

DOMESTICATING THE INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: KEY CONSIDERATIONS FOR KENYA

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(I) Consummation

On Friday 25 August, 2006, around 8:00 p.m., I sat with bated breath in the UN Building in New York as diplomats, country delegations and representatives of the world's community of persons with disabilities waited for the Chairman's gavel to announce the successful finalisation of negotiations for a most landmark Convention, the International Convention on the Rights of Persons with Disabilities (ICRPD). Why, you may ask, all this palpable excitement?

The normative basis for accepted human rights standards at the international level is stated at the policy but declarative level by the Universal Declaration of Human Rights of 1948. Later, the declarative statements in the Declaration were turned into globally binding norms through the 1966 International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the same year. These two Covenants promulgated the rights which all human beings had regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Yet, fairly soon, it became clear that specific categories of peoples might require further normative interventions for the better and more effective protection and promotion of their human rights. This was the basis upon which the Convention on Elimination of Discrimination Against women (CEDAW) and the Convention on the Rights of the Child (CRC) were passed in 1979 and 1989 respectively.

Interestingly, while the subjects of women and children were covered in the initial core human rights Conventions (the ICCPR and ICESCR) to an appreciable extent, this was not the case with the rights of persons with disabilities. In fact, only Article 23 of the CRC makes specific mention of the rights of persons with disabilities. All other protections are inferred on account that persons with disabilities are human beings which these Conventions speak to. At the regional level, only Article 18(4) of the African Charter on Human and Peoples Rights of 1981 makes a cursory provision specifically covering persons with disabilities when it provides

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that: “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”

Finally, the very nature of disability meant that certain further sub-rights might require articulation in a disability-specific instrument. Thus far, the international community had developed “soft law” in declarations such as the United Nations Standard Rules on Equalisation of Opportunities for Persons with disabilities as guides on the protection and promotion of the rights and dignity of persons with disabilities. The purpose of the ICRPD, then, was 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” (ICRPD Article 1).

(II) Making the Convention: Approach

One of the specific functions of the Kenya National Commission on Human Rights (KNCHR) under Section 16(e) of its constitutive statute, the Kenya National Commission on Human Rights Act,² is that the KNCHR should act as the Government’s chief agent to ensure that Kenya complies with its international human rights obligations. Immediately on our establishment in July 2003, we realised that fulfilling this function required us to engage substantively to enable Kenya to participate in the *Ad Hoc* Committee which at the time had begun to negotiate the ICRPD.

Our intervention was necessary on several counts. First, Kenya had a woeful track-record of participating in negotiations to formulate international human rights instruments. The taunt was that Kenya simply waited to decide whether to sign or not to sign a convention. Second, even when the National Commission began to profile the then ongoing negotiations, it became patently clear that negotiating for the Convention was not a priority concern of the Government. Indeed, throughout the negotiations process, the Government invested minimal actual budgetary resources for pre-session preparatory work; and the National Commission paid for the bulk of stakeholder meetings that took place. Finally, the National Commission either possessed or was in a good position to draw upon expertise (including organising stakeholder participation) to enable agreements on quality proposals for Kenya’s negotiating position regarding the Convention.

In the period January-March 2004, and throughout the negotiations process up to December 2006, the National Commission facilitated consultations with and participation by departments of the Government of Kenya as well as with stakeholders in the disability sector. Participants in the process from the Government included: the Attorney General; the ministries of Gender, Culture, Sports and Social Services; Home Affairs; Justice and Constitutional Affairs; Foreign Affairs; Health; Planning and National Development; Transport and Communication; and Education, Science and Technology. Participants in the process drawn from the disability sector included umbrella organisations for and of persons with disabilities such as the United Disabled Persons of Kenya, Federation of and for People with disabilities, Kenya National

² Act No. 9 of 2002

Association of the Deaf, Kenya Society for Deaf Children, Kenya Society for the Physically Handicapped, Kenya Association for the Welfare of Epileptics, African Union of the Blind, Kenya Society for the Mentally Handicapped, Ecumenical Disability Advocates Network, Jacaranda Special School and Kenya Institute of Special Education. Organisations which provide services (including technical and resource support), notably the Voluntary Services Overseas (VSO) and the African Medical Research Foundation (AMREF) were also consulted.

The Government of Kenya participated wholesomely in the actual negotiations at the UN Building in New York³ and members of the disability movement were included as part of all its negotiating delegations.⁴ Commissioners from the National Commission attended all the negotiations and steered Kenya's negotiating activities at critical moments.⁵ The negotiations process received solid support from Kenya's UN Mission in New York.⁶ Between 2004 and 2006, five forums to debrief and review the country's negotiating position were held.

Kenya was among the 81 countries which signed the Convention when it was opened for signature on 30 March 2006. The ICRPD came into force on 3 May 2008 following the 20th ratification of the Convention on 3 April 2008. Subsequently, Kenya ratified the ICRPD on 19 May 2008 as the 27th such state to do so. Now, the arduous process of domesticating the Convention can proceed.

(III) Towards Domestication of the Convention: Prospects and Challenges

The aim of this section of the paper is threefold:

- To recall key concerns which Kenya raised during negotiations for the Convention;
- To determine the extent to which those concerns are reflected in the Convention; and
- Hence, to assess prospects and challenges which the country will face as it seeks to domesticate and implement the Convention.

First, however, we should list the eight principles which the ICRPD establishes as the foundational pillars (ICRPD Article 3) upon which the protection and promotion of the rights of persons with disabilities would be anchored, thereby facilitating a dramatic shift from the welfarist/medical model of disability to the rights model of disability. These principles are:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- Non-discrimination;

³ During much of that time, the delegation was led by the Commissioner of Social Services in the Ministry of Gender, Culture, Sports and Social Services, Ms. Ann Ambwere.

⁴ Indeed, the Government paid expenses for one disabled person to attend one of the negotiating sessions in New York.

⁵ The Commission's work was spearheaded by Commissioner Lawrence Mute and Commissioner Catherine Mumma

⁶ Staffers of the Mission such as Ms Karen Odaba assisted what were referred to in UN diplomatic parlance as "delegations from the capital" with the intricacies of navigating around the minefield presented by UN networks such as the Africa Group which on many occasions seemed ill-aware of the issues that persons with disabilities wished included in the Convention.

- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of disability as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women; and
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

1. Constitutional and legislative imperatives

Since Kenya is a dualist rather than a monist state, signing and ratifying the ICRPD will not in and itself mean that the Convention may become applicable in the country, and legislation will need to be crafted or amended to enable the Convention's provisions.

Domestication of the Convention will call for the amendment of the Constitution of Kenya to incorporate the express ground of disability as an anti-discrimination ground. Presently, Section 82(3) provides:

...the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Kenyans with disabilities now have to rely on the phrase "other local connexion" when they wish to seek shelter under the anti-discrimination umbrella. The Proposed Constitution of Kenya, 2005, provided language apt for purposes of domesticating the Convention at the constitutional level. Art.37 (1) provided that:

The State 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.

Domestication will also entail revision of or additional legislation to fortify the rights of persons with disabilities. A principal target for revision is the Persons with Disabilities Act⁷ (PDA) which, despite its profile as the flagship legislation on the rights of persons with disabilities in Kenya, exhibits glaring defects in its articulation of rights. For example, the principle of progressive realisation of economic, social and cultural rights along with the qualifier subjecting such realisation to the maximum available resources is used so ambiguously in the PDA that the Government could use absence of resources as a justification even for stand-stilling or retrogressing on the rights of persons with disabilities. In fact, the Act is silent on the principle of progressive realisation altogether; Section 11 merely providing that:

⁷ Act No. 14 of 2003.

The government shall take steps to the maximum of its available resources with a view to achieving the full realisation of the rights of persons with disabilities set out in this part.

At the same time, Section 42(1) (c) of the PDA provides thus:

An exemption or deduction may be refused on the basis that it has not been provided for in the allocation of public resources.

This provision amounts to an effective claw back on tax exemptions (Section 12, employers' incentives (Section 16), tax exemptions on import duty, etc (Section 35), tax exemptions for donors, etc (Section 36(1) and provision of telephone services (Section 40). In this regard, the ICRPD provides language which should form the basis for reviewing the PDA, to the following effect:

With regard to economic, social and cultural rights, the Council shall ensure that measures are taken, to the maximum of available resources, and with a view to achieving progressively the full realization of these rights, without prejudice to those obligations that are immediately applicable according to international law.

2. Definition of disability (Preamble; Article 1)

Kenya argued strongly⁸ for a definition of disability, our view being that the Convention should clarify which people could use it to claim rights. Clearly, we recognised that the specificities of disability might mean different things to different people depending on jurisdiction, impairment type and handicapping context. The definition of disability in the Convention was achieved by a combination of preambular language and substantive provision as follows:

Recognising 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;⁹ ... Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹⁰

Critical definitional considerations for Kenya as we domesticate the Convention are threefold. First, is the focus in the PDA which defines "disability" rather than "persons with disabilities". One weakness of this approach is the consequent impossibility of introducing the "on an equal basis with others" standard which would easily apply if legislation defined the person rather than the state of being. Second, no universal normative standard applies in the definition of disability in Kenya. Section 2 of the PDA defines disability as:

A physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.

Second, the definition of disability for purposes of employment legislation proposed by a Task force on Labour Legislation was:

being HIV positive or any permanent physical disability or impairment; physical illness; psychiatric illness; any other loss of abnormality of physiological, or

⁸ Our point man in this regard was Mr. Samuel Kabue.

⁹ Preamble Para. (e).

¹⁰ Article 1.

*anatomical structural function; reliance on a guide dog, wheelchair, or any other remedial means.*¹¹

This cumbersome definition was luckily revised by Kenya's Parliament; and the Employment Act, 2007, defines disability in the manner set out in the PDA with the exception of the word "environmental" which is in the PDA definition.

Third, the Proposed Constitution of Kenya, 2005, varies this definition by stating that disability includes:

*any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.*¹²

Following on from the above definitions, the domestication process of the Convention must be wary of defining disability so precisely that it either strait-jackets disability or it causes persons with disabilities to become marginalised. Statutory instruments should perhaps define disability for specific contexts and purposes rather than simply enforcing a generic definition. A useful discussion-point, for example, would be whether educational or social interventions should engage beneficiaries defined under a broad and overarching rubric such as intellectual disabilities or if such interventions should focus on sub-types of disabilities (such as autism spectrum disorder).

3. Reasonable accommodation (Articles 2 and 3)

We were very excited by the opportunities which the principle of reasonable accommodation could offer Kenyan jurisprudence. The Convention defined reasonable accommodation as:

*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*¹³

A catchy selling point which I employ for the Convention is to say that if the single one most novel principle the Convention on the Rights of the Child (CRC) introduced was the best-interest principle, then the similarly critical innovation which this Convention has introduced is the principle of reasonable accommodation. I look forward to Kenyans with disabilities demanding for reasonable accommodation measures in the work-place, the classroom, the bank, the farm and the pub. In this regard, an audit of PDA Section 16 has to be done. Presently, it provides that while no employer shall discriminate a person with a disability, discrimination will be deemed not to have happened if, among other reasons: "Special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide"¹⁴

Pertinent concerns here include: the test for reasonableness; the arbiter for reasonableness; and the bearer of the burden of proof.

4. Women with disabilities (Article 6)

¹¹ *Employment Bill, 2007.*

¹² Article 286.

¹³ Article 2.

¹⁴ (2)(b).

Kenya backed the Republic of Korea to the hilt on its proposals to introduce a stand-alone article on women with disabilities. The essential arguments articulated principally by the European Union that women's issues were captured effectively in the Convention on Elimination of all forms of Discrimination against Women (CEDAW) could not persuade us when we knew that CEDAW does not mention women with disabilities specifically and furthermore considering local experiences where the women's movement in Kenya has selfishly interpreted women to exclude women with disabilities. In the Convention, Gender is treated as a cross-cutting issue; but at the same time, a stand-alone article on women with disabilities is included, among others, obligating states to ensure the full development, advancement and empowerment of women to enable them to enjoy the rights in the Convention. Kenyan policy and legislation has not dealt with issues of women with disabilities in any depth. Indeed, present reviews of the PDA seek to remedy that lacunae.

5. Children with disabilities (Article 7)

Kenya facilitated negotiations for this Article at the Ad Hoc Committee.¹⁵ The Article:

- Requires measures to be taken to ensure children with disabilities enjoy fully all human rights on an equal basis with other children;
- Reaffirms the best-interest of the child principle; and
- Restates the right of children with disabilities to express their views freely.

Imperatives for domestication here must take note of the fact that while CRC Article 23 already makes provisions on children with disabilities, Kenya's last report to the United Nations Committee on the Rights of the Child did not have specific enough data on the extent to which children with disabilities were enjoying their rights in terms of the article. For example, no information was provided to show how Section 12 of the Children's Act, which provides that a disabled child has the right to be treated with dignity and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible, has been implemented.¹⁶

6. Accessibility (Article 9)

Our view in this regard was that the phrase for operationalising the principle of accessibility should be "places intended for use by the general public" rather than the more restrictive phraseology of "public places" used in early drafts of the Convention. Our concern was that this principle should be applicable in relation to private actors where they provided services intended for use by the general public – accommodation, banks, etc. In the event, Convention Article 9 provides that:

... States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications ... and to other facilities and

¹⁵ Hon. Josephine Sinyo facilitated this Article on behalf of the delegation of Kenya; aided by Ms Cecilia Mbaka.

¹⁶ See Kenya's 2nd Periodic Report to the CRC Committee, 20 September 2005; and "Review of the 2nd Periodic Kenya Country Report on Implementation of the UN Convention on the Rights of the Child (1998-2004)", Kenya National Commission on Human Rights, August 2006

services open or provided to the public ... interalia: (a) buildings, roads, transportation and other indoor and outdoor facilities including schools, housing, medical facilities and workplaces ...

Accessibility is a matter which our legislation has already sought to deal with in PDA Sections 21-27. These sections cover:

- Entitlement to barrier-free and disability-friendly environment;
- Appropriate adaptation of public buildings by proprietors;
- Appropriate adaptation of public service vehicles by proprietors; and
- Orders which the National Council for Persons with Disabilities may issue to ensure that premises or services are accessible to persons with disabilities.

Intriguingly, however, the operationalisation of these provisions is hedged in by a number of legal circumstances with the effect that persons with disabilities do not as yet enjoy the use of the provisions. First, the statute provides that proprietors of public buildings shall comply with provisions on accessibility five years after the law comes into force. Second, and even more frustratingly, the responsible Minister has used powers under the Act not to gazette the adjustment orders provision in question which, therefore, means that time on that provision has not began to run yet. Finally, enforcement of this provision against the Government is anyway undermined through further provisions in the PDA which require that the relevant minister's consent should be sought before adjustment orders are issued against institutions such as schools and hospitals.

7. Freedom of expression and opinion, and access to information (Article 21)

Our view in this regard too was that private entities which provide services to the general public should be required to provide such services to persons with disabilities in accessible and usable formats. Similarly, the mass media would be required to take into account all aspects of accessibility for persons with disabilities when providing services. Unfortunately, the Convention, in Article 21 Para. (c), opts to "urge" private entities to do the same. Similarly, Para. (d) "encourage(s) the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities".

A clear deficit may be noted here - the fact that private actors may not be compelled to provide services in accessible formats. In domesticating this provision, states must, however, be cognizant of ICRPD Article 4(4) which provides that:

Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognise such rights or freedoms or that it recognises them to a lesser extent.

Interestingly, although PDA Section 39 has not been operationalised by the Minister, it does use imperative language when it provides that:

All television stations shall provide a sign language inset or sub-titles in all newscasts and educational programmes, and in all programmes covering events of national significance.

8. Situations of risk (Article 11)

Initially, our proposals sought to lurch on the right to life as a basis for introducing protections for persons with disabilities in situations of risk where necessarily their vulnerability made them more exposed to risk. Kenya's proposed phraseology of "natural disasters, civil strife or war" was eventually amended with a stand-alone Article providing thus:

States parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The concerns of policy-makers and policy-implementers in this regard have been brought into sharp relief with the post-election violence which has affected many parts of the country during the last few months. Persons with disabilities were exposed to particular vulnerabilities when whole communities were uprooted from their villages in the Rift Valley owing to the fact that they could not flee as quickly as their peers. Indeed, a particularly gory incident happened with a woman apparently with a physical disability being burnt in her wheelchair when people were torched in a church in Kiamba, in the Rift valley.

9. Equal recognition before the law (Article 12)

Regarding this matter, we backed the shift from substituted decision making to supported decision making;¹⁷ and the distinction between legal capacity which all persons with disabilities enjoy and capacity to act where they may require support. Furthermore, we introduced proposals whose end-result was the provision that:

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

Several matters may be noted here. First, an all-knowing and paternalistic framework harking back from Victorian England permeates Kenya's institutional dealings with the legal capacity of disabled people – perhaps most in relation to persons with intellectual disabilities. Second, judicial experiences of persons with disabilities who have sought to provide evidence as victims or witnesses in egregious crimes such as rape have been harrowing and by and large unfruitful; courts have not countenanced that a person who could not see or hear or a person with intellectual limitations could be a credible witness and such evidence has invariably been dismissed. On a positive note, the Sexual Offences Act, 2006, includes provisions specifically introducing

¹⁷ I facilitated this particular Article on behalf of the delegation; and I recall having high-minded discussions with a delegate from the People's Republic of China who could not countenance that there could be a distinction between legal capacity and capacity to act.

intermediaries to offer support to vulnerable witnesses as they give their evidence. Section 2 of that Act defines complainant to mean:

The Republic or the alleged victim of a sexual offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse.

Section 31(4) (b) enables a court to direct that a vulnerable witness (defined to include a person with mental disability) shall give evidence through an intermediary.

Third, land and its inheritance continues to be a particularly sensitive matter in Kenya on material and emotional counts. While land policy considerations focus on disinheritance on grounds of gender, the fact that persons with disabilities have been disinherited of their property by their kin or guardians has received no profile and appropriate state responses.

10. Respect for home and the family (article 23)

On matters of sexuality, the Kenyan position was caught up in a maelstrom of conflicting policy considerations and divergent public viewpoints which made our work very difficult. Kenya has always been very wary to ratify Conventions which are deemed to introduce reproductive rights (popularly defined in terms of encouraging abortion or indeed family planning). Up to fairly recently, the Government had declined to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)¹⁸ on this very ground. Yet, we did realise that the sexuality of persons with disabilities has been repressed in Kenya too; that the assumption that disabled people are asexual or unmarriageable was common-place; and that state responses to "protect" the disabled from sexual exploitation included sterilisation.

This conflicted situation saw us, on one hand, reluctantly agreeing to the substitution of the succinct phrase "experience their sexuality"¹⁹ originally proposed in Article

¹⁸ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

¹⁹ This phrase was akin to the one in Rule 9(2) of the United Nations Standard Rules on Equalisation of Opportunities for Persons with Disabilities which states thus: "Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood". Indeed, in the course of interpreting Article 10 of the International Covenant on Economic, Social and Cultural Rights (protection of the family, mothers and children), General Comment No. 5 stresses:

- That sexual needs and desires should be recognized and addressed in both the recreational and the procreational contexts;
- That women with disabilities also have the right to protection and support in relation to motherhood and pregnancy; and
- That the sterilisation of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10. See Bruce et al, "Disability and Social Justice: The International Covenant on Economic, Social and Cultural Rights", in Quinn, Gerard and Degener, Theresia: *Human Rights and*

23 with the more mundane term “relationships”; but successfully arguing for the retention of the concepts of reproductive and family planning education in Article 23 and the phrase “sexual and reproductive health and population-based public health programmes “in Article 25.²⁰

Domesticating provisions here should target anachronistic statute such as the Mental Patients Act. Kenya’s adoption red-tape also assumes that a person with disability is not competent to adopt a child.

11. Education (Article 24)

One of our key aims here was to ensure that inclusive education in the Convention would not be defined in such a way as to undermine education in institutions catering specifically for certain disabilities. We wished to borrow the “best-interest” principle from CRC Article 23 for this purpose as well as retaining the principle of educating children in “the least restrictive environment”. We did not win on the language stakes. However, Para. 2 provides:

In realising this right, states parties shall ensure that: ... (e) Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.²¹

Several matters are pertinent in this regard. First, and significantly, while the Government’s education policies presently emphasise inclusion, this does not vitiate legislative intent to protect institutions which offer specialised educational services. PDA Section 19 requires the NCPD to work with the Government and other agencies to establish wherever possible “Braille and recorded libraries for persons with visual disabilities”.

Another key consideration in the Government’s present review of education legislation is whether special needs education should be framed distinctly as a separate sector. Legal interventions on the education of children with disabilities have tended to be weak and far-flung. The essence of PDA Section 18 is to require learning institutions not to deny admission for a course to a person with disability only on grounds of disability if “the person has the ability to acquire substantial learning in that course”; and that learning institutions:

should take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, (and) class schedules ...

Phrases in these provisions are so ambiguous as to be meaningless.

Clearly, it would be far better if special needs policy was determined in tandem with and as part of the education policy generally.

Disability: The Current Use and Future Potential of United Nations Human Rights Instruments, United Nations, New York, 2002

²⁰ The delegation of the United States particularly protested vehemently at the inclusion of those terminologies.

²¹ The sterling work of Ms Wambui Kennedy regarding this article was particularly commendable. We perhaps would not have got that language without her persistence.

Finally, research by the National Commission shows that the policy of free primary education introduced by the Government of Kenya in 2003 is not enabling children with disabilities to have effective exercise of the right to education. Adequate resources commensurate with levels of disability were not invested to ensure that disabled children could have substantive rather than mere formal use of free primary education. In fact, the research concluded that tuition, accommodation, health and other related costs were integral to the education of children with disabilities and that the principle of free primary education would be a nullity for disabled children unless those costs were supported by the Government at primary, secondary and tertiary levels.²²

12. Adequate standard of living and social protection (Article 28)

Our view, which became incorporated in the Convention, was that social protection is a broader concept when compared with the concept of social security which is far more Eurocentric and tending to cover people in formal rather than informal employment.

The following matters are relevant to policy-makers and policy-implementers in the course of domesticating this provision. First, they have to realise that providing social protection for persons with disabilities should cover persons in formal as well as those in informal employment and indeed those who are not employed.

Second, PDA Section 12(3) provides employees with disabilities entitlement to exemption from tax on all income accruing from their employment. The mischief of this provision – to mitigate disability-related costs – is not particularly achieved via this provision since it focuses only on people in formal employment and since furthermore the provision has not been operationalised. Section 35, which the Minister has not gazetted, requires that persons with disabilities in receipt of an income may apply for exemption from income tax and other levies on such income; and the Minister for Finance may, in consultation with the NCPD, make orders “... exempting the applicant wholly, or to the extent provided by the order, from income tax or other levies specified therein ...”

Third, and related to the above, Kenyan law is very ‘gullible’ in its assumption that an impairment amounts to a disability for purposes of tax exemptions only when such disability is physical. Most frustratingly for persons with visual impairments, PDA Section 35(3) provides that:

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, port charges, and any other government levy which would in any way increase their cost to the disadvantage of persons with disabilities.

Presently, a constitutional reference²³ has been filed in court whose essential arguments are that:

²² “Objects of Pity or Individuals with Rights: The Right to education for Children with Disabilities”, Occasional Report No. 1, Kenya National Commission on Human Rights, 2007

²³ Samuel Kipng’etich Tororei v. Kenya Revenue Authority and the A.G.; High Court of Kenya; Petition No. 466 of 2007

- The letter and spirit of exempting persons with disabilities from paying certain categories of taxes aims to mitigate the negative effects of disability, whether such disability is physical, sensory or mental;
- Technologically, it is not feasible for a car to be so modified that it can be self-driven by a blind person; but
- The law still intends to enable a blind person to enjoy the use of a car, including by employing a driver;
- Hence, that the Kenya Revenue Authority discriminates persons with visual impairments because no feasible technical modifications can be made to a motor vehicle to enable a blind person to drive it; and
- PDA Section 35(3) is *ultravires* Section 82 (1) and (2) of the Constitution which provide that: "... no law shall make any provision that is discriminatory either of itself or in its effect"; and "no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority".

Fourth, the PDA's focus on providing tax breaks to individuals with disabilities is ineffectual as a strategy for mitigating disability-related expenses incurred by parents of children with disabilities or incurred by individuals with disabilities so severe that they cannot undertake gainful employment.

13. Participation in political and public life (Article 29)

Proposals made by us here included introduction of a specific phrase enabling a person with disability to choose who should assist him or her when voting; requiring states to take measures enabling persons with disabilities to represent their governments and participate in the work of international organisations; and enabling persons with disabilities to participate in the formulation and implementation of policies which affect them.

The following may be noted here. First, PDA Sections 29 and 30 are adequate as a normative basis for ensuring that voters with disabilities get assistance of their choice when voting; and ensuring too that polling stations are accessible and equipped with appropriate devices assistive of voting. The practical corollary of this, however, is the reality on the ground where unlike African countries such as Namibia and Ghana, no attempt has been made to deploy Braille ballots for use by voters who are blind.

Second, the non-involvement of persons with disabilities in work which affects them at both local and international levels is somewhat tempered by the fact that the Government quite happily facilitated the involvement of persons with disabilities in negotiating the Convention. An important concern, however, is that the Government should nominate and lobby for the election of a Kenyan with disability to the Committee on the Rights of Persons with Disabilities established under Article 34 to receive and process reports from states parties on measures taken to give effect to the Convention's provisions.

Here, we must also mention an obscure reference to blind persons which is made in the Constitution of Kenya respecting elections to the National Assembly. It provides:

... a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless, at the date of his nomination for election: ... (c) he is able to speak and, unless incapacitated by blindness or other physical cause, to read the Swahili and English languages well enough to take an active part in the proceedings of the National Assembly ...

It is never quite clear if this phraseology presupposes that a blind person cannot read and that they should be exempted from that requirement or whether it requires that, therefore, blind persons should not become legislators. This presupposition is unlikely since Ms Josephine Sinyo and Dr Okii Okoo-Ombaka have been legislators while being blind.

14. Participation in cultural life, recreation, leisure and sport (Article 31)

We unsuccessfully sought to introduce provisions to protect persons with disabilities from negative religious practices – including protection from religious abuse, exploitation and coercion. Intriguingly, these proposals did not receive adequate support even though the reality of life since time immemorial is that disabled people are exploited virtually by all faiths to make some religious point or other about faith or absence of faith – manifested by the story of Bartimaeus in the New Testament and Christian hymns such as “amazing grace”. Since the Convention’s passage, the Government of Kenya has actually stated its intention of passing legislation to protect Kenyans from the negative consequences of religious activities – perhaps principally covering the exploitation of religion to amass wealth; but, too, we would argue, in order to protect persons with disabilities from being coerced into throwing away their crutches and being taunted as faithless when miracles ala st. Paul fail to happen.

15. International cooperation (Article 32)

We recognised that international cooperation was essential if the Convention was to be actualised; but at the same time, we found it necessary to require that a state should not derogate from its obligations using the excuse that such cooperation had not happened. The Convention stated thus in (2):

The provisions of this article are without prejudice to the obligations of each state party to fulfil its obligations under the present Convention.

Concerns for domestication here include the realisation that while gender mainstreaming is a necessary criterion for cooperation with most international agencies, this is still not the case with disability issues. International development organisations such as the World Bank and the International Monetary Fund should, therefore, be prevailed upon to include disability as part of their frameworks for assessing projects which they will support.

In the same vein, Kenya should lobby for the UN to establish a disability programme/fund akin to UNICEF, UNIFEM or UNEP. The United Nations Disability Programme would provide international leadership, harmonisation, coordination and technical backstopping for disability issues. It would mobilise human and financial resources for implementation of the Convention. It would develop and monitor implementation of guidelines for mainstreaming disability into development work. On an annual basis, it would prepare the State of the World Report on Disability.

(IV) Conclusion: From Policy to Practice

This paper's aim has not been to provide a comprehensive analysis of the ICRPD. Rather, we have profiled provisions where the delegation of Kenya's viewpoints were particularly distinct relative to all the other contributions made during the negotiations. The paper does not, therefore, discuss some rights critical to persons with disabilities such as health and employment because the essential approach taken for these rights was totally attuned to Kenya's perspectives. Domestication of these rights will be as challenging as domestication of the rights discussed in this paper.

Finally, then, Article 33 of the ICRPD requires states parties to designate one or more focal points within Government for matters relating to implementation of the Convention. This provision begins to address the fact that while policies may be made, they can only make a difference if they are implemented effectively. The Government of Kenya and Kenyan civil society must interest themselves in practical measures which will cause rights to turn into realities for rank and file persons with disabilities. Interventions must concern themselves with improving the quality of life of persons with disabilities in educational, social, economic and political fields, for example, by:

- a. Engaging with the budgeting process to negotiate matters such as tax breaks for persons with disabilities;
- b. Ensuring affirmative action in the work-place (engaging with more private companies and public institutions to employ the disabled);
- c. Ensuring that economic quotas set aside for disabled persons are filled by them and that new quotas are established;
- d. Ensuring accessible environments (engaging with planners for that purpose; and naming and shaming those who do not comply);
- e. Establishing a legal aid fund for persons with disabilities;
- f. Investigating possible exploitation of disabled persons (whether allegations are made in respect of mental institutions, in respect of sheltered workshops, or in respect of educational institutions for the disabled); and
- g. Responding to the HIV/AIDS pandemic and its impact on persons with disabilities; etc.