



**A socio-legal critique of the legal framework for the
promotion of rights of persons with disabilities in
Kenya**

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Dedication

I dedicate this research paper to God Almighty; my loving wife and children, my loving parents Margaret Onyango (deceased) and Elijah W. Onyango (deceased); and my sister and brothers.

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List of Acronyms

CIC	-	Commission for the Implementation of the Constitution
CKRC	-	Constitution of Kenya Review Commission
DCIC	-	Disability Caucus on the Implementation of the Constitution
DPO	-	Disabled Persons Organisations
IEBC	-	Independent Electoral and Boundaries Commission
KES	-	Kenya Shillings
KNBS	-	Kenya National Bureau of Statistics
KNSPWD	-	Kenya National Survey on Persons with Disabilities
MoGCSD	-	Ministry of Gender, Children and Social Development
NCAPD	-	National Coordinating Agency for Population and Development
NCPWD	-	National Council for Persons with Disabilities
NGEC	-	National Gender and Equality Commission
PDA	-	Persons with Disabilities Act, 2003
PWD	-	Persons with Disability
UN	-	United Nations
UNCRPD	-	United Nations Convention on the Rights of Persons with Disabilities
WHO	-	World Health Organisation

Abstract

This research is a critical analysis of the legal framework on the rights of persons with disabilities in Kenya. It looks at the legal framework which includes the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the Constitution of Kenya, 2010 and the Persons with Disabilities Act, 2003 (PDA) with a view to establishing their shortcomings and why despite their provisions, the rights of persons with disabilities (PWDs) in Kenya continue to be violated. It therefore looks at and discusses the efficacy of the legal framework; the potential of the work done thus far; the potential of the relatively new concept known as “diffability” which recognises that PWDs have different abilities and should therefore be empowered to claim their rights based on these abilities.

The research delves into the right of PWDs to participate in positions of leadership in a bid to bring out the fact that those in power continue to violate the rights of PWDs. The research uses a human rights based approach; the social and medical models of disability; and socio-legal approaches to argue that the legal framework in Kenya has serious shortcomings. It goes ahead to make recommendations on possible ways of improving the legal framework.

Relevance to Development Studies

There is still limited research around the area of disability generally in Kenya and specifically disability and human rights. Indeed, little if at all has been done by way of analysing the success of the international human rights standards, constitutional and legislative provisions at the national level with a view to developing interventions that will reduce the challenges faced by PWDs in Kenya. This research assesses how the government has performed with regard to the promotion and protection of the rights of PWDs and by extension the realization of the UNCRPD.

Keywords

Disability, Medical model, Social model, Participation, Legal framework, UNCRPD, PDA, Constitution of Kenya

Chapter 1 : Introduction

1.1 Background

In 2011, I was retained by the Ministry of Gender, Children and Social Development of the Republic of Kenya to compile the Initial State Report on the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). It was during the writing of the State Report that I got to appreciate the problems that persons with disabilities (PWDs) in Kenya face. I also established that despite the fact that PWDs form a large part of the population, the programming and response by government and/or Disabled Persons' Organisations (DPOs) that is geared towards improving their welfare is not well coordinated. It was apparent that there is no reliable data on PWDs, a fact that may be attributed to lack of a central repository of information on PWDs. Further, there is limited literature on the rights of PWDs in Kenya. All the aforementioned has had an adverse effect on the promotion of the rights of PWDs thereby bringing to question the government's true commitment and/or capacity in this regard.

According to the World Health Organisation, disability affects over 10 [per cent] of every population. However, efforts to determine the disability status [in Kenya] through census and surveys by civil societies, NGOs and government have [to date] not been conclusive (NCAPD, 2008). This assertion was supported by Ingstad *et al* who said that 'there is no accurate data on the number of PWDs in Kenya' (Ingstad, B. and L. Grut, 2007:13). Indeed, it was not until 2010 that the Government of Kenya, through the National Council for Persons with Disabilities (NCPWD) started a process of proactively registering all DPOs and PWDs in Kenya and by August 2011, only a paltry 60,000 PWDs had been registered countrywide.

Another similar initiative was being undertaken by the Government of Kenya through the National Coordinating Agency for Population and Development (NCAPD) and Kenya National Bureau of Statistics (KNBS) which produced the Kenya National Survey for Persons with Disabilities (KNSPWD) which established that the overall disability rate in Kenya was at 4.6 per cent, which translates to 1.6 million people living with disability (NCAPD, 2008). This was followed in 2009 by the 2009 Population and Housing Census which was conducted by the Government of Kenya through the Kenya National Bureau of Statistics. It established that the country had a total of 1,330,312 PWDs, that is, the equivalent of 3.5 per cent of the entire population. All the above confirms that there is no reliable data on PWDs and that the programming for them is not well co-ordinated, a fact that has a risk of affecting the promotion of the rights of the group.

Table 1.1: Population by Main Type of Disability and Sex, 2009

Disability	Male	Female	Total
Visual	153,783	177,811	331,594
Hearing	89,840	97,978	187,818
Speech	86,783	75,020	161,803
Physical	198,071	215,627	413,698
Mental	75,139	60,954	136,093
Others	44,073	55,233	99,306
Total	647,689	682,623	1,330,312
% With Disability	3.4	3.5	3.5

Source: National Population Census 2009 (KNBS)

Despite these significant numbers, PWDs are still the most vulnerable group of people in the Kenyan society. They experience inequality, face discrimination and abuse. Indeed, the manner in which society interprets and reacts to disability has resulted in inbuilt social, cultural and economic prejudices, stigmatization, abuse and violence (Ingstad, B. and L. Grut, 2007:11). They are also among the most politically marginalized, economically impoverished, and least visible members of society (Stein, M.A., 2007:121). Therefore in order for them to overcome the challenges, the government, CSOs and DPOs as duty bearers must put in place very effective programmes that specifically seek to promote the rights of PWDs.

Human rights have become the major global approach to social justice (Merry, 2006b) for the marginalised including PWDs. To this end, there have been a number of United Nations' resolutions, declarations and human rights instruments that have incrementally sought to protect PWDs from discrimination. The most comprehensive initiative was the adoption of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). According to the United Nations, '...the Convention follows decades of work by the United Nations to change attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society'

But despite all the promise that the UNCRPD held at the time of its adoption, the question that still lingers on is whether or not it has or it will deliver the rights guaranteed therein and consequently reduce inequality and discrimination against PWDs and as the Convention correctly points out in its preamble (k) which states that '*...despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.*' This is supported by Lang who argues that the UNCRPD 'will not, in and of itself, be the panacea that

will end the discrimination and social exclusion of disabled people within contemporary society' (Lang, R. 2009:281). One may opine that at the national level, the rights of PWDs in Kenya are adequately guaranteed through the existing legal framework. However, there is still flagrant violation of the rights of PWDs in Kenya. Being a party to the UNCRPD,¹ Kenya is duty bound to respect and uphold the provisions of the Convention. Indeed, Kenya promulgated a new Constitution in August, 2010 which for the first time provided constitutional recognition and protection for a wide range of human rights for different groups of people, including the rights of PWDs. It, (the Constitution) seeks to reduce the challenges that PWDs face and enhance the equalization of opportunities in economic, social, cultural, civil and political sphere.

The promulgation of the new Constitution was indeed a turning point for Kenya on many fronts. With regard to the respect for international commitments, Kenya turned from being a dualist State, which required that an international treaty had to be domesticated first through an enabling legislation for it to become applicable in the country, to a monist State which means that any international treaty which the country is a party to becomes and forms a part of the national legal framework. This provision is contained in Article 2(5) of the Constitution of Kenya, 2010, which states that *'the general rules of international law shall form part of the law of Kenya.'* Article 2(6) adds that *'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'* This therefore means that since Kenya is a State Party to the UNCRPD, it (the UNCRPD) now forms a part of the national legal framework and can therefore be invoked directly in a Court of law when their rights have been violated. Apart from the aforementioned legal provisions, rights of PWDs are also constitutionally guaranteed under Chapter 4, which contains the Bill of Rights. But this must be read together with Article 54 of the Constitution of Kenya, 2010, which enumerates the specific rights that PWDs are entitled to. As for the legislative provisions, they are contained in the Persons with Disabilities Act, No. 14 of 2003 of the Laws of Kenya (PDA) which states in its preamble that the Act seeks *'to provide for the rights and rehabilitation of persons with disabilities to achieve equalization of opportunities for persons with disabilities; to establish the NCPWD; and for connected purposes.'*

On the issue of participation of PWDs in positions of leadership, this is guaranteed under Article 54(2) of the which provides that *'the State shall ensure the progressive implementation of the principle that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities.'* This is the same situation with regard to appointive positions. Indeed, one can literally count the PWDs who have been appointed to positions of leadership and authority in government ministries, department and agencies thereby placing PWDs at a disadvantage. With regard to the appointment of PWDs into other leadership positions, there were 2 Commissioners that served in the Constitutional of Kenya Review Commission from around the year 2000 namely Commissioner Dr. Oki Ooko Ombaka and Commissioner Salome Muigai. They too were appointed after much struggle by PWDs and they played a pivotal role in the in-

¹ Kenya ratified the United Nations Convention on the Rights of Persons with Disabilities on 19th May 2008. See <http://www.un.org/disabilities/countries.asp?id=166>. Accessed on 6th October 2012

clusion of PWDs in the Constitution of Kenya, 2010. With regard to other Constitutional bodies, the Kenya National Commission on Human Rights currently has 2 Commissioners both of whom are visually impaired. They include Commissioner Lawrence Mute who was appointed in 2003 and Commissioner Dr. Samuel Kipnetich Arap Tororei who was appointed in 2008. There is also Justice Daniel S.K. Aganyanya, Judge of the Court of Appeal. Apart from that, there is Commissioner Imaana Kibaaya Laibuta of the Commission for the Implementation of the Constitution.

In this research, I will argue that despite the legal framework in Kenya to support PWDs, their rights are still far from being realised. I will also argue that the legal framework falls short of the international standards thereby exposing PWDs to, instead of protecting them from, further discrimination. Finally, I will argue that unless a sustained and coordinated programme of empowerment is put in place, together with a change in the manner in which the entire society, including government officials, CSOs, DPOS and the public, treat and deal with PWDs, then they will not be able to claim their rights and therefore take their rightful place in the development of the nation. I will do this by looking at and discussing the efficacy of the legal framework; the potential of the work done thus far; the potential of the relatively new concept known as “diffability” which recognises that PWDs have different abilities and should therefore be empowered to claim their rights based on these abilities.

1.2 Relevance and justification of the study

Despite the high numbers of PWDs; the amount of discrimination that PWDs undergo; and the seemingly progressive legal framework for PWDs, there is still limited research around the area of disability and human rights in Kenya. Indeed, little if at all has been done by way of analysing the success of the international human rights standards, constitutional and legislative provisions at the national level with a view to developing interventions that will reduce the challenges faced by PWDs in Kenya. This may be attributed to the fact that this is still a very new area of advocacy for CSOs, DPOs and academic institutions in Kenya. Also, most organisations have dealt with issues relating to PWDs not from a human rights perspective but more from a medical perspective.

Another reason is that there is limited literature on disability in Kenya. This may be attributed to the fact that disability studies [have been] monopolized by western theorists, focused on western industrialized settings and imbued with ideological, theoretical, cultural and historical assumptions (Grech, S. 2009:771) that do not necessarily apply to the African context. It is therefore hoped that this study will contribute to the body of knowledge around the challenges of realizing disability rights in Kenya and more so from an African context by bringing out the clash between the disability models on the one hand and the promotion of human rights of PWDs in the Kenyan society on the other.

This research will also seek to assess how the government has performed with regard to the promotion and protection of the rights of PWDs and by extension the realization of the UNCRPD. In particular, it will look at how the Convention has been translated in Kenya. It will assess how PWDs have chal-

lenged discrimination and marginalization which is both a cause and effect of limited participation in society.

Therefore, this research will delve into linkages between these two areas. At a personal level, I intend to be actively involved in the trial advocacy around the rights of PWDs in Kenya. I will use my new found knowledge in human rights and development to influence the development of laws, policies and jurisprudence that will promote and protect the rights of PWDs. It is therefore my desire to better understand this otherwise emerging area through advocacy for the rights of PWDs in Kenya.

1.3 Overall research objective

Kenya seemingly has a progressive legal framework for the promotion and protection of the rights of PWDs. This includes the UNCRPD, the Constitution of Kenya, 2010, and the PDA. But despite this seemingly progressive legal framework, PWDs in Kenya continue to experience discrimination and marginalisation especially in society in general but more specifically in education, politics, in positions of leadership, among others. The overall objective of this study therefore is to contribute to the body of knowledge on how the rights of PWDs in Kenya are being realised. It will analyse the shortcomings of the legal framework that ought to protect PWDs from discrimination. The analysis will include an analysis using a human rights based approach, socio-legal approaches and the models of disability.

1.4 Research questions

1.4.1 The main question

Why is the realisation of the rights of PWDs in Kenya still a challenge?

1.4.2 Sub – questions

1. What international and national obligations provide for the rights of PWDs in Kenya?
2. What concrete measures has the Government put in place to realise the rights of PWDs in in Kenya?
3. How have individuals and advocacy organisations mobilised to promote the rights of PWDs in Kenya?
4. To what extent have efforts of government and advocacy organisations proved effective in the promotion of the rights of PWDs?

1.5 Research methods and sources

The research utilised both primary and secondary sources of information. It employed qualitative research methodology that entailed securing key informant interviews with individuals that have knowledge and experience on issues relating to the rights of PWDs.

1.5.1 Data sources

(i) Primary data sources

Some of the primary data was derived from interviewing 8 respondents who took part in key informant interviews. These respondents were from DPOs, officials from the Ministry of Gender, Children and Social Development (MoGCSD), PWDs themselves who are based in Nairobi and legal practitioners. The limited number of respondents was because of the nature of the research. These interviews provided qualitative information on the challenges facing PWDs.

(ii) Secondary data sources

The research utilised secondary data that was derived from academic journals, government reports, United Nations website and books. These were available on the ISS website and library; and the website of various government ministries and international agencies that deal with the rights of PWDs. This research also used secondary data to analyse the various theoretical and conceptual frameworks relating to the discrimination of PWDs.

1.5.2 Sampling

(i) Purposive sampling

It was necessary to do purposive sampling because the promotion of disability rights is an extremely specialised field; human rights of PWDs in Kenya is an area in which little research has been done; and thirdly the UNCRPD, the Constitution on Kenya, 2010 and the PDA are all still fairly new legal documents. This therefore necessitated purposive sampling that enabled the researcher to specifically identify individuals that have expertise on human rights of PWDs in Kenya, the budding legal framework and how the government works.

1.6 Limitations

There were several limitations and challenges experienced during the research. At a practical level, the UNCRPD, the Constitution of Kenya, 2010 and the PDA are all relatively new legal instruments. For that reason, not much has been written or research has been undertaken in Kenya in this area. The little research that was available was not specific to human rights of PWDs. To overcome this limitation, the research referred mainly to Western literature. Secondly, there is a serious lack of national empirical or statistical data that is verifiable and reliable. The little that is available, even from different government departments and ministries are contradicting thereby making it impossible to draw comparisons between different periods and themes. Thirdly, there is currently no coordinated programmatic intervention for PWDs on the part of the government of Kenya. It is only now that there are on-going attempts to synchronise government response but the same is still fragmented and is very slow. The National Council for Persons with Disabilities (NCPWD) still lacks

capacity and human resources. Finally, due to competition for resources, there is a general fragmentation of efforts among the CSOs and DPOs that are implementing disability programmes.

1.7 Structure of the paper

This research is a critical analysis of the legal framework. Therefore, it has concentrated heavily on the legal framework in the United Nations Convention on the Rights of the Child (UNCRC), the Constitution of Kenya, 2010 and the Persons with Disabilities Act, 2003 (PDA); and the literature around disability and human rights. The first chapter is an introduction of the research paper and it seeks to contextualize the discussion around the UNCRC and the rights of PWDs in Kenya. The second chapter presents the conceptual and theoretical frameworks around human rights and models of disability. It also brings out the analytical frameworks namely the human rights based approach and the socio-legal approach. The third chapter lays out the various provisions of the UNCRC and how they have been domesticated through the Constitution of Kenya, 2010 and the PDA. It looks at the texts and points out the shortcomings. It also looks at how PWDs have started enhancing their legal consciousness and overcoming the challenges they face with regard to participation in public life and leadership positions. The fourth and final chapter has the conclusion and recommendations on how to improve the national legal framework on PWDs in Kenya

Chapter 2 : Understanding disability through a conceptual and theoretical framework

2.1 Chapter overview

In order to appreciate the import of United Nations Convention on the Rights of the Persons with Disabilities (UNCRPD) and the levels of its domestication in Kenya, it is necessary to bring out some of the definitions; understand how disability has evolved and appreciate some of the conceptual, legal and theoretical frameworks that relate to disabilities. This is because as Friedman *et al* says, disability is a very complex phenomenon. Thus it is imperative that in order to understand and interact with it effectively, one must be alive to its evolving perspectives which lead to different ways of thinking about, measuring and classifying [it] (Friedman *et al.*, 2004). This section of the research presents a framework for understanding disability and evaluating the rights of persons with disabilities (PWDs).

2.2 Human rights based approach to addressing discrimination of PWDs

Kenya's legal framework for PWDs comprises of the UNCRPD, the Constitution of Kenya, 2010 and the PDA. They all seek to promote the rights of PWDs; reduce discrimination against PWDs; and promote participation of PWDs in positions of leadership and are a testament that human rights offers hope to PWDs who are otherwise a vulnerable and subordinated group (Merry, 2006b). But despite all the aforementioned, there is still a very big gap between the disability rights legal framework as was ratified and domesticated on the one hand, and the reality on the ground because PWDs in Kenya still remain among the poorest and most marginalised group in society. They do not receive education, they are not often granted their employment quota. They do not have the knowledge or capacity to fight for their own rights. This research will therefore use a human rights based approach to try and understand the reason why PWDs still face so much discrimination. However, because the human rights based approach is very wide, this research will concentrate on three elements of it namely non-discrimination; participation; and progressive realisation and non-retrogression.

But what is human rights based approach and why use it as a basis of analysis? According to Darrow and Thomas, 'a rights based approach [...] means different things to different people depending upon thematic focus, disciplinary bias, agency profile, and the external political, social, and cultural environment' (Darrow and Thomas, 2005:483). It is a '[...] framework for understanding and managing the negative impacts of discrimination and disempowerment, not a one-dimensional and static formula' (*ibid*, 501). [It] integrates the norms, principles, standards and goals of the international human rights system into the plans and processes. The human rights based approach is characterised by methods and activities that link the human rights system and its inherent notion of power [...] by holding powerful people and

institutions accountable for their responsibilities to those with less power thus making institutions and persons exercising power to become duty bearers. It seeks to support rights holders-especially the poor, powerless and discriminated-against to claim their rights by addressing the causes of violations of rights and bringing about policy and practice changes and thereby reduce discrimination (Save the Children Sweden, 2005; Boesen, J.K. and T. Martin, 2007; de Gaay Fortman, 2006). ‘Disability policy [and laws] under a rights model focuses on ways to make social environments accessible and reform social institutions to include people with disabilities’ (Heyer, 2002:727).

PWDs make a large percentage of the population in Kenya. Therefore, there is need to understand why PWDs in Kenya have not been able to claim their rights. This is because in an ideal situation, a rights framework preserves the freedom and capacity or meaningful choice of PWDs as rights holders. [Rights framework] also allow[s] PWDs to have self-determination and power over their lives (Yamin, 2009:6). According to Sultana, Z., right-based approaches with regards to PWDs has two elements, that is conferring disabled people with the enforceable rights to protection against direct and indirect forms of discrimination; and secondly, that positive action programmes should be designed to rectify the historical subordination of disable people to their able-bodied environment (Sultana, Z. 2010:7).

It is apparent that having rights listed and provided for in the Constitution of Kenya, 2010 or in the PDA is not an end in itself. ‘The effectiveness of any law...depends on the response of [those] whose interests are at issue together with the attention that is given to customs and culture of the people’ (Friedman, L.M., 1969:40-41). Which means that rights exist on paper and the challenge of realising them lies in claiming them by engaging and reforming the structures and institutions charged with upholding them, and in expanding people’s understanding of and sense of entitlement to rights (Schuler (1986) and (2002) as cited by VeneKlasen, L., V. Miller, C. Clark and M. Reilly; 2004). Therefore, it is important to better appreciate how best to empower PWDs to move the rights from what is contained in the legal framework, to having them hold the duty bearers accountable for the realization of their rights. The challenges facing PWDs when it comes to realizing their rights and the strategies currently being employed to overcome those challenges together with the rate of success are discussed in Chapter 3 of this research paper. This research proposes to use Bassier’s three-dimensional approach to human rights that would assess if PWDs are enjoying their rights.

In the first dimension, the State establishes a process that allows people with disabilities to respond to unjust treatment. Here, a PWD whose rights have been discriminated uses an established individual complaints mechanism, which is the core of all anti-discrimination laws, to claim their rights. The individual complaints mechanism empowers PWDs to respond to discrimination in an attempt not only to be compensated but also to change the way that the discriminators act. Here, the ownership of the problem of disability discrimination belongs to the empowered individuals with disabilities who take primary responsibility for the achievement of equality (Basser, 2002).

The second dimension of the process of operationalizing human rights is where the state plays an on-going role in responding to inequalities, and operates proactively to deal with systemic discrimination which cannot be addressed simply through anti-discrimination processes. This dimension involves

a partnership between the State and PWDs in which the State shares the ownership of the problem of PWDs. In this case, the State provides for the making of “standards” and “guidelines” and for public inquiries into problem areas of discrimination. Here, it is expected that the interests and needs of other stakeholders will be taken into account and a pragmatic solution found for the protection of rights (*ibid*).

The third dimension involves the community at large taking responsibility for and owning, the process of ensuring the full inclusion of PWDs into all aspects of the social, economic and political life of the community. In this dimension, all members of the community are empowered to make the equality of PWDs real in the context of specific aspects of communal life. It is notoriously difficult to legislate for attitudinal change and communal ownership goes beyond this. Yet without legislative provision it is hard to imagine how the process of change could begin to come about. This entails the development of “action plans” at all levels which can be adopted and contextualised to suit different organisations. The same are developed by the organisations in collaboration with PWDs. This dimension builds on the partnership of the state and PWDs by providing a role for the community at large (*ibid*).

However, the rights based principles and approaches have been criticised by several writers. Analysing human rights has in and of itself presented a challenge to social scientists and vice versa. As Landman says, human rights continues to be a difficult object of inquiry for social sciences given the absence of agreed philosophical foundations, the contested nature of their full content and the tension between the use of social science methods to research questions that are fundamentally moral in nature (Landman, 2009). But, human rights principles are intended to ensure that being human is sufficient ground for equality and freedom. Indeed, the achievement of rights requires more than a declaration of entitlement. Given the level of human rights abuse to which people with disabilities are subject, the achievement of rights must rely on strong and enforceable law. Ideally, human rights law would limit the activities of the state as well as the day to day lives of all members of the community (Basser, L.A. and M. Jones: 2002 pp 256-257). Grugel and Piper (2009) add that human rights approaches seem to be instrumentally useful, as well as morally robust, for putting some issues on the agendas of states and international organizations; but it does not work to address injustice effectively in all cases. This means that it should not serve as the only moral or intellectual framework for challenging global, national and local injustices, deprivation and marginalization (Jean Grugel and Nicola Piper, 2009:81).

2.3 Socio-legal approaches

This research will use socio-legal approaches to analyse how the UNCRPD has been domesticated and translated through the Constitution of Kenya, 2010 and the Persons with Disabilities Act, 2003 and the impact of their implementation on PWDs. It will also seek to establish how the PWDs are challenging the discrimination that is being perpetuated against them.

2.3.1 Legal consciousness

Legal consciousness is a concept that was borne out of concern that law and society scholars were asking the wrong set of questions, or not penetrating into everyday life (Cowan, 2004:930) and that 'laws rarely provides the whole solution for people' (Khan, 2009). It developed directly from what appeared to be law's failure to realize its aspirations for equality and justice (Silbey, 2005:358). But even though law is 'a tool for social change' (Heyer, 2002), it may have limited effectiveness depending on the context (Darrow and Thomas, 2005:485).

Legal consciousness helps us to try and unpack what is actually transpiring within the society. According to both Trubek and Silbey, legal consciousness tries to address issues of legal hegemony, particularly how the law sustains its institutional power or how any society explains or justifies its legal institutions despite a persistent gap between the law on the books and the law in action (Trubek, 1984; Silbey, 2005). Legal consciousness therefore helps us understand 'the way law is experienced and understood by ordinary citizens' (Merry, 1985) or the way in which society integrates understanding of legal order with other ideas which give meaning to its social world (Trubek, 1984). It can therefore be construed as a type of social practice, in the sense that it both reflects and forms social structures (Silbey, 2005).

There are critics of the concept of legal consciousness who say that even though legal consciousness seeks to explain the gap between law in the books and law in action, the gap is not a creation of the powerful. This is because of the indeterminacy that is inherent to the application of formal law (Sibley, 2005). Those who take this position argue that it is impossible for the powerful to take advantage of this gap because of the difficulty in predicting how the law can be applied. However, I disagree with this assertion and support the position that 'law is just a mere servant of existing power' (Smith and Weisstub, 1979). But there are those who argue that 'law often brings more harm than good to social movements that rely on legal strategies to advance their goals' (Lobel, 2007:939).

From the above, it is therefore my contention that those in authority have been known to use the law to perpetuate their power and sustain their interest at the detriment of the less powerful. This is because laws are neither enacted nor implemented in a vacuum. They (laws) are beholden to the exigencies and realities of the day, which include the need for a particular group to maintain the existing power structures within a society. This confirms the assertion by Darrow and Thomas who say that in the real world, law does not occupy its own compartment, hermetically sealed from social and political struggles and value systems. In fact law is the product of on-going struggles and processes...? (Darrow and Thomas, 2005:484). Therefore, the study of legal consciousness is the search for the forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law (Silbey, 2005:334). It is against this background that I will argue that the manner in which PWDs in Kenya have been denied their rights is a reflection of the fact that those without disability are determined to continue to subjugate the powerless and vulnerable in society.

It is worth noting that African legal consciousness is different from that found in America or Europe. This may be because of the low literacy levels in Africa; widespread poverty; the collectivist nature of the African society, among other factors. This would raise interesting questions especially when it comes to the promotion and realization of human rights in general and the rights of PWDs in particular? This would be good for future scholarly work that is akin to the work done by Marc Hertogh who drew a distinction between a ‘European’ approach and an ‘American’ approach to legal consciousness (Hertogh, 2004) Therefore in analysing the legal consciousness or rights consciousness in Africa, one must always be alive to these realities and the struggles in the African context. However, this research will not delve deeply into the same due to space constraints.

2.3.2 From international to the local: The role of translators on the rights of PWD

In order for international human standards to be made relevant, they must be contextualised to the national setting. Merry says that ‘ideas from transnational sources [...] are typically vernacularized, or adapted to local institutions and meanings’ (Merry, 2006a). This research will analyse how the rights of PWDs as contained in the UNCRPD is being translated from the international setting and applied and domesticated in the national setting in Kenya through the Constitution of Kenya, 2010, the PDA, among others. Here, it will also look at what Sally Merry calls “indigenization” which ‘refers to shifts in meaning—particularly to the way new ideas are framed and presented in terms of existing cultural norms, values, and practices. Indigenization is the symbolic dimension of vernacularization’ (Merry, 2006a). The research will also look at the role of the translators who are actively involved in the promotion of the rights of PWDs in Kenya. In this case, the translators will include government officials, DPOs and CSO activists that take part in the international sphere and implement within the national context. Indeed, as Merry says, activists often participate in two cultural spheres at the same time, translating between them with a kind of double consciousness (Merry, 2006b:3)

This is important because the promotion of rights of PWDs is not a very old phenomenon in Kenya. The UNCRPD was adopted by the UN General Assembly on 13th December 2006 and ratified by Kenya in 2008. Indeed, the drafting and enactment of the PDA went on even as the UNCRPD was being elaborated. Indeed, the PDA was enacted in 2003. One may say that the enactment of the PDA was intended to act as a major milestone for the PWDs. But it may not have translated to much by way of the promotion and protection of the rights of PWDs in Kenya and as Merry says, ‘in order for human rights ideas to be effective, the need to be translated into local terms and situated within local contexts of power and meaning’ (Merry, 2006b:1).

Having been involved in domesticating the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child through the enactment of the Children’s Act, No. 8 of 2001 and also in the lobbying for an Optional Protocol to the UNCRC with an Individu-

al Complaints Mechanism,² I have some experience in translation from the international to the national context. These experiences revealed to me the tensions between what happens at the international or regional level against the expectations at the local level. In this respect, I agree with Merry when she says that ‘human rights ideas, [are] embedded in cultural assumptions about the nature of the person, the community, and the state, do not translate easily from one setting to another (Merry, 2006b). Thus the need to establish where the Kenyan translators have failed.

2.4 Different models of disability vis-a-vis the rights of PWDs

The frameworks for conceptualizing disability fall into two broad, general categories. One focuses on the individual and views disability in terms of individual difference, deficit, or lack. Primary among this group of models is the familiar medical model. The other group focuses on society as the locus of disability in that disabilities are caused by the way in which society is structured—access, stereotypes, conceptions of “normal,” and ideas about difference and capacity are all defined by, and grounded in, the social order. (Rothman, 2010). This part of the research will look at these two main models namely medical model and social model; together with the International Classification of Functioning, Disability and Health (ICF) (WHO, 2001); and the recently established term known as “diffability” (Suharto, 2010) .

2.4.1 *Medical model of disability*

The medical model of disability is probably the most common in that ‘for many people, the only way to understand disability is as a problem of the individual’ (Goering, 2010:55). This model focuses on [the] medical needs [of a PWD] and suggests the normative principles of charity and accommodation. It does not raise questions of justice, nor does it emphasize the rights of people with disabilities (Jongbloed, 2003). ‘The medical model views disability as a problem of the person, directly caused by disease, trauma or other health condition, which requires medical care provided in the form of individual treatment by professionals. Management of the disability is aimed at cure or the individual’s adjustment and behaviour change’ (WHO, 2001:20). This in my view is a reflection of the manner in which the Kenyan society views disability and deals with PWDs. Indeed, PWDs are seen as people who are unable to take care of themselves and need support from the society. It is very difficult

² Between 2006 and 2010, I took part in lobbying for the Optional Protocol to the United Nations Convention on the Rights of the Child on an Individual Complaints Mechanism. It was then that I experienced firsthand the workings of the United Nations. I participated in lobbying for States through their missions in Geneva to support the Optional Protocol. This included organizing and participating in side events at Palais de Nations in Geneva. See <http://publish.uwo.ca/~cgorlick/sw284/documents/HUMAN%20RIGHTS%20COUNCIL.%20Report.pdf>. Accessed on 25th October, 2012. It was during my mission in Geneva that I was interviewed by the Child Rights International Network (CRIN) on my experience as a child rights lawyer. See <http://www.crin.org/resources/infodetail.asp?ID=16773>. Accessed on 25th October, 2012

for PWDs to lead an independent life because they must be aided by those in the community.

But the medical model has been criticised because it is seen as a set of understandings which focus on impairment or functional limitation as the sole or overriding reason for the disabled person's disadvantaged position or restricted opportunities (Read, 1998). Another criticism as argued by Rothman is that the physical, biological aspects of disability, viewed through the traditional lens of the medical, problem-oriented, deficit model tend to create stereotypes and biases that are often internalized by people with disabilities, affecting self-esteem, self-determination, relationships with others (including social work professionals), and the integration of people with disabilities into society (Rothman, 2010).

2.4.2 Social model of disability

There is also the 'social model of disability [which] holds that much of the disadvantage associated with impairment is socially imposed, rather than inherent to the bodily or mental state (a view commonly understood as the medical model)' (Goering, 2010:54). The social model defines disability as the product of specific social and economic structures and aims at addressing issues of oppression and discrimination of disabled people, caused by institutional forms of exclusion and by cultural attitudes embedded in social practices (Terzi, 2004). The essence therefore of the social model therefore is 'not to deny the impairment, but to redirect our attention to how societal attitudes, practices, and institutions may disable individuals unnecessarily and unjustly, and to call for social change that will allow for greater inclusion of people with impairments and recognition of their value (Goering 2010).

Despite the above, the social model has been criticized by Dewsbury G. et al who argue that it lays too much emphasis on the experience of PWDs yet people are exposed to different experiences and therefore one must always be alive to these different experiences when developing an intervention geared towards PWDs (Dewsbury, G. *et al*, 2004). It is my view that human rights principles are generally more akin to the social model. But even by looking at the social model, it important for the constitutional and legal framework to reflect the International Classification of Functioning, Disability and Health (ICF) model developed by the World Health Organization (WHO, 2001). According to the WHO web site, the ICF is a classification of health and health-related domains. These domains are classified from body, individual and societal perspectives by means of two lists: a list of body functions and structure, and a list of domains of activity and participation. Since an individual's functioning and disability occurs in a context, the ICF also includes a list of environmental factors³ The ICF focuses on the negative aspects of the interaction (measured as impairments affecting the body; activity limitations affecting an individual's actions or behaviour or participation restrictions affecting a person's experience of life) between an individual (with a health condition) and that individual's contextual (personal and environmental) factors. Here, focus

³ WHO 'International Classification of Functioning, Disability and Health (ICF)' See <http://www.who.int/classifications/icf/en/>. Accessed on 23rd October, 2012

shifts from measuring deviations from the normative to assessments of difficulties encountered (both personal and environmental) and what an individual may need to become a fully active and integrated member of society (Loeb, M.E. *et al* 2008:34).

But, there is the term called “diffability” which is a concept that was developed by Indonesian scholars called Mansour Fakhri and Setia Adi Purwanta (Suharto, 2001). It is my considered view that “diffability” builds on the ICF model. In his MA Research thesis, Suharto posits that society misunderstands PWDs. He says that ‘the thing which is impaired within a human being is only a particular part of the body such as the leg or the eyes, but the wider community assumes that the whole entity of this human being is impaired, including intelligence and common sense’ (Suharto, 2010:1). Therefore, this ‘term embraces a couple of ideas: firstly, it is directed to remind broader society who has already claimed diffabled people as those who have failed as human beings and secondly, it calls on governments to translate the idea of different-ability (diffability) into appropriate responses, treatments or policies regarding the diversity of impairments’ (*ibid*).

Chapter 3 : Analysis of the legal framework in Kenya on the rights of persons with disabilities

3.1 Chapter overview

This chapter presents a critical analysis of the manner in which Kenya has domesticated the United Nations Conventions on the Rights of Persons with Disabilities (UNCRPD) through the Constitution of Kenya, 2010; and the Persons with Disabilities Act, 2003 (PDA). This analysis will seek to bring out the potential that the framework holds with regard to improving the lives of persons with disabilities (PWDs) in Kenya. It will include an analysis of the feedback from the field while looking at the international and national obligations on the rights of PWDs in Kenya; the measures has the Government put in place to reduce discrimination against PWDs in Kenya; how individuals and advocacy organisations have mobilised to reduce discrimination against PWDs; and why the efforts of government and advocacy organisations have proved to be inadequate. In doing so, this part will point out the shortcomings of the domestication and specifically argue that Kenya failed in ensuring that PWDs enjoy their rights because the legal framework has adopted the medical model of disability as the basis of its intervention towards PWDs. It will also argue that the application of the medical model as a basis for the definition of disability and its consequent application in developing interventions for PWDs has had a lot of shortcomings and contributed to the continued discrimination of against PWDs. The research will use the human rights based approach and socio-legal approaches.

3.2 Measures to realise the rights of PWDs in Kenya

The UNCRPD has been domesticated and translated through the Constitution of Kenya, 2010 and the enactment of the PDA. This ‘constitutional [and legal] protection of human rights is key because it makes clear, at least formally, that the state is committed to human rights’ (Khan, 2009:210). However, PWDs have faced different challenges during the domestication process which revealed the fissures between the global setting where human rights ideas are codified into documents and the local communities where the subjects of these rights live and work (Merry, 2006b). An example of the flashpoint was during the lobbying by DPOs and PWDs to have their issues included within the various drafts of the Constitution as it became apparent that PWDs had to fight to have their issues retained because *“there was always support for the inclusion of issues affecting PWDs during the plenary discussion but whenever the final resolutions were presented, one would find that the issues relating to PWDs had been removed from the review document.”* (Dr. Samuel Kabue, Executive Secretary, Ecumenical Disability Advocates Network). This maybe because disability rights is still a new area of rights and further, there were serious power struggles which DPOs and PWDs had to deal with and as Ms Irene Aloo says, *“for the longest time, we did not think of issues of PWD as issues to talk about or to be articulated. But the Constitution of Kenya, 2010 has now given us an opportunity to look at issues of PWDs in a different manner.”* (Ms Irene Aloo, State Counsel, Ministry of Gender, Children and Social De-

velopment). Indeed, the UNCRPD, the Constitution of Kenya, 2010 and the PDA are all still fairly new and for that reason, not much attention was given to it. This part of the research will reflect on some of the provisions of the UNCRPD and their corresponding provisions in the Constitution of Kenya, 2010 and the PDA.

The UNCRPD was conceived because of the pervasive discrimination against people with disabilities (Manderson, 2004). It provided the most comprehensive and extensive recognition of human rights of PWDs by outlining the civil, political, economic and social rights of PWDs and the two perspectives on disability, that is, the perspective of global public health and the other on perspective of human rights (WHO, 2011; Durkin, M. and C. Gottlieb, 2009). The UNCRPD sought to ameliorate the impact that societal attitudes have on PWDs. It (the UNCRPD) ‘develop[ed] a “disability human rights paradigm” by combining components of social model of disability, the human right to development, and Martha Nussbaum’s version of the capabilities approach, but filters them through a disability rights perspective to preserve that provide for individual flourishing and modifying that which does not’ (Stein, M.A., 2007).

Article 2 of the UNCRPD prohibits discrimination on the basis of disability which has been defined as ‘...any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’ This provision has to be read with that on reasonable accommodation because PWDs need support in order to compete favourably in society. Article 2 also defines reasonable accommodation to mean ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, [...] to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’ In order for any national legislation to benefit PWDs, then it needs to take into account these two definitions that would enhance the chances of PWDs.

Article 5 of the UNCRPD deals with equality and non-discrimination and it states under Article 5(1) that ‘...all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.’ It adds under Article 5(3) that ‘in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.’ Finally, it provides under Article 5(4) that ‘specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination...’ These provisions place an obligation on Kenya to take all measures which include ensuring that PWDs have not only legal and administrative safeguards but where possible, Constitutional protection and guarantees that would enhance equality and non-discrimination.

The above provisions on discrimination under the UNCRPD have been reflected in the Constitution of Kenya, 2010. As a consequence, PWDs in Kenya have a right to have their human rights, fundamental freedom and dignity respected. The Constitution of Kenya, 2010 has emphasized this through Article 19(2) which states that ‘the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.’ This means that the State has a duty to ensure social justice and encourage all PWDs to

achieve their potential. Article 28 of the Constitution of Kenya, 2010 deals with human dignity and it states that *'every person has inherent dignity and the right to have that dignity respected and protected.'*

Article 27(4) of the Constitution of Kenya, 2010 specifically prohibits discrimination on several grounds including on the ground of disability. Further, the provision on equality before and under the law under the UNCRPD is domesticated through Article 27 of the Constitution of Kenya, 2010 which adds that *'every person is equal before the law and has the right to equal protection and equal benefit of the law.'* And Article 27(2) says that *'equality includes the full and equal enjoyment of all rights and fundamental freedoms.'* Article 54 of the Constitution of Kenya, 2010 specifically provides general safeguards for PWDs by seeking to minimise any marginalisation and barriers to equalisation that PWDs may face and it lists the rights that PWDs are entitled to which include the right to be treated with dignity and respect; to have access educational institutions and other facilities; 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 PDA on its part has several provisions that purport to ensure that PWDs enjoy their rights. This is found in Part III which provides for the 'rights and privileges of persons with disabilities.' These include provisions that seek to enhance the employment rights for PWDs (Section 12-17); the right to education (Section 18); the right to special and non-formal education (Section 19); the right to health (Section 20). Further, the PDA has also provided that PWDs are entitled to a barrier-free and disability friendly environment (Section 21-27); the right to sports and recreation (Section 28). The provisions for civic rights are contained in Part IV and they include the right to vote (Section 29). The PDA further provides that polling stations be made disability friendly (Section 30).

It must be noted that the PDA was enacted in response to pressure from the CSOs and DPOs in order to reduce discrimination that was being perpetuated against PWDs. In my view, the drafting of the PDA before the full elaboration and adoption of the UNCRPD did a greater disservice to PWDs in Kenya. This is because the language in the PDA as relates to discrimination against PWDs is to say the least very weak. It has not provided for adequate sanctions for the violation of the rights. It has defined the word "discriminate" under Section 2 to mean to *'...accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability'* which is the same definition under the Employment Act, 2007 as well.

The shortcomings of the PDA can be traced right from the wording of the preamble of the PDA which states that it 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'* From this preamble, the PDA seeks to *'...provide for the rights...'* of PWDs. And the Act does just that, it only *"provides for"* without doing much more. It has neither made an explicit recognition that PWDs have the same rights as people without disability. It has also neither laid emphasis on nor criminalised the discrimination against PWDs. Further, the preamble, and consequently the entire PDA, has neither placed a high threshold upon which

PWDs can set their claims nor has it set the basis for a PWD to demand for recognition of their rights. The preamble also does not seek to enhance integration of PWDs into society. Bassier observes that a piece of legislation reflects the different cultural, political and social environment and cites the Americans with Disabilities Act, 1990 which he says is a reflection of the American commitment to the ideals of individual liberty, equality and freedom while the Australia's Disabilities Discrimination Act is a reflection of social justice and equal rights (Basser, 2002). It is therefore my argument that the preamble, and therefore the entire PDA, does not have any philosophical underpinning. This has led to a situation where the implementers of disability programmes do not know how to intervene in disability programmes because it is not possible to determine whether the PDA is an exclusively social welfare law or an anti-discrimination law.

Further, the 'rights' that are referred to in the preamble have been enumerated in Part III of the PDA which deals with "*rights and privileges of persons with disabilities.*" Section 11 therein states [that the PDA shall be implemented] '*...with a view to achieving the full realization of the rights of persons with disabilities set out in this Part.*' However, it must be noted that the rights as contained in the PDA fall way short of those in the UNCRPD. Indeed, the Act makes feeble declarations of rights and follows it up with jumbled provisions that purport to give life to the rights. Yet, the rights themselves are not expressly enumerated anywhere within the PDA. Instead the language in this Part III of the PDA is very weak and a general reflection of the Government's lack of commitment to the promotion and protection of the rights of PWDs. The language of the PDA does not give a sense of entitlement to PWDs. For that reason, the PDA cannot be reasonably enforced by a PWD. Therefore, for one to enjoy the protection of all the rights that a PWD is entitled to then they must look beyond the PDA and invoke the UNCRPD. Looked at against the work of Sultana (2010), the PDA fails to confer disabled people with the enforceable rights to protection against direct and indirect forms of discrimination; and secondly, that positive action programmes should be designed to rectify the historical subordination of disabled people to their able-bodied environment (Sultana, Z. 2010).

With regard to the definition of "disability" and "persons with disabilities" within the legal framework, I will argue that there is a failure on the part of Kenyan legislators and government policy makers to appreciate disability or comprehend issues relating to and facing PWDs. It must be noted that there is no clear definition of the term 'disability' in the UNCRPD. The closest the drafters of the UNCRPD came to defining disability is in the preamble (e) which recognises 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.*' This lack of a definition is due to the fact that there are various contestations around disability. Indeed, the World Health Organisation (WHO) says that 'disability is an umbrella term, covering impairments, activity limitations and participation restrictions' (WHO, 2004 as cited in Sultana, 2010) and it refers to 'an individual's ability to function within a given social and environmental context' (Freedman, 2004:3).

Mute adds that it is recognition that the specificities of disability might mean different things to different people depending on jurisdiction, impairment type and handicapping context (Mute n.d.). Goodley's supports this as-

sertion in his article where he says that disability is ‘...an expression of wider socio-economic, political and cultural formations of a very specific though complex form of exclusion: the exclusion of people with impairments’ (Goodley, D. 2007:319) and as a definition must ‘recognise that what constitutes disability could vary over time and place’ (Basser, 2002:260). Suffice it to say, the UNCRPD has defined “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.’

Despite the aforementioned, the Constitution of Kenya, 2010 and the PDA have both defined “disability”. Indeed, Section 2 of the Persons with Disabilities Act, 2003 defines disability and it says that *‘disability means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.’* The Constitution of Kenya, 2010 under Article 260 says 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.’*

Just by way of making rather mundane observations, the two definitions have a few similarities and differences. With regard to the types of disability, both have mentioned *‘physical, sensory, mental or other impairment’*. However, the difference is that the PDA has *‘visual, hearing, learning or physical incapability’* while the Constitution of Kenya, 2010 includes *‘psychological’, ‘condition or illness’* within the definition. The second set of similarities is that they both bring out the issue of impact or effect. The PDA refers to impact on *‘social, economic or environmental participation’* while the Constitution of Kenya, 2010 does not talk of this but refers to *‘substantial or long term effect on an individual’s ability to carry out ordinary day-to-day activities’* which one can equate to participating in social, economic and environment issues. But, making reference to *‘social, economic and environmental participation’* is misplaced because PWDs are limited by society and/or the environment and not that an individual is limited from participating in their environment.

From the above, it is worth pointing out that the PDA has not specified who is impacted by the *‘participation’*. Further, it is not clear whether it impacts the society or the PWDs? Another concern is that the term *‘environmental participation’* is not clear and does not make sense. Here, it would be safe to assume that the drafters made an attempt to infuse the International Classification of Functioning, Disability and Health (ICF) model which was developed by the World Health Organization (WHO) which has environmental factors as one of the things that can affect one’s ability to undertake activities. But the Constitution of Kenya, 2010 on its part does not have or make any reference to participation of PWDs but is very clear that the effect (or impact) of the condition is on the *‘individual’* PWD and his or her ability to undertake *‘ordinary day to day activities’*

In this regard, I agree with Mute who says that the Constitution of Kenya, 2010 and the PDA ‘define disability so precisely that it either strait-jackets disability or it causes [other non-listed or defined groups of] persons with disabilities to become marginalised. [The law] should...define disability for specific contexts and purposes rather than simply enforcing a generic definition’ (Mute,

n.d.). This may be because the legislators failed to take into account the fact that there is no agreed definition of “disability” at the international stage.

By defining “disability” within the Constitution of Kenya, 2010 and the PDA, the law risks excluding those that do not fit within the definition. It is therefore more appropriate to define “what causes disability” which would be more appropriate for the realisation of human rights compared to “what is disability”. This position is supported by Mute who says that ‘one weakness of this approach [that was taken by the drafters to define disability] 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’ (Mute, n.d.).

It is worth noting that an amendment to the definition of disability as contained in the PDA was recently proposed through the Persons with Disabilities (Amendment) Bill, 2010 to include and classify “albinism” as one of the forms of disability under the PDA. But this intervention by the group with albinism may not be the solution to the problem of exclusion because in order to establish that one has a disability, it is not necessary to show that one’s situation fits into any of the categories listed in the definition. This is because where a legislative definition contained the word ‘includes’, the terms or factors listed are intended to be indicative or the type of factors consistent with the definition, rather than limiting the class (Basser, 2002).

The second concern in this regard is that even as Kenya opted to have a definition, it went for the medical definition which in my view is a misunderstanding or lack of appreciation of the theoretical bases and the current international debates around disability. The definitions as they are have ‘individualised and medicalized’ (Terzi, 2004) disability in Kenya, in which case, PWDs are viewed in terms of ‘functional limitations [...] where disability is understood as blindness, deafness or other kinds of changes in bodily structures (Grönvik, 2009) and therefore seen as ‘as a problem of the individual’ (Goering, 2010:55). A medically based definitions do not raise questions of justice, nor do they emphasize the rights of people with disabilities (Jongbloed, 2003), and leads to ‘people being asked about their impairments’ (Carter, 2001) or and perceives the site of the problem facing PWDs is their body and looks at them from the point of view of their impairment (Basser, 2002) It suggests the normative principles of ‘charity and accommodation’ (Jongbloed, 2003:207)). In this regard, I agree with Rothman who says that by concentrating on physical, biological aspects of disability which is viewed through the medical, problem-oriented, deficit model tend to create stereotypes and biases which affect the integration of people with disabilities into society (Rothman, 2010).

Therefore, in order to counter this state of affairs and to ensure that ‘[the human rights] framework [is] applied objectively with the rights and interest of the disadvantaged in mind’ (Darrow and Thomas, 2005:477) the legal framework relating to PWDs in Kenya should adopt the ‘social model of disability [which] holds that much of the disadvantage associated with impairment is socially imposed, rather than inherent to the bodily or mental state (a view commonly understood as the medical model)’ (Goering, 2010:54). ‘The key to equality for people with disabilities, on the social model, is the recognition of socially constructed barriers and their removal’ (Basser 2002, 262)

The third concern is still with the part of the definition in the Constitution of Kenya, 2010 which says ‘...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...’ This subordinates and discriminates against PWDs. It confirms the concern that was raised by Dr. Elly Macha, who said during the interviews that ‘the attitude of the society towards PWDs is still a big challenge as there is still so much (sic) stigma against PWDs and recognition of PWDs as equal members of society is still a big challenge among our communities.’ (Dr. Elly Macha, Disability Human Rights Programme Officer, Ecumenical Disability Advocates Network). The wording in the definition reiterates that ‘disability is an individual problem’ (Donoghue, 2003:203) and therefore suggests the normative principles of ‘charity and accommodation’ (Jongbloed, 2003:207) from the society towards and individual that it “perceives” to have a disability. This in my view is the epitome of promoting stigma against PWDs and alludes that ‘the disabled are those who are incapable of performing normal life activities’ (Donoghue, 2003:207). This definition enhances the perception that the site of the problem facing PWDs is their body and looks at them from the point of view of their impairment (Basser, 2002) and that in order for one to receive benefits or sympathy as a PWD then it can only be ‘under the condition that they continue to be defined as abnormal members of society’ (Donoghue, 2003:207). Therefore, it is my position that the entire definition is discriminatory in and of itself because. Further, it fails to recognise the role that society and the environment plays in “disabling”

From the shortcomings highlighted above, it is apparent that Kenya is yet to fully adopt a human rights based approach to the rights of PWDs. According to the UNICEF *Innocenti* Digest, a human rights based approach has the potential ‘...to a shift focus from [...] limitations arising from impairments, to the barriers within society that prevent [PWDs] from having access to basic social services, developing to the fullest potential and from enjoying her or his rights. This is the essence of the social model of disability’ (UNICEF, 2007). With the state of the rights of PWDs being as it is in Kenya; and with the definitions as they are, then the legal framework cannot protect PWDs ‘against direct and indirect forms of discrimination [or] rectify the historical subordination of disable people’ (Sultana, Z. 2010:7). Grugel and Piper (2009) adds that human rights approaches seem to be instrumentally useful, as well as morally robust, for putting some issues on the agendas of states and international organizations (Jean Grugel and Nicola Piper, 2009).

Taking all the above into consideration and reflecting on Basser’s third dimension that acknowledges the difficulty of legislating for attitudinal change (Basser, 2002), it is my argument that the above shortcomings in the legislation have and still continue to perpetuate discrimination against PWDs. This starts with how society appreciates disability and is reflected in the manner in which the duty bearers including parliamentarians have drafted the legal provisions relating to PWDs in both the Constitution of Kenya, 2010 and the PDA. Because the domestication of the UNCRPD in Kenya has concentrated on a medical model of disability, it invariably makes it difficult to guarantee and achieve the human rights of PWDs which is espoused by the social model of disability which according to Goering does ‘not deny the impairment, but redirects attention to how societal attitudes, practices, and institutions may disable individuals unnecessarily and unjustly, and to call for social change that will

allow for greater inclusion of people with impairments and recognition of their value (Goering, 2010). Therefore, Kenya needs to effectively ‘vernacularise’ (Merry, 2006a) the UNCRPD so as to take into consideration the cultural norms, values, and practices but more importantly, to ensure that it promotes and protects the rights of PWDs. It should acknowledge that ‘the thing which is impaired within a human being is only a particular part of the body such as the leg or the eyes, but the wider community assumes that the whole entity of this human being is impaired, including intelligence and common sense’ (Suharto, 2010:1) and therefore society should give “diffabled” people an opportunity to realize their rights and live a dignified life.

3.3 Stakeholders’ responses to the rights of PWDs in Kenya

From personal interactions with Disabled People’s Organisations (DPOs) and some PWDs, many assumed that the enactment of the PDA and the constitutional recognition for PWDs and their rights within the Constitution of Kenya, 2010, was an end in itself and that the same would automatically translate to equality for PWDs. I will argue that this has not been the case because PWDs still continue to be short changed by those in power and there is a general lack of commitment towards guaranteeing the rights of PWDs in Kenya. A human rights based approach seeks to reduce the ‘negative impacts of discrimination and disempowerment’ (Darrow and Thomas, 2005:501). But, I will also argue that Kenya has done quite the contrary while translating and domesticating the UNCRPD in that the drafters of the Constitution of Kenya, 2010 and the PDA took a minimalist and escapist approach thereby leading to the continued discrimination of PWDs.

In order to show this, the research will analyse the participation of PWDs in Kenya. To this end, the research appreciates that the issue of participation is very wide and for that reason will concentrate on the participation of PWDs in leadership, an issue that was identified by the DPOs as one of the most pertinent for PWDs in Kenya at the moment. Indeed, this was identified as one of the most contentious issues because despite there being constitutional guarantees, PWDs still continue being deprived of their right to representation. By saying that appointment into leadership position would end discriminations against PWDs and solve their problems would be over simplifying the debate and as Ms. Irene Aloo correctly pointed out, *“political representation and participation is not really the ultimate. It is just one of the means to ensure that issues of PWDs are integrated into the system”* (Ms. Irene Aloo, State Counsel-Ministry of Gender, Children and Social Development). Therefore, PWDs appreciate that one of the ways starting to break down the societal and environmental barriers and thereby reducing discrimination against them is by increasing the involvement in or engagement of PWDs within positions of leadership, authority, power and politics. It is in these positions that decisions are made and it is only by being represented there that PWDs will at least be able to influence laws and policies that affect them.

Here, the research uses Bassar’s three-dimensional approach to human rights to analyse the rights of PWDs in Kenya. This approach states that in the first dimension, the State establishes a process that allows people with disabili-

ties to respond to unjust treatment. The second dimension of the process of operationalizing human rights is where the state plays an on-going role in responding to inequalities, and operates proactively to deal with systemic discrimination which cannot be addressed simply through anti-discrimination processes. The third dimension involves the community at large taking responsibility for and owning, the process of ensuring the full inclusion of PWDs into all aspects of the social, economic and political life of the community (Basser, 2002).

The Constitution of Kenya was promulgated in 2010 after long and protracted negotiations that took over 20 years. According to Dr. Kabue *“it was as a result of contribution from people and a reflection of the desires of the entire population”* (Dr. Samuel Kabue, Executive Secretary, Ecumenical Disability Advocates Network). Indeed, the Constitution of Kenya, 2010 received broad acceptance as it was voted for by over 67 per cent of those that voted. Compared to the independence Constitution of 1963 which was repealed on 27th August, 2010, the Constitution of Kenya, 2010 has a very progressive Bill of Rights which if applied effectively, would guarantee the rights of all citizens and also promote the rights of PWDs thereby signifying, at least on paper, that the government is committed to the promotion of rights. But despite all the constitutional protections and provisions, PWDs are still not enjoying all their rights.

Suffice it to say, the Constitution of Kenya, 2010 recognises the right of all citizens to enjoy their political rights. But, it is apparent that there is a difference in the language between the UNCRPD and the Constitution of Kenya, 2010 when it comes to participation of PWDs in leadership. While the UNCRPD under Article 29 provides for *‘participation in political and public life’*, the Constitution of Kenya, 2010 under Article 54(2) on the other hand talks of *‘elective and appointive bodies’*. But it is worth noting that the PDA has neither mentioned the right to participate in *“political or public life”* (as is the case in the UNCRPD); nor the right to participate in *“elective or appointive bodies”* or positions (as is the case in the Constitution of Kenya, 2010). This may be because the PDA was enacted in 2003, which was before the adoption of the UNCRPD in 2006 and before the promulgation of the Constitution of Kenya in 2010. In order to understand the genesis of the problem, one would have to trace back to the independence Constitution which pre dates even the UNCRPD, the PDA and the Constitution of Kenya, 2010. Under the independence Constitution, PWDs were considered among the special interest groups and for that matter were among those that were eligible for representation in parliament through 12 seats that were reserved for special interest groups. This provision was found under Section 33 of the independence Constitution which provided that *‘...there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests...’*

Rights exist on paper but the challenge of realising them lies in claiming them and this involves engaging and reforming the structures and institutions charged with upholding them and in expanding people’s understanding of and sense of entitlement to rights (Schuler (1986) and (2002) as cited by VeneKlasen, L., V. Miller, C. Clark and M. Reilly; 2004). This has been a big problem for PWDs and DPOs in Kenya because despite the clear constitutional and legal provisions, they have not been able to benefit from the reserved positions. As Dr. Kabue pointed out, *“the nominated positions rarely went to*

special interest groups for which they were created. Indeed, it was only in 1997 that SAFINA nominated Honourable Josephine Sinyo and she only served one term. Further, not a single party in Kenya has ever elected a member who is a PWD” (Dr. Kabue). This was a flagrant violation of the constitutional rights of special interest groups by the political parties and the government which used the seats to reward political cronies or supporters and party stalwarts that failed in the elections. In the realization that ‘the distribution of [government resources] does not occur by accidents, but is the product of conscious policy choices and political and social struggle’ (Darrow and Thomas, 2005:475), PWDs tried to file a case in Court in 2008 challenging the political parties for denying them their right. But as Dr. Kabue says, “going to Court was a big problem because legal cases on political issues are very expensive. The lawyer who was requested to take up the case demanded KES. 5,000,000 (USD. 62,000) and PWDs do not have that kind of money so they gave up” (Dr. Kabue).

The provision on reservation of seats for special interest groups was retained under the Constitution of Kenya, 2010 so as to reflect the new governance structures that now comprises of a National Assembly, Senate and County Assembly. It makes reservations through affirmative action and support the nomination of special interest groups into the various seat thereby ensuring that ‘the vicious cycle of inequality, elite capture, and disempowerment [does not] spiral out of control in the absence of a framework for equality and non-discrimination in decision making’ (Darrow and Thomas, 2005:476-7). They are in furtherance of Article 54(2) of the Constitution of Kenya, 2010 which says that ‘the State shall ensure the progressive implementation of the principle that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities’. In this regard, Article 97 of the Constitution of Kenya, 2010 which deals with the Membership of the National Assembly provides specifically under Article 97(1)(c) that ‘twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers...’. Article 98 brings out the composition of the Senate and it provides under Article 98(1)(d) that the Senate consists of among others, ‘two members, being one man and one woman, representing persons with disabilities’. Article 177 provides for the membership of County Assembly and it states under Article 177(1)(c) that a County Assembly consists of among others ‘the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament’.

In order to try and correct this situation, government ministries, departments and agencies have been trying to mainstream disability rights and as Ms Aloo says that “one of the mechanism that the Government has put in place pursuant to the directive by H.E. President Mwai Kibaki on 5 per cent representation of PWDs in key decision making positions. That is being done through disability mainstreaming programmes by ensuring that PWDs occupying key decision making positions. But these have still not been fully effected” (Ms Irene Aloo, State Counsel-Ministry of Gender, Children and Social Development). This is a reflection on Bassler’s third dimension that calls for the development of “action plans” at all levels which can be adopted and contextualised (Basser, 2002).

The translation of the UNCRPD in Kenya in so far as the right of PWDs to participate in ‘political and public life’ has been mired in the reality of the Kenyan politics which makes it difficult for them to realise the provisions of Article

29 of the convention. Merry says that ‘in order for human rights ideas to be effective, they need to be [...] situated within local contexts of power and meaning’ (Merry, 2006b:1). But the reality of the local Kenyan politics is very difficult and is reflected in the manner in which disability programmes in general are being implemented and in particular, the right to participate in political or public life. Indeed, PWDs are continuously being short changed. As Dr. Kabue says, “*neither the Constitution of Kenya, 2010 nor the Persons with Disabilities Act, 2003, or any other legislation for that matter, has specified how the five per cent representation will be achieved. Further, no legislation has been passed to promote representation of PWDs in Parliament thus perpetuating the discrimination*” (Dr. Kabue). Secondly, Article 100 of the Constitution of Kenya, 2010 makes provision for Parliament to enact legislation to promote the representation of among others PWD but this has not happened to date. As Dr. Kabue says “*the Constitution has a schedule of laws to be enacted to ensure its implementation. But, if you look at the laws related to PWDs, they have been relegated to the end, that is, the 5th year of implementation. So it could be said that even the implementation of the issue of nomination of PWDs in political positions is not on schedule and will happen after the next general election set for 2013*” (Dr. Kabue). Thirdly, whenever PWDs have demanded for their rights to be represented in positions of leadership, those in authority often say that this is not immediate and cite the principle of “*progressive realisation*” to deny PWDs this right. All the above show that the ‘law is just a mere servant of existing power’ (Smith and Weisstub, 1979).

Other attempts aimed at clawing back the gains made by PWDs under the Constitution of Kenya, 2010 are exemplified in the recent actions of H.E. President Mwai Kibaki who assented to an amendment to the Election Act. Section 34(9) of the Elections Act hitherto provided that ‘*the party list may not contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.*’ With the amendment, the law now allows for losing presidential candidates to be nominated as Members of Parliament by their respective political parties thereby taking the 12 seats that had been reserved for special interest groups within the Constitution of Kenya, 2010. The Commission for the Implementation of the Constitution (CIC) has since filed a suit in Court seeking a declaration that the amendment is unconstitutional as the 12 seats are reserved for youth, women, trade unions and PWDs and would go against the provisions of Article 97(1)(c), 98(1)(b) and (d), and Article 177(1)(b) and (c) of the Constitution of Kenya, 2010 (Committee for the Implementation of the Constitution, 2012). This according to Dr. Kabue, “*...will compromise the position of PWDs and go against the Constitution of Kenya, 2010 which says that there will be 12 seats which shall be divided [sic] between the youth, workers and PWDs*” (Dr. Kabue). This will enable DPOs and PWDs to hold powerful people and institutions accountable for their responsibilities to those with less power so as to reduce discrimination (Save the Children Sweden, 2005; Boesen, J.K. and T. Martin, 2007; de Gaay Fortman, 2006). This can be done by establishing an individual complaints mechanism, which is the core of all anti-discrimination laws as it enable them to claim their rights (Basser, 2002) because the constitutional and legal framework as it is currently does not enable PWDs to be able to hold the government accountable. This should then be followed by Basser’s second dimension that operates proactively to deal with systemic discrimination which cannot be addressed simply through anti-discrimination processes where the State provides for the making of “standards” and “guidelines” for public inquiries into problem areas of discrimination (*ibid*).

DPOs and PWDs have been undertaking lobbying and advocacy by organising themselves into caucuses and making representation to various committees of parliament, government ministries and commissions that are aimed at challenging discriminatory practices, but this has been with limited success. According to Dr. Kabue, “through the Disability Caucus on Implementation of the Constitution (DCIC), PWDs have reviewed over 35 laws that have bearing on PWDs and representations to various offices and committees including the parliamentary committee that was reviewing elections related laws. However, every group that the PWDs met promised to consider and incorporate the recommendations from PWDs but when the final documents are adopted, the recommendations for PWDs are in most cases missing. Only 5 committees took up the recommendations by PWDs and these were not among the crucial legislations or recommendations. For example, in the Elections Bill, PWDs were told that their issues would not be within the main Statute but within the regulations and that they would be included in the development of the regulations. But neither of this happened as they were neither included nor were their issues taken” (Dr. Kabue).

PWDs and DPOs have started using the law to fight discrimination with mixed results. But, they need to be cautious while using the law because ‘the law entices groups to choose legal strategies to advance their social goals but ultimately proves to be a detrimental path leading to a negative effect which is generally understood as “legal co-option”—a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimises on-going injustices, and diverts energies away from more effective and transformative alternative’ (Lobel, 2007:939). Therefore they should not lay too much emphasis on the law because it may prove to be counter-productive as the law can be used to institutionalise the violation of the rights of PWDs.

The mixed results can be seen in the following cases. In *Fredrick Gateau Kaman vs. The Attorney General and Others, Nairobi Constitutional and Human Rights Division Petition No. 157 of 2011 (Unreported)*. In this case, the petitioner who was an employee at the Void Law Courts had had his leg amputated. He was later certified as having a disability and was consequently eligible to retire at 60 years as opposed to 55 years. The Court held that by firing the petitioner before his retirement age of 60, the respondents had violated the rights of the petitioner by disregarding the provisions of Section 15(6) of the PDA which provides that PWDs will retire at the age of 60 years and went ahead to award the petitioner compensation. In the case of *Paul Pikachu Napa vs. The Attorney General and Others, Nairobi Constitutional and Human Rights Division Petition No. 93 of 2011 (Unreported)*, the petitioner was a police officer employed by the Police Service. He was sent on an early retirement on medical grounds after he became disabled in a road accident while on duty. The Court in this case failed to uphold the provision of the PDA that would have meant the reinstatement and reassignment of the petitioner which in my view is wrong and sets a bad precedence.

In summary, this chapter has analysed the manner in which Kenya has domesticated the United Nations Conventions on the Rights of Persons with Disabilities (UNCRPD) through the Constitution of Kenya, 2010; and the Persons with Disabilities Act, 2003 (PDA). It looked at some of the arguments around the UNCRPD and in particular the provisions on equality and non-discrimination. It has pointed out the shortcomings of the PDA right from the preamble of the Act; the lack of any philosophical grounding; and the definitions which have caused more harm than good for PWDs. It has also argued

that having the domestication of the UNCRPD is not a guarantee that discrimination of PWDs will end. In order to illustrate this, the research has looked at the issue of participation of PWDs in leadership and shown that the politician took a minimalist approach when it came to guaranteeing this right thereby perpetuating the discrimination against PWDs especially despite the provisions within the independence Constitution and the Constitution of Kenya, 2010, PWDs that allow for the nomination of PWDs into leadership positions. PWDs have also failed to hold leadership accountable for its action in this regard but this situation is slowly changing.

Chapter 4 : Conclusion and recommendations

Kenya has domesticated the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) through the Constitution of Kenya, 2010 and the Persons with Disabilities Act, 2003 (PDA) and in so doing has established “disability human rights paradigm” (Stein, M.A., 2007) that seeks to enhance equality and reduce discrimination against persons with disabilities (PWDs) in the country. But, there is still a big gap between this otherwise progressive national legal framework on the one hand and actual implementation or realisation of the rights on the other. PWDs continue being discriminated against and as a consequence are prevented from effectively participating in their economic, social, cultural, civil and political development. As a party to the convention, Kenya has a duty to respect, protect and fulfil the rights of PWDs to enhance their equality and protect them from discrimination.

As the research has highlighted, several provisions of the Constitution of Kenya, 2010 and the PDA are doing a greater disservice to PWDs in Kenya. The problem can be traced to the preamble of the PDA. As Basser says, legislation should reflect the ideals of the country (Basser, 2002). But in the case of the preamble of the PDA, it fails to lay out the philosophical grounding upon which to underpin the Statute. Further, the text of the preamble fails to set the tone for the rest of the Statute. This makes it difficult to determine whether the PDA is based on anti-discrimination or social welfare legislation. It would therefore be important for Kenya to enact a law that takes into account the welfare of PWDs and expressly provides a framework to protect them from discrimination through an anti-discrimination centred law. Further, based on the latest international trends, legal provisions relating to PWDs need to enhance integration of PWDs into society and reduce discrimination that is brought about by the economic and social barriers. As already noted, the PDA is neither an exclusively welfare nor an anti-discrimination law

The research has also shown that the ‘rights’ as set out in the PDA does not meet the standards set out in the UNCRPD. Indeed, the language in the PDA is very weak and does not give a sense of entitlement to PWDs thus making it difficult for PWDs to be able to claim them and as Sultana (2010) says, a Statute should confer disabled people with the enforceable rights to protection against direct and indirect forms of discrimination (Sultana, Z. 2010).

Despite there being no definition of “disability” in the UNCRPD, both the Constitution of Kenya, 2010 and the PDA have provided one. Kenya should avoid defining “disability” so precisely because there will always be a group that will feel that the definition does not include them. Further, ‘disability might mean different things to different people depending on jurisdiction, impairment type and handicapping context’ (Mute n.d.). The definition should be one that looks at what disables PWDs and allows for the reality of the experience of disability, where what is meant by ‘disability’, or being a ‘person with disability’, is a contingent category-an aspect of existence rather than a monolithic state. It should have a broad definition that makes it unnecessary to distinguish between impairment and disability where one does not have to prove that they are “abnormal” or focus on their “deficits” when they assert their

rights' (Basser, 2002). Therefore, it should define "persons with disabilities" and not "disability" itself. Indeed, there is no definition of "persons with disabilities" either in both the Constitution of Kenya, 2010 and the PDA. But if there must be a definition of disability, then the same must be broad and all inclusive so as to ensure that it includes many disabled people who would otherwise fall outside its scope as opposed to the current situation.

The definition that Kenya adopted reflects the medical model which views disability as 'an individual problem' (Donoghue, 2003:203) as opposed to the more human rights sensitive social model of disability which looks at the social and environmental factors that inhibit PWDs. The social model does 'not deny the impairment, but redirects our attention to how societal attitudes, practices, and institutions may disable individuals unnecessarily and unjustly, and to call for social change that will allow for greater inclusion of people with impairments and recognition of their value' (Goering 2010:54). Further, the law should be comprehensive enough and acknowledge 'that people with disabilities are truly equal citizens, fully entitled to participate in all areas of political, economic, and civic life' (Bagenstos, 2004). In order to do this, the law must 'shift from the medical model and its emphasis on rehabilitation and welfare toward the social model of disability-which focuses on civil rights, social discrimination and stigma' (Heyer, 2002:725)

The functioning and coordination of the institutional structures and lack of support services [denies PWDs in Kenya] the promises of the Constitution and Bill of Rights (Gathiram, 2008) and as a result, this research has shown that despite the constitutional and legal framework, PWDs in Kenya still continue to be short changed by those in power. It also established that there is a general lack of commitment towards guaranteeing the rights of PWDs in Kenya. The research looked at the issue of participation of PWDs in leadership which had been identified by PWDs as very pertinent and contentious. PWDs as members of special interest groups had reserved seats in Parliament under the independence Constitution. This provision has been retained under the Constitution of Kenya, 2010. 'The representation of people with disabilities [in positions of leadership] can be increased by such measures such as affirmative action... [But], affirmative action must be mandatory to be effective' (Jongbloed, 2003:206). However, this provision has always been caught up in the competitive Kenyan politics thereby making it difficult to realise. Lately, the government has used the principle of "*progressive realisation*" as an excuse to deny PWDs this right.

Here, in order to assess the Government's performance with regard to the promotion of the rights of PWDs, one must look at how [the Constitution] and legislations are being implemented (Lang, R. 2009). Unfortunately, very little has been done by way of putting in place laws and policies that will implement the constitutional provisions relating to PWDs. Therefore, the government needs to put in place a 'facilitative policy and legislative environment and institutional structures to achieve equalization of opportunities and the economic empowerment of physically disabled people' (Gathiram, 2008:153). This will ensure that 'marginalized groups use legal reform to secure their interests through legislative and judicial victories (Lobel, 2007)

Rights-based approaches protect PWDs against discrimination and allow for programmes that would rectify historical subordination of PWDs their able-bodied environment (Sultana, Z. 2010). Thus, establishing a disability hu-

man rights paradigm presents an inclusive approach maintains that every person is entitled to the means necessary to develop. This paradigm compels societies to acknowledge the value of all persons based on inherent human worth, rather than basing value on an individual's measured functional ability to contribute to society. The framework assesses ability from the bottom up, embracing all individuals (Stein, 2007).

PWDs must claim their rights by engaging and reforming the structures and institutions charged with upholding them, and expand their understanding of and sense of entitlement to rights (Schuler (1986) and (2002) as cited by VeneKlasen, L., V. Miller, C. Clark and M. Reilly; 2004). They need to understand their problems in terms of rights and adopting rights consciousness requires experiences with the legal system that reinforces this subjectivity. Thus, it is important that the encounters with the legal system are positive and do not undermine this subjectivity (Merry, 2003). With the legal consciousness among PWDs and DPOs is increasing and to this end, they have started using the law to challenge the discrimination with mixed results. They need to be careful to avoid “legal co-option” (Lobel, 2007:939).

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