repealed Post-Independence Constitution of Kenya.

⁸⁶ Article 54 of the Constitution provides that a person with any disability is entitled to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning, 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, to reasonable access to all places, public transport and information, to use Sign language, Braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person’s disability. The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

⁸⁷ Article 260 of the Constitution.

2.3 Specific Provisions on Disability under the Constitution

The Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.⁸⁸ The persons with disability are therefore supposed to enjoy all rights and freedoms in equal measure with normal people. This is demonstrated by the fact that the Constitution has express provisions aimed at protecting and enhancing the rights of persons with disabilities. The Constitution has provided general rights and freedoms which should be enjoyed equally by all people, including persons with disabilities.⁸⁹ The next part is aimed at evaluating these provisions and laying an emphasis that Kenya is in the fast-track in ensuring that the rights and freedoms of persons with disability are protected and that their capacity is enhanced.

2.3.1 Communication and Language

The Constitution recognizes that Kiswahili and English are the official languages of Kenya.⁹⁰ In addition, it enjoins the State to promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies to persons with disabilities.⁹¹ A person with any disability is entitled to use Sign language, Braille or other appropriate means of communication.⁹²

2.3.2 Discrimination on the basis of Disability

Discrimination against persons with disabilities is entrenched in stereotypes prevailing in Kenya. The society portrays persons with disabilities as burdens and curses. In some instances,

⁸⁸ Quoted from the Preamble to the Constitution.

⁸⁹ These general rights and freedoms include *inter alia*: right to life(article 26(1)), liberty of movement and nationality (article 39),respect for home and the family (article 45(1)), work and employment (article 41), right to participation in cultural life, recreation, leisure and sport (articles 11(1), 11(2) and 44(1)),

⁹⁰ Article 7(2) of the Constitution.

⁹¹ Article 7(3) (b) of the Constitution.

⁹² Article 54(1) (d) of the Constitution.

individuals and/or families who have persons with disabilities have shied away from revealing such persons. The Constitution expressly accords all persons equal treatment before the law.⁹³ Equality includes the full and equal enjoyment of all rights and fundamental freedoms.⁹⁴ In addition, the Constitution outlaws all forms of discrimination in the following words:

“The State or a person shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”⁹⁵

The State is also enjoined to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. This is important in order to give full effect to the realization of the rights guaranteed under this article.⁹⁶ The values and principles of public service include affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service of persons with disabilities, among others.⁹⁷

2.3.3 Accessibility

The Constitution guarantees the rights of persons with disabilities to enable them access basic services in the society. Persons with disabilities are entitled to reasonable access to all places, public transport and information access to educational institutions and facilities for persons with

⁹³ Article 27(1) of the Constitution expressly provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

⁹⁴ Article 27(2) of the Constitution.

⁹⁵ Article 27(4) and (5) of the Constitution.

⁹⁶ Article 27(6) of the Constitution.

⁹⁷ For a comprehensive discussion on this, see Article 232 (1) (i) of the Constitution.

disabilities that are integrated into society to the extent compatible with the interests of the person.⁹⁸

With regard to information and communications, including information and communications technologies and systems, the Constitution enjoins the government to promote the development and use of...Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.⁹⁹

2.3.4 Access to Justice

The State shall ensure access to justice for all persons including persons with disabilities. The Constitution further guarantees that if any fee is required, then the same should be reasonable and shall not impede access to justice.¹⁰⁰ Courts and tribunals should do justice to all irrespective of status.¹⁰¹ The courts and tribunals have also been enjoined to make sure that justice shall not be delayed and that it shall be administered without undue regard to procedural technicalities.¹⁰²

The Constitution, in addition, guarantees the right to a fair trial and public hearing for all persons, including persons with disabilities.¹⁰³ This right is unlimited.¹⁰⁴ Every accused person has a right to a fair trial.¹⁰⁵ On the same breadth, the Constitution guarantees an accused person

⁹⁸ Article 54 of the Constitution.

⁹⁹ Article 7(3) (b) as read with Article 54(1) (d) and (e) of the Constitution.

¹⁰⁰ Article 48 of the Constitution.

¹⁰¹ Article 159 (2) (a) of the Constitution.

¹⁰² Article 159 (2) (b) and (d) respectively.

¹⁰³ Article 50 (1) of the Constitution.

¹⁰⁴ Article 25 (c) of the Constitution.

¹⁰⁵ Under Article 50 (2), the Constitution gives an exhaustive list of the rights accorded to accused persons and include *inter alia*: the right to be presumed innocent until the contrary is proved; to be informed of the charge, with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before a court established under the Constitution; to have the trial begin and conclude without unreasonable delay; to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed; to choose, and be represented by an advocate and to be informed of this right promptly; to have an advocate assigned to the

the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.¹⁰⁶ This can be read with Article 54 of the Constitution which guarantees a person with disabilities the right to use Sign language, Braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person's disability.¹⁰⁷

The Constitution also recognizes the right of every person, including persons with disabilities, to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.¹⁰⁸ It further allows court proceedings to be instituted by a person acting as a member of, or in the interest of, a group or class of persons, a person acting in the public interest or an association acting in the interest of one or more of its members.¹⁰⁹

In order to actualize the provisions of this Article, the Chief Justice is enjoined by the Constitution to make rules providing for the court proceedings...which shall satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.¹¹⁰

When a court, tribunal or other authority is interpreting the Bill of Rights, due regard must be given to promote the values that underlie an open and democratic society based on human

accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to remain silent, and not to testify during the proceedings; to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; to adduce and challenge evidence; to refuse to give self-incriminating evidence...

¹⁰⁶ Article 50 (m) of the Constitution.

¹⁰⁷ See Article 54 (1) (d) and (e) of the Constitution.

¹⁰⁸ Article 22(1) of the Constitution.

¹⁰⁹ Article 22(2) of the Constitution.

¹¹⁰ Article 22(3) (b) of the Constitution.

dignity which includes the principle of human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.¹¹¹ In addition, the Constitution obligates all State organs and all public officers to address the needs of vulnerable groups within society, among others, persons with disabilities.¹¹²

2.3.5 Liberty and Security of the Person and Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment.

The Constitution guarantees every person, including persons with disabilities, the right to freedom and security of the person, which includes the right not to be deprived of one's freedom arbitrarily or without just cause, be detained without trial, not to be subjected to any form of violence, torture, to corporal punishment or treated or punished in a cruel, inhumane or degrading manner. All persons are also guaranteed the right not to be held in slavery or servitude.¹¹³ In instances where the liberty of a person may be deprived then the same must be in accordance with the law. A person with disabilities therefore cannot have his liberty and security of persons curtailed on the mere basis that they have a disability.

2.3.6 Protecting the Integrity of the Person

The privacy and integrity of all persons in Kenya is constitutionally protected. The Constitution guarantees all citizens their right to privacy. It protects all individuals from arbitrary searches of their person, home or property, the seizure of their property or the unnecessary demand of information regarding one's family or private affairs or the interference of their private communications.¹¹⁴

¹¹¹ Article 20(4) of the Constitution.

¹¹² Article 21(3) of the Constitution.

¹¹³ Article 30 of the Constitution.

¹¹⁴ Article 31 of the Constitution.

A person with any disability is entitled to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning.¹¹⁵

2.3.7 Freedom of Expression and Opinion and Access to Information

Every Kenyan, including a person with disability, should exercise freedom of expression and opinion and access to information. Every citizen has the right of access to information held by the State or another person and required for the exercise or protection of any right or fundamental freedom.¹¹⁶ The State is enjoined to publish and publicize any important information affecting the nation.¹¹⁷ The Constitution expressly states that persons with disabilities are entitled to information.¹¹⁸ In addition, a person with disability has the right to use Kenyan Sign language, Braille or other appropriate means of communication and finally to access materials and devices to overcome constraints arising from the person's disability.¹¹⁹ The Constitution makes a laudable provision by obligating the government to promote the development and use of Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.¹²⁰ It further requires that the official languages of Parliament shall be Kiswahili, English and Kenyan Sign language and the business of Parliament may be conducted in English, Kiswahili and Kenyan Sign language.¹²¹

Every person, including a person with disability, has the right to freedom of conscience, religion, thought, belief and opinion.¹²² Further, every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through

¹¹⁵ Article 54(1) of the Constitution.

¹¹⁶ Article 35(1) (a) and (b) of the Constitution.

¹¹⁷ Article 35(3) of the Constitution.

¹¹⁸ Article 54(1) (c) of the Constitution.

¹¹⁹ Article 54(1) (d) and (e) of the Constitution.

¹²⁰ Article 7 of the Constitution.

¹²¹ Article 120(1) of the Constitution.

¹²² Article 32(1) of the Constitution.

worship, practice, teaching or observance, including observance of a day of worship.¹²³ In connection to this right, and to prevent discrimination, the Constitution provides that a person may not be denied access to any institution, employment or facility, or the enjoyment of any right because of the person's belief.¹²⁴

2.3.8 Right to Education

Persons with disabilities have a right of education without discrimination and based on equal opportunities. They should therefore access high quality education because it is one of the major pillars to enable persons with disabilities participate in the society fully and help considerably reduce marginalization. The Constitution guarantees every citizen's right to education.¹²⁵ Every child has a right to free and compulsory basic education.¹²⁶ The constitutional bold provisions to enhance the rights of persons with disabilities are manifested under its article 54. It is a constitutional right for persons with disabilities to access inclusive education. This provision appreciates the challenges faced by persons with disabilities in accessing education and therefore requires educational institutions to modify its facilities to ensure integration into society and greater access to learners with disabilities to the extent compatible with their interests.¹²⁷ The State has been enjoined to put in place affirmative action programs designed to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields.¹²⁸

¹²³ Article 32(2) of the Constitution.

¹²⁴ Article 32(3) of the Constitution.

¹²⁵ Article 43(1) (f) of the Constitution.

¹²⁶ Article 53(1) (b) of the Constitution.

¹²⁷ Article 54 (1) (b) of the Constitution.

¹²⁸ Article 56(b) of the Constitution.

2.3.9 The Right to Health

The Constitution places great adequate commitment upon the State to provide health services to persons with disabilities. This provision is laudable considering the serious health implications and medical service demands of persons with disability. Health services to persons with disabilities are so critical that they call for greater government commitment in the form of an enforceable right. The Constitution provides that every person, including, persons with disabilities, has the right to the highest attainable standard of health which includes the right to health care services including reproductive health care.¹²⁹ Every child, including a child with disability, has the right to basic nutrition, shelter and health care.¹³⁰ The Constitution has placed an obligation on the State to put in place affirmative action programs designed to ensure that minorities and marginalized groups including persons with disabilities have reasonable access to health services.¹³¹

2.3.10 Participation in Political and Public Life

The Constitution has enacted bold and progressive provisions aimed at improving the participation by persons with disabilities in politics and public life. To make this possible, the Constitution expressly provides that electoral system shall comply with among other principles, the fair representation of persons with disabilities.¹³² In order to make this possible, Parliament has been enjoined to enact legislation to ensure that voting is made simple, transparent and takes into account the special needs of persons with disabilities and other persons or groups with special needs.¹³³ The State has an obligation to ensure the progressive implementation of the

¹²⁹ Article 43(a) of the Constitution.

¹³⁰ Article 53 (1) (c) of the Constitution.

¹³¹ Article 56 (e) of the Constitution.

¹³² Article 81 (c) of the Constitution.

¹³³ Article 82(2) (c) of the Constitution.

principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.¹³⁴ In addition, the Constitution guarantees all Kenyan's, including persons with disabilities, above the age of 18 years, the right to be registered as a voter and to vote in an election or referendum.¹³⁵ These measures ensure that persons with disabilities enjoy their right to vote on their own and to be assisted to vote and make their own choice in an election or referendum.

2.3.11 Specific Rights of Women with Disabilities

Women in Kenya remain largely marginalized. They face a number of challenges including the fact that they have limited access to and control of resources and other socio-economic opportunities, they have lower literacy levels compared to men, fewer of them are in formal employment compared to men, they have poor access to quality health, care and advice on family planning and are more vulnerable to gender-based violence. There are high levels of stigma around women with disability in many communities in Kenya.

The vulnerability of women stems from negative cultural practices and attitude towards disability and gender biases, among others. The situation is complicated by traditional and conservative views on the position and the role of women in society, which reinforce the misconception about the ability of women and girls with disabilities to adequately perform their roles as other peers.

The Constitution guarantees all citizens, including women and men with disabilities, the right to equal treatment. This includes the right to equal opportunities in political, economic, cultural and social spheres.¹³⁶ It also expressly prohibits discrimination by the State or any other person

¹³⁴ Article 54(2) of the Constitution.

¹³⁵ Article 38 of the Constitution.

¹³⁶ Article 27(3) of the Constitution.

based on, among others, sex, pregnancy, marital status, sex, disability and dress.¹³⁷ This provision further recognizes that equality includes the full and equal enjoyment of all rights and fundamental freedoms for both women and men, which includes both women and men with disabilities.¹³⁸

The next part is dedicated to discuss the Convention together with its Optional Protocol.

2.4 The United Nations Convention on the Rights of Persons with Disabilities

On December 13, 2006, the General Assembly adopted the United Nations Convention on the Rights of Persons with Disabilities¹³⁹ along with its Optional Protocol¹⁴⁰ by general consensus.¹⁴¹

The Convention opened for signature on March 30, 2007 and entered into force on May 3, 2008.¹⁴² As such, the Convention is the first human rights treaty of the twenty-first century, as well as the first legally enforceable United Nations instrument specifically directed at persons with disabilities.¹⁴³ Kenya signed the Convention on 30th March, 2007 and ratified it on 19th May, 2008. However, it is yet to ratify the Optional Protocol.

¹³⁷ Article 27(4) of the Constitution.

¹³⁸ Article 27(2) and (3) of the Constitution.

¹³⁹ United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007)

¹⁴⁰ Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res.61/106 (2007).

¹⁴¹ See *General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Persons with Disabilities: Delegations, Civil Society Hail First Human Rights Treaty of Twenty-First Century*, GA/105554 (United Nations Department of Public Information December 13, 2006), available online at <http://www.un.org/News/Press/docs/2006/ga10554.doc.htm> (Last accessed on 24th September, 2012).

¹⁴² The CRPD text, along with its drafting history, resolutions, and updated list of States Parties is posted on the United Nations Enable website, available online at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm> (Last accessed on 24th September, 2012).

¹⁴³ The CRPD required ratification by twenty States Parties to enter into force and trigger the establishment of a monitoring Committee on the Rights of Persons with Disabilities. See CRPD, *supra* note 226, at article 45(1) (“The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.”); *ibid.* at article 45(2) (“For each State or regional integration organization ratifying, formally confirming or acceding to the Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.”); Optional Protocol, *supra* note 227, at art. 13(1) (“Subject to the entry into force of this Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.”).

2.4.1 An Overview of the Convention

The Convention holistically melds civil and political rights with economic, social and cultural rights.¹⁴⁴ The Convention aspires to manifest the mandate that human rights are “indivisible, interrelated and interconnected”¹⁴⁵. It articulates a comprehensive catalogue of human rights obligations within the circumstances of a particular group-the persons with disabilities.¹⁴⁶

The Convention’s articles are introductory¹⁴⁷, of general application¹⁴⁸, enumerate substantive rights¹⁴⁹, set forth implementation and monitoring provisions¹⁵⁰ and promulgate rules to govern the operation of the Convention.¹⁵¹ The Optional Protocol governs communications and procedures of inquiry.¹⁵²

The Convention starts off by setting its explicit purpose. It declares that the Convention’s objective is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.”¹⁵³ It conceives of disability as being inclusive of, but not limited to “long-term physical, mental, intellectual or sensory impairments.”¹⁵⁴ In addition, it firmly grounds the disability classification in the social model of disability by stating that as a condition it arises from “interaction with various barriers may hinder their full and effective participation in society on

¹⁴⁴ See Michael Ashley Stein & Penelope J. S. Stein, *Beyond Disability Civil Rights*, 58 *Hastings L.J.* 1203, 1212–14 (2007).

¹⁴⁵ Vienna Declaration, at paragraph 63.

¹⁴⁶ Beginning in the mid-1960s, the United Nations considered the disadvantage experienced by certain populations to human rights abuses that were not addressed with any degree of specificity in existing international human rights law and initiated human rights treaty drafting in respect of specific groups. See NCD White Paper, *supra* note 228, at Part II.

¹⁴⁷ See the preamble to the Convention, arts. 1–2.

¹⁴⁸ See Articles 3-9 of the Convention.

¹⁴⁹ See Articles 10-30 of the Convention.

¹⁵⁰ See Articles 31-40 of the Convention.

¹⁵¹ See Articles 41-50 of the Convention.

¹⁵² See the Optional Protocol to the Convention.

¹⁵³ Article 1 of the Convention.

¹⁵⁴ *Ibid.*

an equal basis with others” rather than as an inherent limitation.¹⁵⁵ If States enter any reservation on this article, it cannot be permissible since the conceptual norms are set forth in the purpose article.¹⁵⁶

The Convention does not directly define the word ‘disability’.¹⁵⁷ Instead Article 1 of the Preamble affirms the social construction of disability in which limitations arise from a person’s interaction with environmental barriers rather than as the consequence of an individualized impairment.¹⁵⁸

Article 2 of the Convention broadly defines the terms ‘communication’¹⁵⁹, ‘language’¹⁶⁰ and ‘universal design’¹⁶¹ and takes an expansive approach to two disability-specific terms central to the interpretation of non-discrimination principles as they apply to persons with disabilities. Accordingly, discrimination that ensues ‘on the basis of disability’ includes ‘any distinction, exclusion or restriction on the basis of disability that ‘has the purpose or effect of impairing or

¹⁵⁵ *Ibid.*

¹⁵⁶ Article 19 of the Vienna Convention on the Law of Treaties prohibits a State from entering a reservation to a treaty, *inter alia*, where the “reservation is incompatible with the object and purpose of the treaty.” Vienna Convention on the Law of Treaties G.A. Res. 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967, 1150 U.N.T.S 331.

¹⁵⁷ See Article 2 of the Convention. There is no direct definition of disability.

¹⁵⁸ See paragraph (e) to the Preamble to the Convention which recognizes that disability is an evolving concept and 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.

¹⁵⁹ See Article 2 of the Convention; ‘Communication’ has been defined to include languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

¹⁶⁰ See *ibid* article 2: ‘language’ has been defined to include spoken and signed languages and other forms of non-spoken languages.

¹⁶¹ See *ibid* article 2 “universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

nullifying the recognition, enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms.¹⁶²

Article 3 enunciates the Convention's general principles as including respect for inherent dignity and individual autonomy including the freedom to make one's choice and independence of persons;¹⁶³ respect for difference and acceptance of disability as human diversity;¹⁶⁴ non-discrimination;¹⁶⁵ equal opportunity;¹⁶⁶ complete and meaningful social participation;¹⁶⁷ accessibility;¹⁶⁸ sexual equality;¹⁶⁹ respect for children's rights and support of their evolving capabilities.¹⁷⁰

Article 4 discusses the general obligations of State Parties to undertake measures aimed at ensuring the promotion and full realization of all human rights and fundamental freedoms under the Convention for all persons with disabilities¹⁷¹ and to achieve these goals without discriminating in any way on the basis of disability.¹⁷² State Parties are obligated to adopt legislative, administrative and other measures to implement the Convention;¹⁷³ modify, abolish or amend existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;¹⁷⁴ adopt an inclusive approach to protect and promote the rights of

¹⁶² *Ibid.*

¹⁶³ See *ibid* at article 3(a).

¹⁶⁴ See *ibid* at article 3(d).

¹⁶⁵ See *ibid* at article 3(b).

¹⁶⁶ See *ibid* at article 3(e).

¹⁶⁷ See *ibid* at article 3 (c).

¹⁶⁸ See *ibid* at article 3 (f).

¹⁶⁹ See *ibid* at article 3 (g).

¹⁷⁰ See *ibid* at article 3 (h).

¹⁷¹ See *ibid* at article 4.

¹⁷² See *ibid* at article 4(1).

¹⁷³ See *ibid* at article 4(1) (a).

¹⁷⁴ See *ibid* at article 4(1) (b).

persons with disabilities in all policies and programmes;¹⁷⁵ refrain from conduct violative of the Convention and ensure that the public sector respects the rights of persons with disabilities;¹⁷⁶ take measures to abolish disability discrimination by any person, organization or private enterprise;¹⁷⁷ undertake research and development of accessible goods, services and technology for persons with disabilities and to promote others to undertake such research;¹⁷⁸ provide accessible information about assistive technology to persons with disabilities;¹⁷⁹ promote professional and staff training on Convention rights for those working with persons with disabilities on the Convention;¹⁸⁰ and consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning rights under the Convention.¹⁸¹

The Convention requires State Parties to ensure the equality of persons with disabilities and to prohibit all forms of discrimination “on the basis of disability.”¹⁸² State Parties should recognize “that all persons are equal before and under the law” and thus entitled “to the equal protection and equal benefit of the law” free of any discrimination.¹⁸³ State Parties also must “prohibit all discrimination on the basis of disability” while guaranteeing that persons with disabilities have “equal and effective legal protection versus all forms of discrimination.”¹⁸⁴ In order “to promote equality and eliminate discrimination,” State Parties are required to “take all appropriate steps to

¹⁷⁵ See *ibid* at article 4(1) (c).

¹⁷⁶ See *ibid* at article 4(1) (d).

¹⁷⁷ See *ibid* at article 4(1) (e).

¹⁷⁸ See *ibid* at article 4(1) (f) & (g).

¹⁷⁹ See *ibid* at article 4(1) (h).

¹⁸⁰ See *ibid* at article 4(1) (i).

¹⁸¹ See *ibid* at article 4(3).

¹⁸² See Article 5 of the Convention

¹⁸³ See *ibid* at article 5(1).

¹⁸⁴ See *ibid* at article 5(2).

ensure that reasonable accommodation is provided”.¹⁸⁵ The Convention further provides that any specific measures that “are necessary to accelerate or achieve de facto equality of persons with disabilities” may not themselves be construed as discrimination.¹⁸⁶

The Convention appreciates the vulnerability of children and women in the society and specifically underscores the rights of women¹⁸⁷ and children with disabilities.¹⁸⁸

Article 8 of the Convention addresses some of the underlying determinants of disability discrimination by requiring States Parties to raise public awareness in support of which it provides a non-exhaustive list of illustrative measures.¹⁸⁹ Article 9 seeks to dismantle barriers hindering the effective enjoyment of rights by persons with disabilities by addressing a broad spectrum of accessibility concerns within both the public and private spheres.¹⁹⁰

The substantive articles of the Convention cover the human rights that all persons are entitled to under existing international human rights as well as under customary international law. These

¹⁸⁵ See *ibid* at article 5(3).

¹⁸⁶ See *ibid* at article 5(4).

¹⁸⁷ See *ibid* article 6(1) which provides that States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. Article 8(2) states that States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

¹⁸⁸ See *ibid* article 7 which provides that States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children, in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration and States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

¹⁸⁹ See *ibid* article 8(1) provides that State Parties undertake to adopt immediate, effective and appropriate measures to raise awareness through society...to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life and to promote awareness of the capabilities and contributions of persons with disabilities.

¹⁹⁰ See *ibid* article 9. These include physical, technological, information, communication, economic and social accessibility.

include fundamental freedoms such as the right to life,¹⁹¹ equal recognition before the law,¹⁹² freedom from torture or cruel, inhuman or degrading treatment or punishment,¹⁹³ liberty of movement and nationality,¹⁹⁴ the right to education,¹⁹⁵ health,¹⁹⁶ work and employment,¹⁹⁷ political participation,¹⁹⁸ access to justice,¹⁹⁹ freedom of expression and opinion,²⁰⁰ privacy,²⁰¹ participation in cultural life, recreation, leisure and sport,²⁰² respect for home and the family,²⁰³ personal integrity,²⁰⁴ liberty and security of the person²⁰⁵ and adequate standard of living social protection.²⁰⁶

Implementation and monitoring measures are set forth in the ten subsequent articles²⁰⁷ and in the Optional Protocol. Specially innovative for human rights treaties are provisions allowing the treaty monitoring body to receive collective complaints and thus target systemic deficiencies as well as individual grievances,²⁰⁸ elicit the expertise and input of NGO's and UN specialised agencies and organs, conduct proactive inquiries and procedures to better manage reporting deadlines and conduct Conferences of State Parties.

¹⁹¹ See *ibid* article 10.

¹⁹² See *ibid* article 12.

¹⁹³ See *ibid* article 15.

¹⁹⁴ See *ibid* article 18.

¹⁹⁵ See *ibid* article 24.

¹⁹⁶ See *ibid* article 25.

¹⁹⁷ See *ibid* article 27.

¹⁹⁸ See *ibid* article 29.

¹⁹⁹ See *ibid* article 13.

²⁰⁰ See *ibid* article 21.

²⁰¹ See *ibid* article 22.

²⁰² See *ibid* article 30.

²⁰³ See *ibid* article 23.

²⁰⁴ See *ibid* article 17.

²⁰⁵ See *ibid* article 14.

²⁰⁶ See *ibid* article 28.

²⁰⁷ See *ibid* articles 31-40.

²⁰⁸ See article 1 of the Optional Protocol which provides that a State Party to the present Protocol recognizes the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

The Convention's final provisions address rules governing the operation of the Convention including, *inter alia*, its entry into force, amendments and the official languages in which the Convention is to be considered equally authentic.

2.5 Conclusion

The promulgation of the Constitution of Kenya, 2010 marked a milestone in Kenya's constitutional making process. In particular, the Constitution is a hallmark in protecting and enhancing the rights of persons with disabilities in Kenya. It cannot be gainsaid that the Constitution makes bold and specific provisions which were lacking in the repealed Constitution. The Constitution is the supreme law of the Republic...²⁰⁹ In addition, any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.²¹⁰ In this regard therefore, the Constitution ranks higher than any other law and in particular, the Persons with Disabilities Act. If any of the provision(s) of the Persons with Disabilities Act are inconsistent with the Constitution, then those provisions are void and unconstitutional. This will be demonstrated in the last chapter of this study.

The General Assembly's adoption of the Convention and the Optional Protocol by consensus, along with the subsequent signature and ratification of the Convention by the State Parties sends a signal that the international community recognizes the place of disability within the human rights canon.²¹¹

²⁰⁹ Article 2(1) of the Constitution.

²¹⁰ See *ibid*, article 2(4) of the Constitution.

²¹¹ See *Lauding Disability Convention as "Dawn of a New Era," UN urges Speedy Ratification* (UN Press Release 13 Dec. 2006), available online at: <http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab> (Last accessed on 25th September, 2012). (Summarizing statements made on the adoption of the Convention and heralding its significance for persons with disabilities and for the development of international human rights law. See also UN Secretary General Kofi Annan Statement, *Secretary-General Hails Adoption of Landmark Convention*

Moreover, the Convention should be regarded as an educative tool insofar as it can serve to teach mainstream society about the life circumstances of persons with disabilities, by providing information regarding their relative position. Its potential may be fully realized provided the provisions in the Convention supporting its use as an educational tool are fully implemented by both the State and non-State actors.²¹²

The Convention is designed to trigger among State Parties, national level engagement with disability law and policy.²¹³ Consequently, the vast majority of States will be required to develop or substantially reform legal and social policies towards their respective domestic populations of persons with disabilities. Each State must make an independent judgment as to whether it will ratify the Convention and the Optional Protocol, and then adjust to own national level schemes accordingly, adjust its national framework first, followed by ratification, or adopt some intermediary measure.²¹⁴

The Convention is part of Kenyan law.²¹⁵ In this regard, therefore, Kenya's municipal laws on disability and particularly, the Persons with Disabilities Act should be in conformity with the provisions of the Convention. As demonstrated in the earlier discussion, State Parties to the

on Rights of Persons with Disabilities, 13 Dec. 2006, UN Doc. SG/SM/10797 HR/4911 L/T/4400, available online at: <http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm> (Last accessed on 25th September, 2012). (“This Convention is a remarkable and forward-looking document. While it focuses on the rights and development of people with disabilities, it also speaks about our societies as a whole – and about the need to enable every person to contribute to the best of their abilities and potential.”).

²¹² See, e.g., CRPD, *supra* note 1, art. 8 (requiring States Parties “to adopt immediate, effective and appropriate measures...to raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities...”).

²¹³ The Convention's provisions on national-level implementation are quite novel among the core international human rights conventions. See CRPD, *supra* note 1 at art. 33.

²¹⁴ See CRPD at article 33(1) (obligating States Parties to “designate one or more focal points within government” for “matters relating to the implementation of the present Convention”); article 33(2) (requiring States Parties to “maintain, strengthen, designate or establish” one or more independent mechanisms to “promote, protect and monitor implementation” of the CRPD); and art. 33(1) (further requiring States to “give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.”).

²¹⁵ See *Supra* note 38 article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.

Convention bind themselves to adjust their national legal frameworks on disability accordingly, to conform to the international standards as dictated by the Convention.²¹⁶ Kenya being a signatory of the Convention should be in the forefront to address any areas of her laws on disability which are not in conformity with the Constitution and the Convention. The next chapter interrogates the provisions of the Persons with Disabilities Act.

²¹⁶ *Supra* note 143.

CHAPTER THREE

AN ASSESSMENT OF THE PROVISIONS OF THE PERSONS WITH DISABILITIES ACT²¹⁷

3.1 Introduction

Kenya enacted her first disability-specific law in 2003, the Persons with Disabilities Act²¹⁸ (hereinafter also referred to as “the Act”). The Act is based on the Persons with Disabilities Bill, 1997 that had been earlier proposed by the Task Force on Laws Relating to Persons with Disabilities. Prior to that, Kenya’s disability law was contained in bits and pieces of general provisions in the constitution²¹⁹ and other pieces of legislation.²²⁰ The Persons with Disabilities Act, 2003 now codifies provisions applicable to all forms of disability and it exists alongside the prior-existing pieces of legislation. It was assented to on the 31st December, 2003 and came into force²²¹ on the 16th June, 2004.²²² The main objectives of the Act are to provide for the rights and rehabilitation of persons with disabilities, to achieve equalization of opportunities for persons with disabilities, to establish the National Council for Persons with Disabilities and for connected purposes.²²³ In order to further implement the provisions of the Act and give greater effect to the United Nations Convention on the Rights of Persons with Disabilities, the Minister responsible for matters relating to persons with disabilities has made several pieces of subsidiary

²¹⁷ *Supra* note 8, Act No. 14 of 2003.

²¹⁸ *Ibid.*

²¹⁹ Constitution of Kenya. (Repealed edition).

²²⁰ These pieces of legislation include *inter alia*: the Mental Health Act (Chapter 248 of the Laws of Kenya), Kenya Society for the Blind Act (Chapter 251, Laws of Kenya), Public Health Act (Chapter 242, Laws of Kenya), Radiation Protection Act (Chapter 243, Laws of Kenya), Income Tax Act (Chapter 470 of the Laws of Kenya), Customs and Excise Act (Chapter 472 Laws of Kenya), Penal Code (Chapter 63, Laws of Kenya), Criminal Procedure Code (Chapter 75 of the Laws of Kenya), Education Act (Chapter 211 of the Laws of Kenya), and Children Act, 2001 (Act number 8 of 2001).

²²¹ With the exception of sections 22, 23, 24, 35(2), 39 and 40. However, these pending sections were gazetted in January, 2010 and they are now operational.

²²² This was through Legal Notice No. 64 of 2004.

²²³ See the Preamble to the Persons with Disabilities Act, Act No. 14 of 2003.

legislation.²²⁴ This paper dedicates the next part in discussing the various features under the Act. The central role of this part will be to measure whether the provisions of the Persons with Disabilities Act are in conformity with the Constitution of Kenya, 2010 and the United Nations Convention on the Persons with Disabilities.

3.2 The National Council for Persons with Disabilities

The Act establishes the National Council for Persons with Disabilities²²⁵ which is a semi-autonomous government agency under the parent Ministry.²²⁶ The membership consists of nominees of organizations of and for persons with disabilities²²⁷, three members appointed from a panel of names submitted to the Minister by organizations for persons with disabilities, government ministries²²⁸, the office of the Attorney General, Federation of Kenya Employers and the Central Organisation of Trade Unions. It is headed by a non-executive Chairman. The day-to-day activities are run by a Secretariat. Not less than twenty of the permitted maximum twenty seven members of the Council must be persons with disabilities.²²⁹ The Council may co-opt one member with approval of the Minister. The Council is directed to employ a director to liaise with ministers and other relevant institutions and organizations for the benefit of the disabled and achievement of the Council's mandate.²³⁰

²²⁴ These include the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, the Persons with Disabilities (Cost Care, Support and Maintenance) Regulations, 2009, the Persons with Disabilities (Registration) Regulations, 2009, the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010, and the Persons with Disabilities (National Development Fund for Persons with Disabilities) (Conduct of Business and Affairs of the Board of Trustees) Regulations, 2009. Available at <http://www.kenyadisability.or.ke/index.php/resources/legal-framework/75-legislation> (Last accessed on 11th September, 2012).

²²⁵ See Section 3 of the Act.

²²⁶ This is the Ministry of Gender, Children and Social Development.

²²⁷ Section 4(1) (a) of the Act provides that should be not more than eight in number.

²²⁸ Section 4(1) (c) of the Act. These members are to be drawn from the Ministries of Culture and Social Services, Local Government, Health, Education, Economic Planning, Housing, Transport and Labour.

²²⁹ Section 4 (1) (g) (i) of the Act.

²³⁰ Section 6 of the Act.

The Council is a body corporate with the legal powers that are usually bestowed upon bodies corporate.²³¹ The Council is mandated *inter alia*, to co-ordinate and liaise with the relevant government departments or agencies on disability matters. In this regard, the Council is mandated to issue adjustment orders, advise the minister on the provisions of any international treaty or agreement relating to the welfare or rehabilitation of persons with disabilities and its benefits to the country, consult with the government in the formulation of suitable curricula for vocational rehabilitation and training for persons with disabilities, assess and report to the minister on the welfare and rehabilitation of persons with disabilities and advise on the relative priorities in the implementation of those measures. The Council's mandate also includes co-ordinating with the government during national census exercises for purposes of ensuring that the national census gets the accurate population of persons with disabilities, and liaising with the government for the provision of suitable and affordable housing for persons with disabilities.²³²

The Council is mandated to register persons with disabilities²³³. The registration should specify those whose disability conditions require constant medical attention in order to facilitate the provision of subsidized medical services. The Council is also mandated to register institutions and organizations that provide services for the rehabilitation and welfare of persons with disabilities, and places where rehabilitation services are provided. Consonant with this mandate is the expectation that subsequent to the registration of such persons and institutions, the Council will assist in placing the registered persons with disabilities with the appropriate medical and rehabilitation services and institutions. The functions of the Council enjoin it to provide certain direct material services to persons with disabilities. For example, the Council is required to

²³¹ Section 3(2) of the Act. It has perpetual succession and a common seal and shall in its corporate name be capable of suing and being sued and acquiring, holding and disposing of movable and immovable property.

²³² Section 7 (1) of the Act.

²³³ Section 7 (1) (c) of the Act.

provide, as far as possible, assistive devices, appliances and equipment to persons with disabilities.

The Council's mandate extends to many other matters generally designed for enhancing the welfare of and services to persons with disabilities. These include *inter alia*:

- a) Formulating and developing measures and policies designed to achieve equal opportunities for PWDs;
- b) Co-operating with the government during the National Census to ensure that accurate figures of PWDs are obtained;
- c) Issuing orders requiring the adjustment of buildings that are unfriendly for use by PWDs;
- d) Recommending measures to prevent discrimination against PWDs;
- e) Encouraging and securing the rehabilitation of PWDs within their own communities and social environment;
- f) Registering persons with disabilities and institutions and organizations giving services to PWDs; and
- g) Raising public awareness regarding PWDs.²³⁴

Similarly, under the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, the Council in collaboration with the relevant government departments, research institutions, development partners and local authorities is required to undertake, promote and sponsor research, in the following areas as they relate to persons with disabilities namely, prevention of disability rehabilitation including community based rehabilitation

²³⁴ Available at <http://ncpwd.go.ke/aboutncpwd/functions-of-ncpwd/> (Last accessed on 12th September, 2012).

development of assistive devices including their psycho-social aspects; job identification for persons with disability; on site modification in offices and factories. The Council is further required to undertake research and baseline surveys to ensure availability of disaggregated data on persons with disability.²³⁵

3.3 Realization of Specific Rights and Freedoms

3.3.1 Equality and Non-discrimination

To enable persons with disabilities access their rights, the Act specifically prohibits discrimination by employers against persons with disabilities. It is an offence to discriminate against a person with disability in relation to job advertisement; recruitment; creation; classification or abolition of posts; the determination or allocation of wages, salaries, pensions, accommodation, leaves or other benefits; the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment, the provision of employment facilities; or any matter related to employment.²³⁶

The Act places a responsibility upon employers to make reasonable accommodation at the workplace to facilitate the employees with disabilities in the performance of their employment duties. In this regard, employers are enjoined to provide facilities, physical, administrative and other modifications in the workplace as may be reasonably required to accommodate persons with disabilities.²³⁷ Discrimination of a person with disability in relation to employment constitutes an offence that attracts either a fine or imprisonment or both. The Act also declares

²³⁵The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009. Available at <http://www.kenyadisability.or.ke/index.php/resources/legal-framework/112-convention> (Last accessed on 12th September, 2012).

²³⁶ Section 15(1) of the Act.

²³⁷ Section 15(5) of the Act. A provision that an employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for his employees with disabilities is entitled to an income tax relief equivalent to 50% of the costs incurred in the accommodation.

void employment contracts or other contracts for provision of goods, facilities or services in so far as they purport to deny any person the rights conferred under the Act.²³⁸

The Attorney General is required to make regulations for the provision of free legal services for persons with disabilities with respect to the violation of their rights.²³⁹ To give greater effect to the Act, the relevant Minister is also required to make regulations specifying and describing the nature of acts of discrimination against persons with disabilities.²⁴⁰ The Council may request the Attorney General to take appropriate legal action if it believes that a person or group of persons is engaged in a practice, which is discriminatory and the discrimination is a significant and substantial infringement of the rights of persons with disabilities and raises issues of public interest.²⁴¹

The Council is also enjoined to establish, maintain and update a record of persons with disabilities who possess various skills or qualifications of job placement.²⁴² It should also endeavour to secure for such persons the reservation of at least five percent of all casual, emergency and contractual positions in employment opportunities in both the public and private sectors.²⁴³

However, there are three instances in which an employer will not be deemed guilty of discrimination.²⁴⁴ First, it is not discrimination if the act or omission alleged to constitute the discrimination is not wholly or mainly attributable to the disability in question.²⁴⁵ Secondly, it is

²³⁸ Section 15(4) of the Act.

²³⁹ Section 38 of the Act.

²⁴⁰ Section 44 of the Act.

²⁴¹ Section 49(1) of the Act.

²⁴² Section 17 of the Act.

²⁴³ Section 13 of the Act.

²⁴⁴ Section 15(2) of the Act.

²⁴⁵ Section 15(2) (a) of the Act.

not discrimination if the disability in question was a relevant consideration in relation to the particular requirement of the type of employment concerned.²⁴⁶ This is a reasonable exemption which recognizes that certain disabilities may preclude the disabled individual from practically performing certain tasks. Third, it is not discrimination if the special facilities or modifications required at the workplace to accommodate the person with disability are ones which the employer cannot reasonably be expected to provide.²⁴⁷

A complaint by a person with a disability that his employer has discriminated against him in a way which is contrary to this Act may be presented to the Industrial Court through the appropriate trade union.²⁴⁸

The Act's provisions on ensuring that persons with disabilities are not discriminated upon are quite bold. The Constitution of Kenya, 2010²⁴⁹ and the Convention²⁵⁰ have a similar provision but the Act is ahead in that its provisions are detailed and it goes further to make it an offence (with stiff penalties) for discriminating against persons with disabilities.

3.3.2 Awareness Raising

Disability in Kenya was and still is viewed by some members in society as a curse, taboo and a burden. Persons with disabilities are often concealed from the public and subjected to physical and psychological abuse due to ignorance, poverty and lack of awareness. In order to counteract this, the Government declared 1980 the National Year for Persons with Disabilities. This was

²⁴⁶ Section 15(2) (b) of the Act.

²⁴⁷ Section 15(2) (c) of the Act.

²⁴⁸ Section 15(3) of the Act.

²⁴⁹ *Supra* note 7.

²⁵⁰ *Supra* note 51.

ahead of the 1981 United Nations Year of the Disabled Persons.²⁵¹ The global awareness created during the 1981 International Year of the Disabled Persons expanded social participation and equality for disabled persons.

The Kenya National Disability Policy takes cognizance of the importance of awareness raising in minimizing marginalization and exclusion of persons with disabilities from the social, development and political spheres. The Policy states that the Government of Kenya shall seek to increase the levels of public awareness on the needs, aspirations and capacities of persons with disabilities so as to enhance their acceptance, participation and integration in society. It shall also seek to do this in collaboration with organizations of persons with disabilities, parent groups and other service providers. Some of the key areas of awareness-raising in the policy include: awareness on the different types of disabilities where parents and families can seek support or services; promoting inclusive societies and equality of opportunities and participation of persons with disabilities in socio-economic and political spheres; promoting access to education, health and employment of persons with disabilities; challenging myths and misconceptions about disability that often give rise to stigma and discrimination providing information on prevention of disability; the vulnerability of persons with disabilities to HIV and AIDS intervention responsive to the needs of persons with disabilities.

²⁵¹ In 1976, the General Assembly proclaimed 1981 as the International Year of the Disabled Persons (IYDP) through United Nations General Assembly Resolution 31/123. It called for a plan of action at the national, regional and international levels with an emphasis on equalization of opportunities, rehabilitation and prevention of disabilities. The theme of the IYDP was “full participation and equality” defined as the right of persons to take part fully in the life and development of their societies, enjoy living conditions equal to those of other citizens and have an equal share in improved conditions resulting from socio-economic development.

Other objectives of the Year included: increasing public awareness, understanding and acceptance of persons who are disabled and encouraging persons with disabilities to form organizations through which they can express their views and promote action to improve their situation.

A major lesson of the Year was that the image of persons with disabilities depends to an important extent on social attitudes; these were a major barrier to the realization of the goal of full participation and equality in society by persons with disabilities. For a full account see <http://www.un.org/esa/socdev/enable/disidydp.htm> (Last accessed on 14th September, 2012).

The Act establishes the National Council for Persons with Disabilities whose mandate includes undertaking advocacy and raising public awareness regarding persons with disabilities, training and capacity building; and disability mainstreaming.²⁵² To this end, the government, through the relevant state authorities, should design publications and disseminate them, that seek to create awareness to the public on issues related to the needs and rights of persons with disabilities, prevention of disability causing diseases and social activities or behavior that might lead or cause the effects of disabilities, among others.

The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations²⁵³ requires that the government undertakes information, education and communication, disseminate the provisions of the Act and promote public awareness about the rights of persons with disabilities through a comprehensive nation-wide education and information campaign conducted by the government through the relevant ministries, departments, authorities and other agencies. It further requires the government to provide training, sensitization and awareness programmes on the rights of persons with disabilities for community workers, social workers, media professionals, educators, decision makers, administrators and other concerned persons to enable them acquire skills for proper information, dissemination and education on the rights of persons with disabilities.

3.3.3 Accessibility and Mobility

Persons with disabilities face various barriers in their day to day life. These barriers range from environmental, communication, social and economic factors. In this regard, therefore, there should be in place legislative, policy and administrative measures that seek to mitigate these

²⁵² Section 7 of the Act.

²⁵³ 2009.

challenges and further assist persons with disabilities to live an acceptable and dignified quality of life. These measures seek to promote equalization of opportunities for the full and effective participation of persons with disabilities in economic, social, cultural and political life.

In this regard, therefore, the Act is enjoined to provide for the right of persons with disability to aid in their accessibility and mobility. It provides that persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities. They are also entitled to assistive and other equipment to promote their mobility.²⁵⁴ In order to comply with this provision, a proprietor of a public building shall adapt it to suit persons with disabilities in such manner as may be specified by the Council.²⁵⁵ This requirement must be complied with within 5 years after this section comes into operation.²⁵⁶

The Council is mandated to serve an adjustment order upon the owner of the premises or the provider of the services or amenities concerned if it considers that any premises, services or amenities are inaccessible to persons with disabilities.²⁵⁷ The Council's power to adjustment orders against health or educational institutions controlled or managed by the government or one registered under the Public Health Act²⁵⁸ or Education Act²⁵⁹ respectively is, however, subject to the requirement that the Council may not serve an adjustment order against such institutions unless the Council has sought and obtained consent of the Minister of the institution concerned.²⁶⁰ If the Minister either fails to give or refuses his consent within 60 days from the

²⁵⁴ Section 21 of the Act.

²⁵⁵ Section 22(1) of the Act.

²⁵⁶ Section 22(2) of the Act.

²⁵⁷ Section 24 of the Act.

²⁵⁸ Cap 242, Laws of Kenya.

²⁵⁹ Cap 211, Laws of Kenya.

²⁶⁰ Section 27(1)(b) of the Act.

date of request then the Council may proceed to serve the adjustment order as though the Minister had consented.²⁶¹

The Act has adopted the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations²⁶² which seeks to promote accessibility to education,²⁶³ employment,²⁶⁴ sports, recreation and social integration,²⁶⁵ transport,²⁶⁶ buildings, information, communication, technology, income, maintenance and social security, family life and personal integrity, culture and provides support and relief in certain cases. In addition, these regulations require that facilities in public buildings should provide for suitable ramps, adapt all public toilets for wheel chair users and other persons with disability provide for Braille symbols and auditory signals in elevators or lifts and provide for ramps in health and educational institutions.²⁶⁷

In addition, and in order to promote mobility of persons with disabilities, the Act is enjoined to guarantee that an operator of a public service vehicle shall adapt it to suit persons with disabilities in such manner as may be specified by the Council.²⁶⁸ This provision should be complied with within two years after this section comes into operation.²⁶⁹

It is an offence for any person to use disability as a ground alone, to deny a person access or to reserve the right of admission into any premises into which members of the public are ordinarily admitted or to deny a person the provision of any service or amenities to which members of the

²⁶¹ Section 27 of the Act.

²⁶² 2009.

²⁶³ Regulation 9.

²⁶⁴ Regulations 10 and 11.

²⁶⁵ Regulation 9.

²⁶⁶ Regulations 12 and 13.

²⁶⁷ Regulation 14.

²⁶⁸ Section 23(1) of the Act.

²⁶⁹ Section 23(2) of the Act.

public are entitled unless such denial is motivated by a genuine concern for the safety of such person.²⁷⁰

The Act is enjoined to provide for exemption to persons with disabilities to payment of postal charges on printed and recorded literature, article, equipment and other devices for the use of persons with disabilities which are send by mail within and outside Kenya, and aids and orthopaedic devices for persons with disabilities sent outside Kenya by mail for repair. For these items to qualify under this category, they should be personal or for institutional purposes and are recommended for this exemption by the Council, and that the person with a disability or the organization is registered with the Council.²⁷¹

While the provisions of the Constitution of Kenya, 2010, are deemed to take effect immediately, the provisions of the Act are not enacted to be applied immediately. Requirements for adaptations to public buildings must be complied within five years while on those on public service vehicles must be complied within two years of coming into operation of the provision. This provision may, therefore, not be brought into operation until such time as the Council will have specified the required standards. In addition, while the Constitution guarantees persons with disabilities access to all places, the Act is narrow in the sense that it restricts itself only to access to public buildings and leaves out buildings owned by private proprietors. In addition, it touches on public service vehicles and leaves out trains which are important public transport facilities in Kenya.

²⁷⁰ Section 25 of the Act. A person with disability who is denied admission into any premises or the provision of any service or amenity shall be deemed to have suffered an injury and be entitled to seek damages recoverable in court of competent jurisdiction summarily as a civil debt as provided under section 25(3) and (4) of the Act.

²⁷¹ Section 41 of the Act.

3.3.4 Advancing Credit to Persons with Disabilities

The Act places a duty upon the minister responsible for credit unions, co-operatives and other lending institutions to encourage such institutions to extend credit to persons with disabilities.²⁷²

3.3.5 Access to Justice

The Act legislates for a scheme for legal representation of persons with disabilities whenever they are charged with capital offences and in respect of any legal proceedings relating to the violation of their rights or the deprivation of their property.²⁷³ In this regard, therefore, the Attorney General is enjoined to, in consultation with the Council and the Law Society of Kenya, to make regulations on free legal services for persons with disabilities and in particular on matters affecting the violation of the rights of persons with disabilities or their deprivation of their property.²⁷⁴

The Chief Justice is also required to make rules providing for the persons with disabilities to be exempted from the payment of fees in relation to matters for which free legal services will have been secured through the Attorney General's regulations.²⁷⁵ The Chief Justice is further required to make rules providing for free sign language interpretation, Braille services and physical guidance assistance for the persons with disabilities who attend court.²⁷⁶ To safeguard the rights of accused persons who have disabilities and have denied bail, they shall be entitled to be held in facilities modified in accordance with regulations made by the Minister.²⁷⁷ The Chief Justice is also enjoined by the Act to make efforts to ensure that all suits involving persons with disabilities

²⁷² Section 37 of the Act.

²⁷³ Section 38(1) (a),(b) of the Act.

²⁷⁴ *Ibid.*

²⁷⁵ Section 38(2) of the Act.

²⁷⁶ Section 38(2) (b) of the Act.

²⁷⁷ Section 38(3) of the Act.

are disposed of expeditiously having the regard to the particular disability and suffering of such persons.²⁷⁸

The rights of children with disabilities are specifically catered for under the Act. The Act establishes The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations²⁷⁹ which creates regulations for institutions that cater for persons with severe disabilities. It provides that the Council shall promote and advise in the development and implementation by local authorities, community based organizations and other stakeholders of suitable community based rehabilitation and welfare programs for the inclusion, integration, maintenance, care and support of children and persons with disabilities, including offenders with disabilities who may at the material time be serving a probationary sentence and ex-prisoners, in the respective communities. Among the areas of trainings offered under the community rehabilitation program is capacity building of children and persons with disabilities for their effective rehabilitation and inclusion in the community.

The provisions of the Act to ensure that persons with disabilities access justice are indeed laudable. However, the Act has not incorporated mandatory provisions, for example, the right to fair trial, which is a fundamental right as captured under the Constitution. In addition, the compliance mechanism of this provision is very weak because the Chief Justice has not made the relevant rules to actualize this provision.

²⁷⁸ Section 38(4) of the Act.

²⁷⁹ 2009.

3.3.6 Living Independently and being included in the Community

Persons with disabilities should live independently and they should be included within the community. The Act prohibits discrimination thereby ensuring that persons with disabilities live with their communities.

The Persons with Disabilities (Cost, Care, Support and Maintenance) Regulations²⁸⁰ provides a legal framework for the development of community rehabilitation programs for persons with disabilities, that train on vocational and trade skills, independent living skills and capacity building of children and persons with disabilities. This would enhance, effectively, rehabilitation, independent living and inclusion within the community.

3.3.7 Freedom of Expression and Opinion and Access to Information

The Council is required to make provisions for an integrated system of special and non-formal education for persons with all forms of disabilities and further to establish, where possible, Braille and recorded libraries for persons with visual disabilities.²⁸¹ All television stations are required to provide a Kenyan Sign Language inset or subtitles in all newscast and educational programs and in all programs covering events of national significance.²⁸² With regard to communication, the Act provides that all persons providing public telephone services shall as far as possible install and maintain telephone devices or units for persons with hearing disabilities and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system.²⁸³ In order to enhance compliance with this requirement, the manufacturers of such telephone facilities should be allowed to enjoy the relief contemplated

²⁸⁰2009.

²⁸¹ Section 19 of the Act.

²⁸² Section 39 of the Act.

²⁸³ Section 40 of the Act.

under the Act²⁸⁴ and telephone service providers should also be allowed certain economic incentives to offset possible costs of compliance.

The challenge in this provision is in its compliance. While the Constitution guarantees that every citizen has the right of access to information held by the State or another person...compliance by privately-owned stations is difficult to achieve because the Act does not provide any incentives to mitigate this cost. In addition the Constitution has provided that Kenyan Sign language is one of the languages to be used in conducting Parliament's business. The Act lags behind in this front.

3.3.8 The Right to Education

Persons or learning institutions are prohibited from denying a person with disabilities admission to any course of study by reason of such disability if the person has the ability to acquire substantial learning in that course.²⁸⁵ In addition, learning institutions are supposed to take into account the special needs of persons with disabilities with respect to entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar requirements.²⁸⁶ The Act requires the establishment of special schools and institutions for the deaf, the blind and mentally retarded to cater for their formal education, skills and self reliance.²⁸⁷ In the same breadth, the Council is required to make provisions for an integrated system of special and non-formal education for

²⁸⁴ Section 36(2) of the Act provides that the Minister responsible for finance or other appropriate authority shall endeavor to provide, subject to the provisions of any other relevant law, incentives to local manufacturers of technical aids and appliances used by persons with disabilities including, but not limited to, the following—(a) additional deductions for labour expenses; (b) tax and duty exemptions on imported capital equipment; (c) tax credits on domestic capital equipment; (d) simplified customs procedures; (e) unrestricted use of consigned equipment; (f) employment of foreign nationals; (g) exemptions from taxes and duties on raw materials; and (h) access to bonded manufacturing systems.

²⁸⁵ Section 18(1) of the Act.

²⁸⁶ Section 18(2) of the Act.

²⁸⁷ Section 18(3) of the Act.

persons with all forms of disabilities and further to establish, where possible, Braille and recorded libraries for persons with visual disabilities.²⁸⁸

The Constitution makes a case for an integrated system of education for both persons with disabilities and able persons. The Act contemplates of integration limited to special and non-formal education within the special institutions. It does not provide for the integration of formal and special education. If the persons with disabilities are confined to special institutions of learning, they may find it very difficult to socialize and integrate into the larger society.

3.3.9 The Right to Health

The Act mandates the Council to monitor the provision of health care to persons with disabilities so as to ensure that the services are devoid of any form of discrimination. It also ensures that the programs of the Ministry of Health are geared towards prevention of disability; early identification of disability; early rehabilitation and medical services in public and privately owned health institutions; availing essential health services to persons with disabilities at an affordable cost and availing field medical personnel to local health institutions for the benefit of persons with disabilities.

All public toilets should be adapted to cater for the interests and demands for wheel chair users and other persons with disability, provide for Braille symbols and auditory signals in elevators or lifts and provide for ramps in hospitals, health centers and other medical care and rehabilitation institutions.²⁸⁹

²⁸⁸ *Supra* note 216, Section 19.

²⁸⁹ Regulation 14 of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009.

While the Constitution has placed a firm obligation on the State to put in place an affirmative action to provide access to health to persons with disabilities, the provisions of the Act do not place adequate commitment upon the government towards the health of persons with disabilities. This right as provided in the Act is unenforceable. In addition, the Act does not give any timeframe within which the Council's representation must be incorporated. This makes this provision difficult to realize.

3.3.10 Participation in Cultural Life, Recreation, Leisure and Support

All Kenyans are allowed to access places of cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services and, as far as possible, enjoy access to monuments and sites of national cultural importance without discrimination. Persons with disabilities are entitled, free of charge, to the use of recreation or sports facilities owned or operated by the government during sporting, social and recreational activities, unless the facilities are under special hire.²⁹⁰ Persons with disabilities are also entitled to participate in all national and international sports events.²⁹¹ The Ministry responsible for sports, with consultation with the Council, is mandated to provide the necessary suitable environment, including architectural infrastructure, apparatus, equipment, training and medical personnel and transportation facilities for the participants.²⁹² To this end, therefore, the government should show a commitment to ensuring that persons with disabilities access cultural activities, leisure, tourism and sporting facilities.

²⁹⁰ Section 28(1) of the Act.

²⁹¹ Section 28(2) of the Act.

²⁹² Section 28(3) of the Act.

3.3.11 Tax Reliefs and Exemptions

The Act tries to accord tax exemptions to persons with disabilities. All persons with disabilities who are in receipt of an income, including income from employment, are entitled to exemption from payment of income tax.²⁹³ However, the person may individually apply to the Minister responsible for finance to effect this exemption from income tax and any other levies on such income.²⁹⁴ The Minister responsible for finance shall in consultation with the Council, assess all applications received under...and make such order thereon, if any as he deems fit, exempting the applicant wholly, or to the extent provided by the order, from income tax or other levies specified therein, and any such order shall, notwithstanding the provisions of any other Act, have effect according to its terms.²⁹⁵ The import of this provision is that income tax exemption must, therefore, be recommended by the Council and approved by the Minister. The exemption from income tax or other levies may either be whole or partial to the extent specified in the Minister's order. Consequently, the Act effectively exempts persons with disabilities from payment of income tax as long as the Minister responsible for finance approves.

Secondly, materials, articles and equipment including motor vehicles, that are modified or designed for the use of persons with disabilities shall be exempt from import duty, value added tax, demurrage charges, post charges and any other government levy which would in any way increase their cost to the disadvantage of persons with disabilities.²⁹⁶

Thirdly, all goods, items, implements or equipment donated to institutions and organizations of or for persons with disabilities shall be exempt from import duties, value added tax, demurrage

²⁹³ Section 12(3) of the Act.

²⁹⁴ Section 35(1) of the Act.

²⁹⁵ Section 35(2) of the Act.

²⁹⁶ Section 35(3) of the Act.

charges, post charges and any other government levy which would in any way defeat the purposes of or increase the cost of the said donations.²⁹⁷

3.3.12 Incentives accorded to Persons with Disabilities

The Act has devised a plan to encourage the compliance of its provisions by different stakeholders. It provides that any donations, bequest, subsidy or financial aid which may be made to government agencies involved in the rehabilitation of persons with disabilities or to organizations involved in such rehabilitation and registered with the Council...subject to the provisions of the Income Tax Act be allowed as deductions from the donor's gross income for the purposes of computing taxable income.²⁹⁸ The Minister responsible for finance or other appropriate authority is enjoined to provide, subject to the provisions of any other relevant law, incentives to local manufacturers of technical aids and appliances used by persons with disabilities including but not limited to additional deductions for labour expenses, tax and duty exemptions on imported capital equipment, tax credits on domestic capital equipment, simplified customs procedures, unrestricted use of consigned equipment, employment of foreign nationals, exemptions from taxes and duties on raw materials and access to bonded manufacturing systems.²⁹⁹

The tax reliefs, exemptions and deductions and the economic incentives provided by the Act are welcome. However, their implementation may be difficult to realize because they have been subjected to additional requirements against the Council and government departments. These additional requirements in terms of claw-back provisions are responsible for unnecessary delays thereby defeating the very purpose of these incentives to be enjoyed by persons with disabilities.

²⁹⁷ Section 35(4) of the Act.

²⁹⁸ Section 36(1) of the Act.

²⁹⁹ Section 36(2) of the Act.

This can be contrasted with general Constitutional provisions which are plain and not subjected to any unnecessary conditions.

3.3.13 The National Development Fund for Persons with Disabilities

The Act establishes the National Development Fund for Persons with Disabilities³⁰⁰ as a permanent fund whose income is to be used for the benefit of persons with disabilities in Kenya.³⁰¹ The Fund shall be administered by the Council through a board of trustees.³⁰² The Board of Trustees consists of the Chairman of the Council, the Director of the Council who shall be the Secretary to the Board, a representative of the Minister appointed by the Minister, a representative of the Ministry responsible for finance appointed by the Minister responsible for finance, four appointees of the Council each representing persons with visual disabilities, hearing disabilities, mental disabilities and physical disabilities. In addition, not more than three persons co-opted by the Council to represent the donors that in its opinion have substantially supported the welfare of persons with disabilities.³⁰³ The Fund has been established to perform a horde of functions.³⁰⁴

³⁰⁰ Section 32(1) of the Act.

³⁰¹ Section 32(2) of the Act.

³⁰² Section 32(3) of the Act.

³⁰³ Section 34 of the Act.

³⁰⁴ Section 33(2) of the Act provides the specific functions of the Fund. The Board of Trustees has been mandated out of the Fund to contribute to the expenses, including capital expenses, of organizations of or for persons with disabilities; contribute to the expenses, including capital expenses, of institutions that train persons in the care of persons with disabilities; contribute to the capital expenses of projects undertaken by the Government for the benefit of persons with disabilities; provide or contribute to the cost of assistive devices and services; pay allowances to persons with disabilities falling in the following categories and who have no other source of income—persons with severe disabilities and who are therefore not trainable in any skills; aged persons with disabilities; and single parents with children with disabilities and who cannot therefore seek employment; and make payments or contributions for such purposes as may be prescribed by the Council.

3.4 Conclusion

In conclusion, this chapter has exhaustively interrogated the provisions of the Act. It has appreciated that the enactment of this Act makes a bold step in the development of disability law in Kenya. The chapter has illustrated both the strengths and the weaknesses of the Act as measured against the Constitution of Kenya, 2010. The study appreciates that the Act to a large extent is not in conformity of the Constitution. In addition, the Act has not addressed some very important and major rights for persons with disabilities like participation in political and public life for persons with disabilities and the rights of women with disabilities. This is a justification that a lot of harmonization work is required in order to bring the provisions of the Act in tandem with the provisions of the Constitution of Kenya, 2010 and the Convention.

The next chapter addresses the legal, institutional and policy framework on persons with disabilities put in place by the Republic of Korea.

CHAPTER FOUR

PROTECTION AND ENHANCEMENT OF THE RIGHTS AND FREEDOMS OF PERSONS WITH DISABILITIES: THE CASE OF THE REPUBLIC OF KOREA.

4.0 Introduction

Korea has some of the best practices in the world as far as protecting, enhancing and implementing the rights of persons with disabilities is concerned. This chapter demonstrates that Korea's practices on disability issues are worthy to be emulated. This being a comparative study, it is important to note that Korea is far much better than Kenya especially in her compliance in implementing the law on persons with disabilities.

For instance, in times of national emergency, the Korean government has established a national emergency plan which includes methods for evacuating those in welfare facilities and accommodating them in designated refugee shelters, a plan to temporarily accommodate the disabled who are left behind or abandoned in emergencies.³⁰⁵

It is mandatory in Korea for buildings to be equipped with facilities that allow persons with disabilities to be evacuated in the case of an emergency, such as emergency exit lights and audible alarm systems.³⁰⁶

The Korean government has dispatched assistants to provide aid to people with severe disabilities. These assistants provide persons with disabilities with help in daily living, mobility and activities in local community.³⁰⁷

The Korean government runs several Independent Living Experience Homes across the country in which persons with disabilities are trained for life outside of institutions. The facilities

³⁰⁵ For a further analysis look at the Initial Report under the Convention on the Rights of Persons with Disabilities for the Republic of Korea of June 22, 2011. Available at <http://www.google.co.ke/search?hl=en&output=search&client=psyab&q=BEST+PRACTICES+OF+THE+REPUBLIC+OF+KOREA+&btnK=> (Last accessed at 31st October, 2012).

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

provide a range of services to assist independent living and help the disabled choose their place of residence.³⁰⁸

The Korea Government also runs Welfare Centers for persons with disabilities run by the central and local governments which provide the disabled in local communities with comprehensive rehabilitation services, including counselling, rehabilitation treatment and welfare.³⁰⁹

Disabled infants and toddlers are eligible for free education and education from kindergarten to high school is compulsory for disabled students. The laws also provide stronger support for higher and lifelong education of disabled people.³¹⁰ It is imperative to note that Kenya has not come up with any of the practices discussed above. In addition, Kenya has majority of the provisions of the law discussed below in its statutes just like the Republic of Korea. However, the level of compliance in Kenya is very low as contrasted with Korea which has scaled the heights in its implementation and compliance of the legal provisions on disability.

The Republic of Korea signed the Convention of the Rights of Persons with Disabilities when it opened for signature on 30 March 2007. The Convention was ratified by Parliament on 11 December 2008. It brought it into effect domestically on 10th January, 2009. The domestic legislative framework to promote and implement the Convention includes the Constitution of Republic of Korea, which is the basic law of the country, the National Rights Commission Act³¹¹ and six other major pieces of legislation enacted by Government to promote the welfare of and protect the rights of persons with disabilities.³¹²

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ 2001.

³¹² These pieces of legislation include Act on Promotion of Convenience for the Disabled, Senior Citizens and Pregnant Women, Anti-discrimination against and Remedies for Persons with Disabilities Act, Act on Special Education for Persons with Disabilities, Employment Promotion and Vocational Rehabilitation of Disabled Persons Act, Mobility Improvement for the Transportation Disadvantaged Act and Welfare of Disabled Persons Act.

The Constitution of the Republic of Korea³¹³, states that all citizens, regardless of disability, have dignity and value as human beings and the right to pursue happiness.³¹⁴ Along with the Constitution, other disability-related laws affirm the dignity of persons with disabilities as human beings.³¹⁵

The terms “disability” and “persons with disabilities” have been defined extensively in several Korean laws.

A person with disabilities has been defined as:

“a person whose daily life or social activity is hampered by physical or mental disability over a long period of time,” while the terms “physical disability” and “mental disability” are defined as “a disability of principal external bodily functions and of internal organs” and “a disability caused by psychological development disorder or mental disease” respectively.³¹⁶

The ARPDA defines disability as:

“A state where a physical or mental impairment or loss of function substantially limits an individual’s personal or social activities for an extended period of time.”³¹⁷

In addition, the EVDPA defines “a person with disabilities” as

“a person whose long-term professional life is substantially restricted as a result of physical or mental impairment.”³¹⁸

The National Human Rights Commission Act³¹⁹ defines disability as:

“A condition where one is hampered by substantial restriction in daily or social activities for a long time due to physical, mental or social factors.”³²⁰

³¹³ This was promulgated in July, 1948 and revised in October, 1997.

³¹⁴ See *ibid* at article 10.

³¹⁵ See e.g. Article 4(1) of the Welfare of Disabled Persons Act stipulates that “Persons with disabilities shall be respected with dignity and valued as human beings and be treated as such.” In addition, article 1 of the Anti-Discrimination against and Remedies for Persons with Disabilities Act states its purpose as “realizing the human dignity and value of persons with disabilities.”

³¹⁶ Article 2 of WDP.

³¹⁷ Article 2(1) of ARPDA.

³¹⁸ Article 2(1) of EVDPA.

³¹⁹ This Act was enacted in May, 2001 and revised in July, 2005.

Korea has endeavoured to realize various rights enshrined in the Convention, such as the inherent dignity and individual autonomy of persons with disabilities, non-discrimination, participation and inclusion in society, equality of opportunity and respect for independence through various laws.

The major reason why Korea is of major attraction to this study is that her disability-related laws, institutions and policies aim at the full and effective participation of persons with disabilities in the society as it will be demonstrated in the following areas:

4.1 Women with Disabilities

The Korean government recognizes that women with disabilities are in a particularly unfavourable position in various areas, including education, employment, information and culture due to both their gender and their disability, and thus they are often subject to discrimination. To address this issue, the government has taken various legal measures to protect and advance the human rights of women with disabilities.

On the employment of women with disabilities, the EVDPA states that special emphasis shall be given to the employment promotion of women with disabilities³²¹ and business owners employing disabled women shall be entitled to preferential treatment.³²²

The WDPA requires the State and local governments to devise education policies for women with disabilities, including foundation learning and vocational education.³²³ In accordance with the provision, the government has designed sixteen relevant agencies across the country to

³²⁰ Article 2(7) of the NHRCA.

³²¹ Article 3(2) of the EVDPA.

³²² *Ibid*, article 21. For instance, in the grant aid provisions for employers with disabled workers, the government provides more financial assistance to business owners who hire women with disabilities than to those who hire men with disabilities. The Korea Employment Agency for the Disabled (KEAD), an affiliated organization of the Ministry of Employment and Labour has adopted a gender quota system, under which 36% of the employment service quota and more than 30% of the vocational training quota are allocated to women with disabilities.

³²³ *Ibid*, article 7.

operate programs for the development of basic learning skills, health and welfare, education, social adjustment and participation and cultural experience and enjoyment for women with disabilities. In addition, in keeping pace with the information age, the government provides learning computers to low-income disabled women and connects them with female volunteers who instruct them on how to use the internet.

The ARPDA stipulates that no person shall forcibly impose upon or deprive women with disability of roles in relation to pregnancy, childbirth, child rearing and housekeeping based on their disability.³²⁴ In addition, no employer shall refuse to provide reasonable accommodations in relation to the use of workplace childcare services.³²⁵

In order to make this provision effective, the Act enjoins persons in charge of sexual assault prevention programs in educational institutions, workplaces and welfare facilities to include in such programs the information on the gender perspective on women with disabilities and the prevention of sexual assault against them.³²⁶

4.2 Children with Disabilities

In order to ensure the fundamental freedoms and rights of children with disabilities are enhanced and protected, Korea has enacted and/or amended laws related to children and adolescents.³²⁷

Korea has therefore established a legal basis for childcare, health, medical and educational services for children with disabilities.

The ARPDA ensures that children with disabilities are not discriminated against in any sphere of life. The Act expressly prohibits excluding children with disabilities from compulsory education

³²⁴ *Supra* note 314 at article 33(2).

³²⁵ *Ibid*, article 33(3). The Government of Korea dispatches home helpers for four weeks to provide maternity support to severely disabled women who deliver children.

³²⁶ *Ibid*, article 33(4).

³²⁷ Some of these laws include *inter alia*: ASEPD, Infant Care Act enacted in January, 1991, Child Welfare Act, 1961, Framework Act on Juveniles, 1991 and Elementary and Secondary Education Act, 1997.

and depriving them of opportunities to receive education, training, health care services, rehabilitation services, employment preparation and recreations. Children are also protected against unfavourable treatment such as abandonment, abuse, extortion, confinement and battering and forced placement in facilities or coercion to receive unreasonable rehabilitation treatment.³²⁸

4.3 Awareness-raising

The Korean government has established provisions on raising the awareness of persons with disability-related laws. The State and local governments have been enjoined to implement publicity campaigns such as education and public advertising for students, public employees, workers and other general public for the improvement of public recognition on persons with disabilities and to include the related contents in textbooks used by schools.³²⁹

In addition, employers are obliged to provide education to improve the awareness of persons with disabilities in order to create favourable working conditions for disabled workers and to

³²⁸ Article 35 of the ARPDA. The government assists children with disabilities aged under 18 from low-income families who stay at home with the Disabled Child Allowance and free childcare benefit that enable them to grow healthily both physically and mentally in a stable living environment. Other measures include providing disabled children in low-income families with rehabilitation treatment voucher services every month for speech, hearing, and art and music therapies to allow them to choose and receive any desired rehabilitation services. Available at [http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDYOFjAB&url=http%3A%2F%2Fwww.dpikorea.org%2Fpdsroom%2Fdown_ok.asp%3Faddfile1%3D\(%25C3%25D6%25C1%25BE%25BF%25B5%25B9%25AE\)%25C0%25E5%25BE%25D6%25C0%25CE%25C2%25F7%25BA%25B0%25B1%25DD%25C1%25F6%25B9%25FD%25BF%25B5%25B9%25AE%25B9%25F8%25BF%25AA\(2%25B4%25DC%25BA%25F1%25B1%25B3\)_09.8.21.pdf&ei=lkORUOmnOKPD0QXEtYH4Cw&usg=AFQjCNEgt4knYGwWPPP_VdcDqYxEqy4XAsw](http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDYOFjAB&url=http%3A%2F%2Fwww.dpikorea.org%2Fpdsroom%2Fdown_ok.asp%3Faddfile1%3D(%25C3%25D6%25C1%25BE%25BF%25B5%25B9%25AE)%25C0%25E5%25BE%25D6%25C0%25CE%25C2%25F7%25BA%25B0%25B1%25DD%25C1%25F6%25B9%25FD%25BF%25B5%25B9%25AE%25B9%25F8%25BF%25AA(2%25B4%25DC%25BA%25F1%25B1%25B3)_09.8.21.pdf&ei=lkORUOmnOKPD0QXEtYH4Cw&usg=AFQjCNEgt4knYGwWPPP_VdcDqYxEqy4XAsw) (Last accessed on 31st December, 2012).

³²⁹ Article 25 WDPFA. In accordance with this provision, the government has included details regarding the human rights of persons with disabilities and the facilities accessible and useable by them in the textbooks of elementary and secondary schools. Furthermore, in order to improve disability awareness, it has provided a special class called “First-hour Class of the Republic of Korea” to elementary school students on the International Day of Disabled Persons every year. It has also made a film about disability recognition titled “Good Friends” for middle and high school students, and aired it on a public TV program. Meanwhile, the National Rehabilitation Center and welfare centers for the disabled operate disability experience programs to raise the public awareness of persons with disabilities. Available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CC4QFjAB&url=http%3A%2F%2Fwww.ableinfo.co.kr%2Fnew_ableinfo%2Fdown%2FWELFARE%2520OF%2520DISABLED.doc&ei=VEWRUOeODvGY1AXFoYHIDA&usg=AFQjCNHIXd-xOemTrpmEZ6fsvP-DKVMu4Q (Last accessed on 31st October, 2012).

expand their opportunities for employment.³³⁰ In addition, the Ministry of Employment and Labour is enjoined to develop and distribute educational materials for the smooth provision of education to enhance the awareness of persons with disabilities.³³¹ The State and local governments are required to provide education that increases awareness and aids in the prevention and elimination of all forms of harassment of persons with disabilities.³³²

4.4 Accessibility

There are several laws in Korea which provide for the accessibility of persons with disabilities. The Framework Act on Building states that the State and local governments shall take the necessary measures to make sure buildings and spatial environments are planned and designed with the accessibility and usability by persons with disabilities.³³³ In addition, the APC obliges facility owners to install various convenience facilities in buildings, houses, schools, medical facilities and workplaces in compliance with certain accepted installation standards so that persons with disabilities can easily access and use those facilities.³³⁴

The APC Enforcement Rule stipulates that heads of central administrative agencies and local governments shall investigate the actual conditions of convenience facilities every year and conduct a complete enumeration survey every five years.³³⁵

³³⁰ Article 5(3) of EVDPA.

³³¹ *Ibid*, article 5(4). In accordance with the same provision, KEAD has developed and disseminated videos, cyber educational programs, and participatory disability awareness programs, and aired public awareness campaigns on the television to share best practices related to the employment of workers with disabilities. Available at

³³² *Ibid*, article 32(6). In an effort to raise public awareness of disability discrimination, the government has publicized this Act through various media, and published and distributed brochures and handbooks on the Act. It has also carried out monitoring on the implementation of the Act, and the reduction in discriminatory practices to assess the level of public awareness of the discrimination against persons with disabilities. Available at

³³³ Article 7(2) of the Framework Act.

³³⁴ Article 9 of the APC. These facilities include, access points, corridors and stairs, which are accessible to disabled users; exclusive parking lots for the disabled; elevators, ramps and toilets designated solely for disabled users and accommodations designed to guide persons with visual or hearing disabilities.

³³⁵ *Ibid*, article 4(1).

Since 2008, the government of Korea has implemented a system to certify roads, parks, passenger facilities, buildings, transportation means, districts, cities...as “Barrier-free Living Environments” when they are built, in accordance with certain standards for the transportation of the disadvantaged, including persons with disabilities, to easily access and use them.³³⁶

Individuals, corporations and public institutions are obliged by the law to provide reasonable accommodations to ensure that persons with disabilities can access and use electronic and non-electronic information on an equal basis with persons without disabilities.³³⁷ The Act stipulates that different entities shall provide reasonable accommodations at different phases. In addition, the Act guarantees the accessibility for persons with disabilities to various equipments used to provide goods and services. The Act forbids the act of providing goods, services, convenience...which would bring benefits unequal to those provided to persons without disabilities in substance.³³⁸ If persons with disabilities are denied these accessibility rights they can file a complaint with the NHRC to pursue remedies.

4.5 Situations of Risk and Humanitarian Emergencies

The Korean government specifies the provision of “alarm and evacuation systems for persons with hearing or visual disabilities” in the APC Enforcement Decree. The owner of a facility is required to make the necessary evacuation arrangements, such as emergency exit lights and path-finding lights for persons with hearing disabilities and alarm systems for persons with visual

³³⁶ This is implemented under article 17(2) of the MITDA.

³³⁷ Articles 20 and 21 of the ARPD. Such reasonable accommodations include subtitles, sign language, Braille and Braille conversion, hearing aids, screen readers and voice services

³³⁸ *Ibid*, article 15(1)

disabilities.³³⁹ It is mandatory for the head of an institution to conduct regular and frequent safety inspections and report the results to the head of the local government.³⁴⁰

The government has also been enjoined to conduct training drills that simulate evacuations to designated temporary shelters. These drills are conducted at social welfare facilities on an annual basis, with the aim of safeguarding residents with disabilities in situations of national emergency. In such emergencies, the government is also obliged to safeguard persons with disabilities staying at home, providing temporary housing for persons with disabilities who have been abandoned and selecting them as basic livelihood security recipients.³⁴¹

4.6 Access to Justice

Public institutions are prohibited from discriminating against persons with disabilities in relation to provisions of judicial and administrative procedures and services, thereby ensuring effective access to justice for persons with disabilities on an equal basis with others. Public agencies have been enjoined to provide reasonable accommodation that enable persons with disabilities to use judicial and administrative procedures on a substantially equal basis to persons without disabilities.³⁴²

The justice system is required to identify when an individual involved in a case suffers from disorders that make it difficult for the said individual to communicate and express his or her opinion. In cases where persons with disabilities apply for assistance in the criminal justice process, their request cannot be rejected without justifiable reasons.³⁴³

The Court has also been enjoined to appoint a defence counsel *ex officio* in the case where the defendant has a hearing disability or is suspected of having a mental and physical disability, and

³³⁹ Article 4 of the Enforcement Decree.

³⁴⁰ Article 34-3 of the Social Welfare Services Act, 1970.

³⁴¹ See generally the Emergency Resources Management Act, 1984.

³⁴² Article 26 of ARPD.

³⁴³ *Ibid*, article 26(6).

has no defense counsel available.³⁴⁴ The court shall appoint a defense counsel *ex officio* within the scope that it does not go against the explicit intention of the defendant when the court deems it necessary to protect the rights based on the age, intelligence, educational level...of the defendant.³⁴⁵ The court should not sit without the defense counsel.³⁴⁶

In a case where people with hearing or communication disabilities are under investigation, they should be offered sign language interpreters or text interpreters or attended by a person who assists communication; and that a suspect with disabilities should be notified that they are eligible for a legal aid.³⁴⁷

With respect to the socially weak, including persons with disabilities, police officers shall guarantee the participation of someone who has a reliable relationship or the capacity to communicate with them.³⁴⁸ In a case where police officers are conducting an investigation of persons with disabilities, they shall choose and implement investigative methods that are appropriate to the relevant type of disability, ensuring that persons with disabilities are not placed at a disadvantage during the investigation.³⁴⁹

³⁴⁴ Article 33(1) Criminal Procedure Act.

³⁴⁵ *Ibid*, article 33(3).

³⁴⁶ *Ibid*, article 282. Regarding some cases in 2010 where the court failed to take the appropriate procedures to appoint a defense counsel for a defendant with a grade two visual disability, and where the court turned down the request of a person with a grade three hearing disability for the appointment of a defense counsel, the Supreme Court ruled that these cases were in violation of Article 33 (3) of the Criminal Procedure Act. The Court ruled that the hearing that proceeded without the defense counsel violated the right to defense reserved for the defendant, thereby affecting the ruling (Supreme Court Decision 2010Do881 Decided April 29, 2010; Supreme Court Decision 2010Do4629 Decided June 10, 2010). Available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww2.ohchr.org%2FSPdocs%2FCRPD%2Ffutureession%2FCRPD-C-KOR-1_en.doc&ei=kkaRUNytN6ml0QXvwiGwBQ&usg=AFQjCNFKDS0vV1eASC0eZHTLS7bmMx_84A (Last accessed on 31st October, 2012).

³⁴⁷ Article 55 of the Guidelines on Investigations Regarding Human Rights Protection, the Instructions of the Ministry of Justice, enacted in December, 2002 and wholly amended in June, 2006, *ibid*. The legal aid is offered by the Korea Legal Aid Corporation. Available at <http://www.klac.or.kr/ws08040h.html> (Last accessed on 31st December, 2012).

³⁴⁸ *Ibid*, article 10.

³⁴⁹ *Ibid*, article 75.

In addition, the law also ensures the access to justice by persons with communication disabilities in actions civil in nature. In the event that persons with disabilities taking part in hearing or pleadings have any impediment in hearing or speaking the court shall have an interpreter conduct the interpretation or allow them to ask or make statements in writing.³⁵⁰

With the objective to ensure the access to justice for persons with disabilities who are economically challenged or ignorant of laws, the government has provided rules which guide the provision of *pro bono* legal aid to persons with disabilities.³⁵¹

4.7 Liberty and Security of Person

In order to promote this right, judicial institutions shall provide reasonable accommodations to allow persons with disabilities to maintain a quality of life on a substantially equal basis to persons without disabilities when they are under confinement or arrest.³⁵² In addition, inmates shall not without justifiable grounds, be discriminated against on the basis of their disability,³⁵³ and that appropriate consideration shall be given to the treatment of the disabled inmates based on the degree of their disability.³⁵⁴ The Enforcement Rules of the Act requires the head of an exclusive correctional institution to accommodate only inmates with disabilities to develop and implement rehabilitation programs tailored to the persons with disabilities.³⁵⁵ In correctional facilities that are not exclusively correctional, the head is required to designate and operate an extra space reserved for inmates with disabilities and to install bathrooms for persons with

³⁵⁰ Article 143, Civil Procedure Act, 1960.

³⁵¹ See generally the Rules on Handling of Legal Aid Cases. See generally http://m.visitseoul.net/en/m/article/article.do?method=view&m=1004004002007&p=04&menu=0004007002014&art_id=32782&searchLoca=&searchTheme=&flag=&searchType=0004007002014 (Last accessed on 31st October, 2012).

³⁵² Article 26(4) ARPD.

³⁵³ Article 5, Administration and Treatment of Correctional Institutions Inmates Act, 1950.

³⁵⁴ *Ibid*, article 54(2).

³⁵⁵ *Ibid*, article 50.

disabilities.³⁵⁶ The Act also stipulates that equipment and medical staff specialized for rehabilitating persons with disabilities must be provided.³⁵⁷

4.8 Freedom from Exploitation, Violence and Abuse

The ARPDA recognizes the right of persons with disabilities to be free from all types of violence and prohibits anyone from engaging in activities that might ostracize them in schools, facilities, workplaces, local communities and other places or in derogatory verbal expressions or conduct that might cause offense or disparagement. In addition, the Act forbids any activities that are intended to abandon or abuse persons with disabilities or activities that aim to extort money from them in private spaces, homes, facilities, work places, local communities and other places. It also states that any infringement on the right to sexual self-determination of persons with disabilities or verbal expressions that cause a sense of shame, are unlawful. The Act also forbids molestation, assault, rape or taking advantage of persons with disabilities. The Act also recognizes the right of persons with disabilities to receive counseling and treatment, legal aid and other appropriate measures, and prohibits any discriminatory treatment against them for reporting damages incurred due to harassment.³⁵⁸

In protecting the persons with mental disabilities, the law provides that no mentally ill person shall be institutionalized in a location other than the facilities where medical protection can be provided for persons with mental illness. Neither the head of a mental health facility nor its employees shall engage in acts of violence or perform harsh treatments on mentally ill persons hospitalized or admitted to or making use of the facilities.³⁵⁹

³⁵⁶ *Ibid*, article 51.

³⁵⁷ *Ibid*, article 52.

³⁵⁸ Article 32(2) of the ARPDA.

³⁵⁹ Article 43 MHA.

As it concerns children with disabilities, the government strictly forbids showing children and juveniles with disabilities to the public for the purpose of making profit or entertainment.³⁶⁰

The state and local governments have been enjoined to establish facilities for victims of sexual assaults and, if necessary, facilities only for persons with disabilities.³⁶¹

4.9 Personal Mobility

Korea has enacted very bold and progressive laws and policies to aid the personal mobility of persons with disabilities. The MITDA prescribes that transportation service providers and transportation administration agencies shall install mobility improvement facilities to make means of transportation, passenger facilities and roads accessible and usable to persons with disabilities on an equal basis with others.³⁶²

The State and local governments have been enjoined to introduce low-floor buses for persons with disabilities and other transportation disadvantaged persons to use them conveniently and safely. To this end, the Act prescribes that a fixed route bus provider who operates a certain number of low-floor buses³⁶³ for the convenience of the transportation of the disadvantaged shall be preferentially given a business license. In order to encourage compliance with this provision, the fixed-route bus provider who introduces low-floor buses shall be given financial support within the scope of the budget.³⁶⁴

The MITDA prescribes that at least one-tenth of the areas in vehicles used for urban rail operation shall be assigned to priority zones for the transportation of the disadvantaged,

³⁶⁰ See article 29(7) of the Child Welfare Act and article 26(4) of the Juvenile Protection Act, 1997.

³⁶¹ Article 12, Act on Prevention of Sexual Assault and Protection of Victims, 2010.

³⁶² Article 9(1) MITDA. Examples of such accommodations include stop announcements, electronic signboards, wheelchair-boarding equipment, and priority seats for the transportation disadvantaged in the means of transportation; pedestrian access roads and main entrances accessible and usable by persons with disabilities, and disability parking zones at passenger facilities; and paved sidewalks, ramps, and crosswalks at roads to enable persons with disabilities to travel

³⁶³ This includes half or a third of the total number of the buses to be operated in a metropolitan city or a local government, respectively.

³⁶⁴ *Supra* note 381 article 14(2) & (4) and article 14 of the Enforcement Decree.

including persons with disabilities.³⁶⁵ It also stipulates the types of mobility convenience facilities and the detailed criteria for their structures and materials. Urban rail operators have continued to expand mobility convenience facilities such as elevators.

In addition, the head of a local government shall operate special transport unit³⁶⁶ equipped with wheelchair-boarding equipment to support the mobility of the transportation of the disadvantaged, including persons with severe disabilities who have great difficulties in travelling.³⁶⁷

For the safe travel of visually impaired people, the MITDA Enforcement Rule prescribes that Braille, signage, Braille blocks or guidance signal equipment shall be installed or the texture of floor materials shall be differentiated to be detectable by the visually impaired.³⁶⁸

With the aim of promoting the development and supply of auxiliary devices, the State and local governments are obliged to provide production subsidies, technical support and promotion for research and development to corporate entities that produce auxiliary devices for persons with disabilities.³⁶⁹ Under the Act, the government has financially supported development and research projects in healthcare and medical areas to develop core parts and products, including visual, hearing and everyday life aids.³⁷⁰

³⁶⁵ *Ibid*, article 15(1).

³⁶⁶ This is referred to as call taxis for persons with disabilities.

³⁶⁷ *Supra* note 381 article 16 and article 5 of the Enforcement Rule.

³⁶⁸ Article 2(1) of the Enforcement Rule, “Detailed Criteria for the Structure and Materials for Mobility Convenience Facilities. The government has taken various measures for persons with disabilities to buy mobility aids at affordable costs. Among others, it has exempted the value added tax imposed on wheelchairs and other mobility aids to enable persons with disabilities to buy mobility aids cheaply. It has also made the purchase price of an electric wheelchair reimbursable through the National Health Insurance since 2005, and distributed auxiliary devices, including walking aids, for free to persons with disabilities from low-income families having difficulties with living costs.

³⁶⁹ Article 67, WDPA.

³⁷⁰ The public and private sectors offer a variety of discount, exemption, and support systems for the mobility rights of persons with disabilities. Ten million won is lent to each person with disabilities who purchases a car, and taxes imposed on automobiles such as individual consumption, registration, acquisition, and automobile taxes are exempted. In addition, an identification mark for a car carrying a person with a disability, which is issued by local governments, entitles the disabled

4.10 Freedom of Expression and Opinion and Access to Information

Broadcasters, including internet multimedia broadcasting business, shall provide watching convenience services to persons with disabilities such as closed captioning, sign language interpretation and screen readers so that they can access and use broadcasting programs and services on an equal basis with others.³⁷¹

The ARPDA Enforcement Decree prescribes that public entities shall guarantee the accessibility to their websites so that persons with disabilities can access and use the electronic information via the websites.³⁷² In addition, national agencies providers of information and communications services and the manufacturers of information and communication products shall ensure the access to their products and services by persons with disabilities, and, in particular, the access to their websites through which their information and services are provided.³⁷³

Common carriers offering telephone services are obliged to provide telecommunications relay services, including video relay service and text relay service so that persons with disabilities can access and use telecommunication services on an equal basis with others.³⁷⁴ The Act also prescribes that public institutions and other entities shall provide support as required for the participation and communication of persons with disabilities in any event hosted by the said institutions, including sign language interpreters, text or vocal interpreters and hearing aids.³⁷⁵

person to use handicap parking spaces, a parking free discount in the public parking facilities, and a 50 percent discount on highway tolls. Furthermore, when persons with disabilities use public transportation services such as railway, urban rail, airplane, or coastal ferry, a 20 to 50 percent discount of fares is available.

³⁷¹ Article 21(3), ARPDA. In 2010, the government also provided financial support in the sum of 2.82 billion won to 46 terrestrial and premium broadcasting companies for the provision of closed captioning, sign language broadcasting, and screen reading broadcasting.

³⁷² Article 14(2) of the ARPDA Enforcement Decree.

³⁷³ Article 32, The Framework Act on National Informatization, 1995.

³⁷⁴ Article 24(4). This section was operationalised in May, 2011.

³⁷⁵ *Ibid*, article 21(2). The government operates sign language interpretation centers, providing visiting service for sign language interpretation to hearing impaired people who need the service for their visit to public offices, legal institutions, and doctors' offices.

4.11 Right to Education

Korea has a firm legal framework to enhance the right to education for persons with disabilities. The State and local governments have been enjoined to establish and operate schools for those who need special educational care due to physical, mental and intellectual disabilities and to establish and execute policies to support their education.³⁷⁶ The government is also obliged to provide disabled persons with an exclusive educational environment and education according to the person's life cycle by considering the type and degree of their disabilities.³⁷⁷

ASEPD prescribes that the superintendent of each office of education shall establish and operate one Special Education Support Center (SESC) per subordinated educational administrative agency in charge of early discovery, diagnosis and evaluation of persons eligible for special education, itinerant education...³⁷⁸ Under the Act, the government has established a SESC at every office of education in the country since 2005 so that students with disabilities can be supported in their special education regardless of the educational setting that they are assigned to, whether it is a home or a regular class...The ASEPD requires the superintendent of each office of education or the head of each district office of education to select persons eligible for special education, based on the results of the diagnosis and the evaluation of persons with disabilities by SESCOs.³⁷⁹ It also places the selected persons in regular classes at a regular school, in special classes at a regular school, or in a special school through deliberation by the Special Education Steering Committee concerned and educates them.³⁸⁰

With a view to expanding the opportunity of education for children with disabilities, the ASEPD prescribes that the educational courses from kindergarten to primary and secondary school shall

³⁷⁶ Article 18, Framework Act on Education, 1997.

³⁷⁷ Article 1, ASEPD.

³⁷⁸ *Ibid.*, article 11.

³⁷⁹ *Ibid.*, articles 15 & 16.

³⁸⁰ *Ibid.*, article 17.

be compulsory, and the designated majors and education for disabled infants who have not reached 3 years of age shall be provided gratis.³⁸¹

To realize the principle of inclusive education, the ASEPD prescribes that special classes shall be established at regular schools and that the regular schools where students with disabilities are placed shall establish and execute a comprehensive plan to educate them. This plan includes curricular adjustment, support of assistant, support of learning assistive devices and provision of other conveniences.³⁸²

In order to develop the abilities of persons with disabilities targeted for special education, the ASEPD prescribes that the heads of schools at each level shall establish a plan for individualized education including educational goals, methods, contents and services related to special education taking into account the types and nature of disabilities. To this end, the Act stipulates that the schools organize and operate an individualized education support team consisting of experts.³⁸³ Special education teachers and staff in charge of special education-related services shall conduct ‘itinerant education’ by visiting the targeted persons for special education placed at each level of schools medical institutions, home or welfare facilities.³⁸⁴

ASEPD guarantees lifelong learning for persons with disabilities beyond the school age.³⁸⁵ To this end, since 2008, the government has supported a lifelong education program for disabled adults developed at each office of education in the city province.

With a goal of enhancing the professionalism in teaching and training students with disabilities, the government introduced special education courses in the training programs of general

³⁸¹ *Ibid*, article 3(1).

³⁸² *Ibid*, article 21.

³⁸³ *Ibid*, article 22.

³⁸⁴ *Ibid*, article 23.

³⁸⁵ *Ibid*, articles 33 & 34.

education teachers who are in charge of inclusive education. It is mandatory for those teachers to take at least 60 hours of courses. Since 2009, it has required universities fostering general education teachers to have mandatory special education courses in their curricula. As a mandatory requirement, one special education teacher should be placed per four students.³⁸⁶

4.12 Right to Health

The State and local governments are obliged to come up with measures and policies to detect and treat earlier diseases that cause disabilities³⁸⁷ as well as provide disabled persons with rehabilitative medical services in order for them to learn or recover their abilities for independence.³⁸⁸

The Korea government guarantees by law the safe use of sanitation facilities by persons with disabilities. The APC and the Act on Promotion of Convenience and Safety for the Transportation of Disadvantaged prescribe that restrooms for persons with disabilities shall be installed, setting forth the standard for the structure, floor materials, attachments...for the convenient use by persons with disabilities.

4.13 Habilitation and Rehabilitation for Persons with Disabilities

The State and local governments have been obligated to devise the necessary policies such as the provision of rehabilitative and independence support services tailored to the type and degree of

³⁸⁶ Article 22, ASEP Enforcement Decree.

³⁸⁷ Article 17(1) WDP.

³⁸⁸ *Ibid*, article 18. In order to allow persons with disabilities to access medical rehabilitation services in their communities, the government has implemented Community-based Rehabilitation (CBR), through which various services such as early detection of disabilities, health improvement and rehabilitative treatment for persons with disabilities, and support for families with disabled members are offered. The government has had public health centers at each region develop and implement their detailed action plans for improving the health of persons with disabilities. At present, out of 253 public health centers across the country, 45 centers (17.7%) offer rehabilitation services (See Tables 60 and 61 in the Appendix). The government has established the National Rehabilitation Center, where medical care, counseling and rehabilitation training are offered to persons with disabilities. The government has also granted financial aid to welfare centers for persons with disabilities and residential institutions that offer medical rehabilitation services for persons with disabilities.

the disability³⁸⁹ and to make provisions to enable persons with disabilities to receive services at national or public hospitals, health centers, disability welfare facilities through health screenings and rehabilitation consultations.³⁹⁰ In addition, they are required to provide rehabilitative treatment, including functional and psychological treatment necessary to persons with disabilities to learn or regain life skills and to provide them with the necessary assistive technology devices.³⁹¹ The State and local governments must hold training programs that enable persons with disabilities to undergo a smooth transition into their daily and social lives after their rehabilitative treatment is over.³⁹² They should also promote persons with disabilities to pursue an occupation that is suitable to their aptitude and ability when they return to their daily lives by providing services such as vocational guidance for the development of disabled persons' vocational competence, evaluation of vocational competence, occupational adaptation training and job search assistance.³⁹³

4.14 Work and Employment

The government forbids discrimination based on disabilities in the field of employment in several pieces of legislation. In particular, the ARPDA forbids employers from discriminating against persons with disabilities in relation to recruitment, hiring, wages and employee benefits

³⁸⁹ Article 35, WDPDA

³⁹⁰ *Ibid*, article 34.

³⁹¹ *Ibid*, article 18.

³⁹² *Ibid*, article 19.

³⁹³ *Ibid*, article 21. 130. Since 2009, the government has been operating the “disability assistive technology device case management demonstration project” in order to provide customized aid suited to disability characteristics. The demonstration project includes the “case management service” where doctors, therapists, and rehabilitation engineers form teams to assist persons with disabilities to use assistive technology devices befitting their disabilities; the “assistive technology device call centers” that promptly provide disabled persons with information regarding assistive technology devices; and the “disabled assistive technology device education programs” aimed at rehabilitation professionals, which educates them about assistive technology devices. In addition, the government issues assistive technology devices such as speech recognition devices, visual magnifiers, and portable wireless signallers to low-income persons with disabilities as stipulated under articles 18 and 66 WDPDA.

as well as training, placement, promotion, transfer, retirement, resignation and dismissal.³⁹⁴ Employers are enjoined to provide reasonable accommodations in order to enable workers with disabilities to work under equal conditions as persons without disabilities in carrying out allocated jobs.³⁹⁵

The Act on the Development of Workplace Skills of Workers prohibits discrimination based on disabilities in workplace skill development training and specifies that in instances where opportunities for vocational training are being provided, workers with disabilities should be prioritized.³⁹⁶ Accordingly, the government allocates the budget and the “Employment Insurance Fund” to ensure that persons with disabilities are provided with vocational competence development programs on an equal basis as persons without disabilities. The government separately manages the “Fund for Promoting Employment and Vocational Rehabilitation of persons with Disabilities” in order to provide vocational training services to persons with disabilities.³⁹⁷

The PDEA aims to promote the ventures and business activities of persons with disabilities. The Act obliges the State and local governments to give preference to investments and loans to disabled business founders and enterprises related to supporting disabled person’s ventures³⁹⁸ and in supporting mid-sized businesses to give preference to disabled persons’ enterprises.³⁹⁹

³⁹⁴ Article 10(1), ARPDA.

³⁹⁵ *Ibid*, article 11(1). 132. Based on the EVDPA, the government implements the “mandatory employment of disabled workers system” in order to promote employment opportunities for persons with disabilities. The system was originally introduced in 1990 pursuant to the Promotion of Employment of Disabled Persons Act. The mandatory employment system applies to owners of businesses with 50 or more regular workers, including central and local governments and public agencies. Following the system, governmental and public agencies must hire disabled workers to make up at least 3 percent of their workforce, and 2.3 percent for the private sector. To this end, employers with more than 100 regular workers who have failed to meet the mandatory employment quota must pay the “disability employment levy” (560,000 won per person per month).

³⁹⁶ Article 3 (3) & (4) of the Act on the Development of Workplace Skills of Workers.

³⁹⁷ Article 12 EVDA.

³⁹⁸ Article 8(2) PDEA.

³⁹⁹ *Ibid*, article 9(1).

The Act also recommends the heads of public sector organizations purchase goods produced by disabled persons' enterprises⁴⁰⁰ and makes such purchases tax-deductible.⁴⁰¹

The government has also established KEAD⁴⁰² which helps persons with disabilities find jobs through job placements and vocational training programs and provides employment promotion incentives and assistive technology devices to business owners who hire workers with disabilities.⁴⁰³

4.15 Participation in Political and Public Life

According to the Constitution, all citizens have the right to vote as provided by law.⁴⁰⁴ The Public Official Election Act (POEA)⁴⁰⁵ grants, in principle, the rights to vote, eligibility for election candidacy to all people regardless of disabilities.

According to POEA, those who cannot appear at designated voting places due to being under long-term inhabitancy in hospitals or rest rooms or due to severe disabilities, are permitted to vote at the said facilities or residence. In such cases, voting booths should be installed at residential facilities for persons with disabilities.⁴⁰⁶ In cases of voting at designated polling stations, the POEA allows voters who cannot vote in person due to visual or physical disabilities to be accompanied by their family members or two persons designated by the person for assistance in voting.⁴⁰⁷

⁴⁰⁰ *Ibid*, article 9(2).

⁴⁰¹ *Ibid*, article 14.

⁴⁰² This body was established in 1990 under the Ministry of Employment and Labour with the aim of promoting the employment of persons with disabilities.

⁴⁰³ Support services for the employment of persons with disabilities offered by the KEAD include: the evaluation of vocational competence, job placements and online job portal systems. In addition, as part of the efforts to provide those support services, the government is running Work Together (available at www.worktogether.or.kr, last accessed on 6th October, 2012), a website specializing in the employment of the disabled.

⁴⁰⁴ Article 24 of the Korean Constitution.

⁴⁰⁵ The Public Official Election Act, 1994 as amended in March, 2010.

⁴⁰⁶ *Ibid*, article 38(3), paragraph 2 and article 140(2).

⁴⁰⁷ *Ibid*, article 157 (6).

ARPDA stipulates that the State and local governments shall provide reasonable accommodations, including facilities and equipment, promoting and conveying information, developing and distributing election support tools and assigning support staff in order to guarantee their political rights.⁴⁰⁸ The POEA aims to promote convenience for persons with disabilities throughout the election period, including the provision of sign language, interpretation, subtitles for televised advertisements for election campaigns or televised candidate speeches⁴⁰⁹ as well as special ballot papers or voting assistive technology devices to persons with visual disabilities on voting day.⁴¹⁰

In cases where persons with disabilities are elected to serve at any level in governmental institutions or appointed to do so, the person shall not be discriminated against due to their disabilities and shall be entitled to be provided with conveniences necessary to perform their jobs in the area of employment according to the Act.⁴¹¹

4.16 National Implementation and Monitoring

The government has assigned matters related to persons with disabilities to several governmental agencies. For instance, the government has designated the Bureau of Policy for Persons with Disabilities⁴¹² as the focal point to inspect the aspects relating to the implementation of the Convention on the Persons with Disabilities. It is noteworthy to note that this body had reviewed the implementation of the Convention by analyzing domestic statutes, systems and policies

⁴⁰⁸ Article 27(2) ARPDA.

⁴⁰⁹ *Ibid*, articles 70(6) and 72(2).

⁴¹⁰ *Ibid*, article 151(7). To this end, the National Election Commission provides voting booths for persons with disabilities and voting assistive technology devices at polling stations, and additional convenience facilities (such as provisional ramps) in places that lack access points or convenience facilities for persons with disabilities. In addition, the National Election Commission aims to eliminate inconveniences for persons with disabilities in participating in the voting process, by deploying voting assistants (2–4 persons per polling station) who provide guidance on voting procedure according to the type of disability. The National Election Commission provides information regarding voting methods and procedures in advance, in the form of voting guidelines in Braille and audio CDs. Available at

⁴¹¹ *Ibid*, article 11.

⁴¹² This body is established at the Ministry of Health and Welfare.

regarding persons with disabilities. It has also been overseeing and monitoring the progress of the Five-year Policy Development Plan for persons with disabilities, which has been under promotion on a pan-governmental basis since 1998.⁴¹³

In order to establish an overall policy on persons with disabilities adjust the opinion of relevant governmental agencies and supervise and evaluate the implementation of the said policy, the government has established and operated the Policy Co-ordination Committee for Disabled Persons (PCCDP) as a non-standing body.⁴¹⁴

NHRC⁴¹⁵ is responsible for research, recommendation or presentation of opinions, with respect to the ratification and the implementation of any international treaties on human rights⁴¹⁶ and presents its opinion on state party's reports prepared under the provisions of any international treaties on human rights.⁴¹⁷ The NHRC investigates statutes, systems, policies and practices regarding the human rights of social minorities, including persons with disabilities and presents recommendations or opinions for their improvements, pursuant to the NHRCA, the ARPDA... which are based on or implement international human rights standards.

In addition, the government has been promoting persons with disabilities to participate in monitoring legislation and policies pertaining to persons with disabilities.

4.2 Conclusion

This Chapter has discussed the legal, institutional and policy framework on persons with disabilities in the Republic of Korea. It has interrogated the different rights in the various pieces

⁴¹³ The purpose of this process is to improve the rights and quality of life for persons with disabilities, and has periodically monitored whether the ARPDA, which will serve as the foundation for the implementation of the Convention, is being adhered to in the public and private sectors.

⁴¹⁴ This body is established under article 11 of the WDP.

⁴¹⁵ Based on article 3, NHRCA.

⁴¹⁶ *Ibid*, article 19(7).

⁴¹⁷ *Ibid*, article 21.

of legislation aimed at protecting and enhancing the lives and welfare of persons with disabilities. This chapter appreciates the bold and generous ways in which the laws on disability in the Republic of Korea have been designed. The implementation and monitoring mechanism put in place is *sui generis* and far and large achieves the core objectives of the Convention. Without losing sight of the importance of this chapter, which is majorly a comparative analysis, it is important to point out that Kenya still lags behind in her legal, institutional and policy framework on protecting and enhancing the rights and fundamental freedoms for persons with disabilities. Indeed this chapter is a wake-up call to the Kenya's policy makers and law makers to deeply assess her strength in legally protecting the rights of persons with disabilities. The only sustainable measures proposed by this study is for her to systematically realign its laws, institutions and policies to reflect the text of international law instruments and particularly the United Nations Convention on the Rights of Persons with Disabilities. The next chapter is the conclusion and recommendations of this study.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

“Nothing about us, without us”⁴¹⁸

5.0 Introduction

This chapter focuses on the summary and conclusions in respect of the foregoing chapters. It also summarizes the gaps that exist in the legal, institutional and policy framework on the various laws on or about persons with disabilities in Kenya. Since the study was context-specific and focused, in order to focus on the legal questions advanced, this summary will be on the Persons with Disabilities Act. This chapter also makes appropriate recommendations which if adopted would go a long way towards the realization of better pieces of legislation on persons with disabilities in Kenya.

5.1 Summary and Conclusions

Chapter One outlined the objectives and the importance of this research paper. It laid out the scope of the paper and the idea was to shed light on to the study, its significance and to set out what it aimed to accomplish.

Chapter Two discusses the provisions of the Constitution of Kenya, 2010 touching on persons with disabilities. In addition, this chapter also discusses the United Nations Convention on the Rights of Persons with Disabilities. The aim of the chapter is to lay a basis of the rights and freedoms of persons with disabilities as captured under the Constitution and the Convention.

Chapter Three was a conceptual chapter whose purpose was to lay a background of the topic under discussion. The chapter interrogated the provisions of the Persons with Disabilities Act in order to expose, on one hand, the bold and generous provisions, and on the other hand to

⁴¹⁸ See generally <http://www.ucpress.edu/book.php?isbn=9780520224810> (Last accessed on 31st October, 2012).

highlight areas where the Act is weak and needs adequate adjustments in order to achieve its objectives.

The chapter starts by giving a brief history of disability laws in Kenya generally and goes specifically to discuss the Persons with Disabilities Act. It goes ahead to discuss the specific provisions of the Act. It starts by discussing the National Council for Persons with Disabilities; its composition, legal status and its responsibilities. Some of its responsibilities highlighted include registering persons with disabilities, placing the registered persons with disabilities with the appropriate medical and rehabilitation services and institutions, providing certain direct material services like assistive devices, appliances and equipment to persons with disabilities. The Council is also required to make provisions for scholarships, loan programs, fees subsidies...for assisting with the education of children with disabilities. While the Council has been given very wide and bold powers and functions, there are imminent gaps notable. First, the Council's source of funds is through allocation by the Parliament and donations from well wishers. This implies that the Council's principal source of funds shall remain the budgetary allocation made by the National Assembly, for donations from well wishers are not certain. In the event that the Council does not secure enough funding from the National Assembly, this will drastically affect realizing its objectives. On the composition of the Council, whereas there is a perceived advantage in placing persons with disabilities to be in charge, the composition of the Council as currently established under the Act is unjustifiably skewed towards persons with disabilities.

The Chapter also discusses the specific disability rights as provided under the Act. It discusses the right to employment. Most of the provisions on this right discuss on the issue of discrimination against persons with disabilities who are seeking employment or are already

employed. Discrimination of a person with disability in relation to employment constitutes an offence that attracts either a fine or imprisonment or both. This provision makes a bold step by instituting a system of incentives to encourage private employers to employ and retain persons with disabilities who possess the required skills or qualifications.

The right to education by persons with disabilities is also discussed. In order to achieve this right, persons and/or learning institutions are prohibited from denying persons with disabilities admission to any course of study by reason of such disability if the person has the ability to acquire substantial learning in that course. A weakness in this provision can be noted. It provides for the establishment of special schools and institutions. Such special institutions of learning in which persons with disabilities are secluded may complicate their lives because it may be difficult for them to socialize and integrate into the larger society.

In addition, the chapter discusses civic rights tailor-made for persons with disabilities. This touches on the right to participate in politics and political life. The Act attempts to address the plight of persons with disabilities by providing that they can be assisted during voting in case they are unable to vote on their own. However, the Act's provisions on these rights are weak and short-sighted. For instance, the Act does not address the possibility of making necessary accommodations on voting areas, providing polling stations to residential centers hosting persons with disabilities and who have mobility challenges, making voting materials in Braille to accommodate persons with visual disabilities etc. The Act also falls short of specifically addressing the plight of women with disabilities who seek to vie for elective positions.

Persons with disabilities are guaranteed of sporting and recreational rights. They have the right to use, free of charge, government-owned or operated sporting and recreational facilities. They are also entitled to participate in all national and international sports events. The Act introduces

a claw-back provision by providing that the minister responsible for sports, in consultation with the Council, should provide necessary suitable environment and equipment for the participants. This implies that the implementation of this provision largely depends on the Minister's will and action. It is also important to note that there is no timeframe indicated on when the Minister should act.

The right to health is one of the important rights to be provided to persons with disabilities due to their critical condition(s). The Act guarantees persons with disabilities their right to health. However, the provisions on this right cannot achieve much in their present form. The health ministry has been obliged to incorporate the representation of the Council in the implementation of a national health program in respect of certain aspects of disability. There are notable gaps in this provision in that the commitment upon the government is not well articulated and secondly, there is no timeframe within which the Council's representation should be incorporated. Persons with disabilities have not been granted the right for a relief against the ministry responsible for health.

Accessibility and mobility are key to persons with disabilities. The Act prescribes that persons with disabilities are entitled to barrier-free and disability friendly environment to enable them have access to buildings, roads and other social amenities. This provision was brought into effect in 2010 and therefore nothing has been realized as far as its implementation is concerned. Private developers have not been included in this provision and this is undesirable because persons with disabilities are required to access private enterprises. In addition, the provision talks of public service vehicles as the only mode of public transport system. This leaves out the train transport system which is an important mode of public transport system in Kenya.

In order to have persons with disabilities get information, important public amenities should be rendered friendly to persons with disabilities; including television programs and telephone services. All television stations are required to observe this. However, the compliance mechanism is weak. State-owned television stations have been complying with the provision but with privately-owned television stations have not been faithful in compliance. About the telephone requirements, it is regrettable the State nor private entities have not shown any efforts of compliance.

Persons with disabilities are supposed to enjoy some tax reliefs and exemptions. However the Act makes compliance of this provision unnecessarily difficult to attain. The Act effectively exempts persons with disabilities from payment of income tax as long as the minister approves. The Act directs that the Minister's order on income tax exemption shall have effect according to its terms notwithstanding the provisions of any other Act. The Minister's order takes the form of subsidiary legislation. It will therefore be of no effect if it contravenes an Act of Parliament.⁴¹⁹ This is further complicated by the fact that the Income Tax Act⁴²⁰ subjects persons with disabilities to the same tax rates as their counterparts without disabilities. In addition, the Minister has been given huge powers to refuse an exemption on the basis that it has not been provided for in the allocation of public resources. These additional requirements and conditions leave a lot to be desired.

The Act also gives incentives to persons from whom their compliance or other intervention is required; for instance, employers of persons with disabilities. These incentives confirm that the Act's provisions, to some extent, are generous to persons with disabilities. However, it is problematic to realize them because they have been subjected to additional requirements like

⁴¹⁹ Section 31(b), Interpretation and General Provisions Act, Cap 2, Laws of Kenya.

⁴²⁰ Cap 470, Laws of Kenya.

approval by the Council and relevant government departments. These additional conditions are mere claw-backs and occasion delays even where urgency is required and this defeats the very purpose of the Act.

In relation to court proceedings concerning persons with disabilities, if they are to be held in custody after denial of bail, they should be held in facilities modified in accordance with regulations made by the Minister. This implies that the Minister holds the key to the realization of these benefits; until he comes up with these regulations, the Act will continue being a mere paper victory. The Chief Justice is required to ensure that suits involving persons with disabilities are disposed off expeditiously, having due regard to the particular disability and suffering of such persons. The Act does not provide how this may be achieved and there are no existing guidelines to facilitate this provision because cases concerning persons with disabilities are treated the same way as to their counter-parts without disabilities.

The Act contains an inbuilt system of monitoring the implementation and compliance with its provisions. However, it is weak, slow and therefore has not achieved much.

Chapter Four discusses the legal, institutional and policy framework for persons with disabilities in the Republic of Korea. This chapter is comparative in nature. It achieves its objectives by showing that South Korea's major pieces of legislation are in conformity with her Constitution and the Convention on the Rights of Persons with Disabilities. In addition, Korea's level of compliance with the laws on persons with disabilities is encouraging. Indeed, Kenya needs to emulate the steps taken by Korea by amending her disability laws to make them bolder and enhance her implementation and monitoring levels.

Having laid this basis, it is fair to conclude that the Persons with Disabilities Act is not comprehensive enough and compliant to the International Convention on the Rights of Persons

with Disabilities and the Constitution of Kenya, 2010. In addition, the provisions of the Act have not been implemented fully in order to protect and enhance the rights and fundamental freedoms of persons with disabilities in Kenya.

5.2 Recommendations

This research paper proposes the following recommendations to the Persons with Disabilities Act:

- (a) The definition of disability is not sufficiently inclusive of mental disability. It is too general and should be expanded so as to articulate the specific forms and types of disabilities, particularly mental disability;
- (b) The membership, leadership and control of the National Council for Persons with Disabilities should be opened up to adequately accommodate individuals, including those with disabilities, with training and experience on disability matters. It should also expressly state that its membership would partly be drawn from persons with intellectual and psychological disabilities;
- (c) The Act has been a subject of piecemeal implementation. In order to effectively realize the objectives of the Act all provisions should be brought into operation. Although sections 22, 23, 24, 35(1), 35(2), 39 & 40 were gazetted so as to bring them into operation, their full effects have not been felt by persons with disabilities. Their gradual implementation should also be replaced with implementation in once;
- (d) There is an urgent need to harmonize the Act with the provisions of other statutes that directly and indirectly relate to disability. Some of these statutes are the Mental Health Act, Children Act, Penal Code and the Education Act. Most importantly, the Act should

be amended to conform to the Constitution of Kenya, 2010 and the Convention on the Rights of Persons with Disabilities;

- (e) Some of the remedies proposed by the Act may not fully satisfy the infringed rights of persons with disabilities. The assumption of section 15(3) of the Act that all employees with disabilities will belong to trade unions and therefore amenable to the jurisdiction of the Industrial Court under the Trade Disputes Act is erroneous. This should be amended to make it possible for an individual to pursue their remedies individually;
- (f) The Act contains too many claw-back provisions which make its implementation difficult to achieve; for example, under sections 35 and 36, the Act purports to give tax exemptions but surprisingly under section 42, subjects this process to stringent conditions, discretionary powers of the Minister for Finance and availability of allocated finances;
- (g) The Act should be amended to provide for the early detection and identification of disability in order for the children with disabilities to begin enjoying the rights under the Act at the earliest opportunity. Detection of disability should be made compulsory before, during and after birth as is the practice in the Republic of Korea;
- (h) The Act is focused more on physical and visual disability. Amendments should be effected to reflect other forms of disability, especially mental and psychological disability;
- (i) The Act should make clear and specific provisions on the rehabilitation of persons with disabilities;

- (j) The provisions of the Act should take into account that some persons with disabilities particularly mental disability can only access most of their rights through supported assistance, for instance, their professionals, human readers, care givers, parents or guardians;
- (k) The Act should provide for specific forms, types and categories of disabilities. It should address the varying needs in accordance to the various forms, types and categories of persons with intellectual disabilities;
- (l) The Act should also be amended to provide a right of every child with disability to appropriate health, education and other forms of care at public finance;
- (m) An amendment should also be made to establish a body with a multidisciplinary approach to assess the capabilities of children and persons with mental disabilities and issue certificates with which they can use to access education, training and employment;
- (n) It should provide for free and compulsory education and training for the disabled children at all levels of public institutions as is the case in the Republic of Korea where disabled infants and toddlers are eligible for free and compulsory education from kindergarten to high school. Her laws also provide for stronger support for higher and lifelong education for persons with disabilities;
- (o) It should have a provision to prohibit all forms of abuse, neglect and exploitation of persons with mental disabilities;
- (p) The Act should also provide for participation and financial support to non-governmental agencies and organizations concerned in the implementation of disability programs;

- (q) Several provisions of the Act need to be amended to make them have a binding effect to the government, for instance, to make the government's obligation to provide health services to persons with disabilities enforceable against it;
- (r) The Act should be amended to come up with a provision for government's incentives for employers who are keen in recruiting women employees. In the Republic of Korea, special emphasis is given to the employment promotion of women with disabilities and business owners employing disabled women are entitled to preferential treatment;
- (s) In order to create awareness of disability rights and laws, the Act should provide that this content should be put in text books used by schools. In the Republic of Korea, for instance, the State and the local governments carry out publicity campaigns such as education and public advertising to employees, workers and the general public;
- (t) On mobility, the Act should be amended to provide that all buildings; public and private buildings, including spatial environments should be designed with the accessibility and usability by persons with disabilities. The Republic of Korea model provides that the owner of a facility should make the necessary evacuation arrangements such as emergency exit lights and path-finding lights for persons with hearing disabilities and alarm systems for persons with visual disabilities. In addition, it provides that convenience facilities in all buildings, public places should be certified 'barrier free living environments';
- (u) On access to justice, the Act should have a provision that the State is obligated to appoint a defence counsel in the case where the defendant has a hearing disability or is suspected

of having a mental and physical disability, and has no defence counsel available just like the practice in the Republic of Korea;

(v) The Act should also be amended in order to ensure that all persons with disability exercise their right to vote. The Republic of Korea has ensured that all persons with disabilities exercise their right to vote by installing voting centres in hospitals and/or rest rooms accommodating persons with severe disabilities;

(w) The Council should profile and maintain a list for persons with disabilities; and

(x) In order to fully realize the purpose of the Convention on the Rights of Persons with Disabilities, Kenya should ratify the Optional Protocol to the Convention.

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