

**AFRICA HUMAN RIGHTS ACCESS TO JUSTICE PROGRAMME**

**CASE NO: 289**

**THEME : WOMEN'S RIGHTS**  
**(Disability and forced sterilisation)**  
**DATE : FEBRUARY 2008**  
**COUNTRY : KENYA**

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**LEGAL OPINION**

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## INTRODUCTION:

1. Consultant is Africa Human Rights Access to Justice (“AHRAJ”), an international NGO that provides financial and legal assistance to lawyers and organisations conducting strategic litigation with a view to domesticating international human rights standards in a number of African Countries.
2. Consultant has requested the author to provide a legal opinion focusing on international human rights instruments and comparative law that could be used in litigating the below mentioned case before a Kenyan national Court. Further, consultant requested that the opinion succinctly illustrates how the relevant instruments and standards can be used.
3. The case falls on the broader women’s rights theme and specifically raises issues concerning reproductive rights (forced sterilisation) and anti-discrimination (disability).
4. Structure of the opinion
  - 4.1 Factual background
  - 4.2 Kenyan Constitutional Framework
  - 4.3 The relevance and application of international human rights standards and instruments before the Kenyan legal system.
    - 4.3.1 UN treaties
    - 4.3.2 African Charter on Human and People’s rights
  - 4.4 Analysis of the applicable rights:
    - 4.4.1 Prohibition of discrimination
      - 4.4.1.1 Analogous grounds
      - 4.4.1.2 Disability discrimination
      - 4.4.1.3 Sex discrimination

#### 4.4.2 The right to be free from inhuman and degrading treatment

#### 4.5 Conclusion

### **FACTUAL BACKGROUND:**

5. Anna Nthenya is a 37 year old woman who is visually impaired. She became blind after she contracted polio and measles as a child. She lives in an informal settlement. She has 5 minor children. Her children were born in 1991, 1993, 1997, 2000 and 2005. They were all born at the Thika District hospital.
6. After the birth of her last child, she developed stomach pains which required her to constantly visit the hospital for check-ups. She received various prescriptions for medicines, some of which she could not afford as she was not able to generate an income because of her inability to beg on the streets. Before the last child was born, Anna was in good health and was able to attend to her duties, and support herself, pay her rent in the slums.
8. In March 2006 she consulted a private medical practitioner who undertook a gynaecological scan. The scan was done after several months after the childbirth. She consulted the medical practitioners after she started experiencing severe headaches, stomach and back pains.
9. Once when she attended at the government hospital that she attended she overheard staff members discuss her case as very bad, because her uterus had been removed. She went back to Thika hospital to seek further information.
10. Upon consulting the Medical Officer of health ("MOH"), it emerged that during her last childbirth in May 2005, Anna's uterus had been removed.

The MOH advised her that this procedure was a good thing in that she would not have to deal with the problem of getting pregnant again, as she was blind and was giving birth to too many children. The Medical Officer of Health further advised that Anna had unfortunately not healed well, as she did not take all her medication and thus needed another operation.

11. The opinion proceeds from the premise that Thika is a public hospital that falls under the control and administration of the ministry of health. The State is therefore vicariously liable for the actions of its employee, the doctor who conducted the forced sterilisation

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## **KENYAN CONSTITUTIONAL FRAMEWORK**

12. Article 70 of the Kenyan constitution provides for the protection of fundamental rights. The purpose of which is to afford protection of those right thus creating an obligation for the state. In the protection of fundamental rights states incur positive duties. These positive duties manifest themselves in two ways. In the duty to protect there is first, the duty to prevent others from violating the rights protected and second, there is a procedural duty to investigate and prosecute.
13. In the above-mentioned fact pattern a number of fundamental rights violation arise. For the purposes of this opinion we will however focus on the violation of the right to equality and the prohibition from discrimination as provided for in section 82 and the right to be free from inhuman, and degrading treatment as provided for in section 74 as these can be sustained using the prevailing limited constitutional framework.
14. Through its action in the form of sterilising the applicant without her consent, the state violated its obligations to protect under Article 74 and

82 of the Constitution. Second, it has failed in its positive obligations to protect the applicant from discrimination on the basis of sex and disability and in its duty to protect from inhuman and degrading punishment. It has further failed in its positive procedural obligations to effectively investigate, prosecute and punish the perpetrators.

15. Although the Kenyan Constitution prohibits discrimination on a number of listed grounds, including sex, it does not list discrimination on the basis of disability. Before proceeding to the discuss the substantive violation of the right to be free from discrimination, it is imperative to first address the importance of recognising disability as an analogous grounds of discrimination. In order to discuss disability as an analogous ground it is important to start out by addressing the issue of the application of international human rights standards and instrument before the Kenyan domestic courts which has relevance for this section and other parts of the opinion.

## **THE RELEVANCE AND APPLICATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS BEFORE THE KENYAN LEGAL SYSTEM**

### **The Kenyan legal position**

16. Kenya follows a dualist system. The rigid application of this system means that international treaties have no domestic application until they have been incorporated into national law.
17. Kenya is a signatory to a number of human rights treaties. It has however not proceeded to domesticate these instruments. The following human rights instruments are of relevance to this case but have not been domesticated.

- 18.1 Universal Declaration of Human Rights
- 18.2 Convention on Civil and Political Rights – Kenya acceded to the convention on 1<sup>st</sup> May 1972
- 18.3 Convention on the Elimination of Discrimination against – Kenya acceded to CEDAW on 09 March 1984
- 18.4 The Convention on the Rights of Persons with Disabilities – Kenya signed on 30 March 2007.
- 18.5 African Charter on Human and People's Rights – Kenya ratified on 23 January 1992 and deposited on 10 February 1992
- 18.6 Protocol to the African Charter on Human and People's rights on the Rights of Women in Africa – Kenya signed on 17 December 2003

### United Nations Treaties

- 18. In a strict application of the dualist system, these instruments will not find application in Kenya because they have not been domesticated. The Kenyan Courts have not been consisted in deciding the extent of application of international instruments when they have not been domesticated.
- 19. Whilst the strict application of the dualist system is has been gradually weakened the principle was first enunciated in 1879 by the English Supreme Court in the *Parlemente Belge* case<sup>1</sup>. In 1937, in the case of

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<sup>1</sup> [1879] 4.P.D. (Eng. Sup.Ct.).

*Attorney General for Canada v Attorney General for Ontario*<sup>2</sup> Lord Atkinson said the following which has been consistently used as a basis for the principle:

*Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of the obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of the treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of the treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes...Parliament...has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created while they bind the state as against other contracting parties, Parliament may refuse to perform them and so leave the state in default*

20. This notwithstanding, in some instances however, Kenyan courts have however found that some of the international human rights instruments are directly applicable by virtue of the fact that Kenya is a signatory to these instruments. In *Re the Estate of Andrew Manuzyu Musyoka (Deceased)* [2005]<sup>3</sup>, in seeking to find recourse for an applicant in a inheritance discrimination case Judge Wendoh asked:

*Does this mean the objector will have no recourse? I think not, because Kenya subscribes to international customary laws and has*

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<sup>2</sup> A.C. 326 (1937) [JCPC]

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*ratified several international covenants and treaties. Kenya subscribes to the international Bill of Rights which is the Universal Declaration of Human Rights (1948) and the covenant on economic social and cultural rights and the covenant on Civil and political rights. In 1984 Kenya also ratified the convention on the Elimination of All forms of Discrimination Against Women (CEDAW) ....In 1992 Kenya also subscribed to the African Charter of the Human Rights and People's rights (Banjul Charter 1981)...international law is applicable in Kenya as part of our law so long as it is not in conflict with the existing law even without specific legislation adopting them<sup>4</sup>*

21. In the *Mary Rono*<sup>5</sup> case the court also held that international instruments were applicable in a case dealing with inheritance where daughters alleged discrimination on the basis of sex.
22. In a recent case of *RM and others v Attorney General*<sup>6</sup> the full bench of the High Court applied legal dualism in its strictest sense by holding that considering international human rights instruments will amount to usurping the role of the legislature.

### Comparative law

23. The rigid application of the dualist system has undergone a significant transition over the past twenty years. The evolution of a defined global human rights regime and the fact that courts are often confronted with claims from litigants who are seeking to hold their governments accountable in respect of obligations that they have acceded to in international platforms is responsible for the transition.

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<sup>4</sup> Page 7-8,

<sup>5</sup> Mary Rono v Jane Rono and William Rono CA 66/02

<sup>6</sup> Civil case 1351 of 2002



24. In the region, there is also a view that such signature should not be rendered meaningless at the national stage. In *Sara Longwe*<sup>7</sup> v *International Hotels*, the *Zambian Court* held that.

*“Ratification of such instruments by a nation state without reservation is a clear testimony of the willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by International Instruments, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.”*

25. In *Attorney General (Botswana) v Unity Dow*<sup>8</sup> which concerned Section 4 of the Botswana Citizenship Act 1984, the courts applied international instruments to infuse a constitutional provision. In *Ephraim v Pastory*<sup>9</sup> the court found that a gender discriminatory inheritance provision was inconsistent with international conventions that Tanzania was a signatory to.
26. In the Australian case of the *Minister of State for Immigration and Ethnic Affairs v Teoh*<sup>10</sup> is regarded as a turning point from the strict application of the dualist system to the more flexible approach that seeks to comport with the protection of human rights. Following this decision, courts continued to occupy themselves with the content of the legitimate expectation that an individual can derive from the executive's act of ratification. Whilst it was important in the Australian case for the court to emphasise the traditionalist dualist theory but it was also important for them to enquire as to what the impact of the ratification of a statute could be in the absence of domestication. The court held that the fact that the

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<sup>7</sup> Page 9

<sup>8</sup> (124/1990) (CA No. 4/1991)

<sup>9</sup> (2001) AHRLR 236 (TzHC 1990)

<sup>10</sup> 1995 3 LRC

convention has not been incorporated into domestic law does not mean that its ratification holds no significance for Australia<sup>11</sup>. In *Al-Kateb v Goodwin* Kirby J stated as follows,

*“Whatever may have been possible in the world of 1945, the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms”*<sup>12</sup>

27. In *National Corn Growers Association v Canada (Import Tribunal)*<sup>13</sup> the court was willing to view an unincorporated treaty as an interpretive aid to be used by courts when construing domestic legislation. In *Baker v Canada (Minister of Citizenship and Immigration)*<sup>14</sup> the Canadian Supreme Court further re-iterated the dualist position that since the UN convention at stake was not incorporated into domestic law it had no direct domestic legal effect. The court however proceeded to find that ‘nevertheless the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review’. In *Suresh v Canada (Minister of Citizenship and Immigration)*<sup>15</sup> the court noted that ‘International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However in seeking the meaning of the Canadian Constitution, the courts may be informed by international law...’

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11 At para 14

12 [2004] HCA 37 (6 August 2004) at para 175

13 1990 2 SCR 1324

14 1999 2 S.C.R. 817

15 2002 1 S.C.R at para 6

28. The recent decision of *A-G Barbados et.al v Jeffrey Joseph and Lennox Ricardo Boyce*, the newly-established Caribbean Court of Justice considered a number of factors as being responsible for courts being open to considering international human rights instruments even in instances where they have not been incorporated. The proliferation of international treaties has made individuals active players on international plane pursuant to treaties entered into by their governments, this has resulted in a distinct, irreversible tendency towards confluence of domestic and international jurisprudence and that court will find it difficult to sit idly by, accepting a treaty “as a mere window-dressing capable of being entirely ignored on the domestic plane”. The court further held:

*...by ratifying the treaty, the Executive has thrown to the condemned man, fighting for his life to be spared, a lifeline...As the man is about to grasp this lifeline, is it fair for the executive, which placed it there in the first place, to yank it away? Is it enough for the court then to merely to explain to the man that unincorporated international treaties form no part of domestic laws? that he has derived no “right”? ... [T]hat the Executive does not have to await [a decision from] the international body before executing him? Those are haunting questions that cause judges much discomfort.*

29. It is therefore important to proceed to distinguish this case from the precedent set in the *RM v Attorney General*. In this instance the applicant does not seek that the court should find that the various treaties that Kenya is a signatory are applicable. The Court will be asked to use international human rights standards in interpreting the applicable provisions of the Constitution.

*African Charter on Human and People’s Rights*

30. The relationship between the Kenyan Legal system and the African Charter however seems to suggest an implicit endorsement of the direct application of the African Charter on Human and People's rights, the lack of domestication notwithstanding.
31. In as early as 1988 Kenya willingly complied with its obligations with regard to the African Charter on Human and People's rights. Representatives of the Kenyan Government have attended the sessions of the African Charter on Human and People's rights.
32. The mandate of the African Commission is three-fold: the protection of human and peoples' rights, the promotion of human and people's rights and the interpretation of the African Charter on Human and People's rights.
33. Within the framework of its role of interpreting the African Charter on Human and Peoples' Rights, the Commission is charged with interpreting all provisions of the present Charter. Kenya has consistently submitted itself to the jurisdiction of the African Commission of human and people's rights by being a litigant before the Commission and more importantly answering to cases that raises human rights violation that arises from the Charter<sup>16</sup>.
34. Kenya accepts the jurisdiction of the African Commission and the application of the African Charter as demonstrated above. It therefore follows that the Charter should be applicable in Kenya for violations of human rights in the same way as it will before the African Commission.

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<sup>16</sup> 7<sup>th</sup> Annual Report 19/88 International PEN vs. Malawi, Ethiopia, Cameroon, Kenya, 8<sup>th</sup> Annual Report 142/94 Muthuthuri Njoka v. Kenya (previously 56/91), 9<sup>th</sup> Annual Activity Report 135/94 Kenya Human Rights Commission/Kenya

35. Advancing this argument in a domestic court is a judgement call. There are two ways of going about it in the pleadings. First, plead the violations of the Charter simultaneously with the violations of the Constitution or plead them as alternative basis for the violation. It however needs to be clearly set out that the violations complained of emanate from different sources, the charter and the constitutions. Alternatively, the strategy would be not to insist that the violation is based on the charter but to merely include charter provisions as a tool for interpretation.

## ***ANALYSIS OF THE APPLICABLE PROVISIONS OF THE CONSTITUTION***

### ***The prohibition of discrimination***

36. Section 82 of the Kenyan Constitution prohibits discrimination on a number of listed grounds. The complainant's case impacts on two grounds, sex discrimination and disability discrimination. The Kenyan constitution does not however prohibit discrimination on the basis of disability.

### ***Analogous grounds of discrimination***

#### ***Kenyan Position on analogous grounds***

37. In *RM v Attorney General* the court refused to expand the anti-discrimination categories. In doing so it rejected *Attorney General of Botswana Unity Dow* and stated that if it were to recognise an analogous ground of discrimination it would amount to usurpation of the work of the Constitutional framework. The court further held that requiring the court to recognise an analogous ground for unfair discrimination fails to take into account the state's margin of appreciation. I now turn to deal with the

state's margin of appreciation argument as I believe it is crucial to address it not only because it is very restrictive because in the RM case it was incorrectly applied.

Margin of appreciation

26. The Court's reliance on the principle of margin of appreciation did not constitute an accurate application of the principle. In rejecting the argument to deem marital status as an analogous ground the court also stated that its reason was that reading in an analogous ground failed to recognise the state's margin of appreciation. Without elaboration it relied on the *Belgian Linguistics case*<sup>17</sup> where the European Court of Human Rights held that states have a margin of appreciation in providing education in different languages at schools.
27. There are marked differences between the manner in which the European Court applied the margin of appreciation and the manner in which the constitutional court did.
28. Margin of Appreciation is a jurisprudential tool of non-restraint created by the European Court. The basic idea is that the Court will not adjudicate on certain issues and will instead defer to the State. In the first instance, margin of appreciation is not a tool that is available to domestic courts it is a tool that is available at the international level.

*Since the margin of appreciation has been developed as a means of delineating the supervisory functions of an international court, it has no direct application to cases brought under the Human Rights Act 1998...there are two principal strands of reasoning which underlie the European Court's approach. The first is that function of*

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<sup>17</sup> No(2), (A/6)(1979-80) 1 E.H.R.R

*an international court is different from that of a national court; and the second is that in certain cases there may be lack of European Consensus on a particular point*<sup>18</sup>

When there is a strong European community consensus on a particular issue the margin for state divergence is smaller than when the community is divided over how to proceed. It was therefore improper for the Constitutional Court to rely on the margin of appreciation as it is not a tool that can be used by a domestic court as pointed out in *R v Stratford Justices, ex p. Imbert*<sup>19</sup>

*“The application of the doctrine of the margin of appreciation would appear to be solely a matter for the Strasbourg Court. By appealing to the doctrine that court recognises that the detailed content of a least some Convention obligation is more appropriately determined in the light of national conditions...The English Judge cannot therefore himself apply or have recourse to the doctrine of the margin of appreciation as implemented by the Strasbourg Court. **He must however, recognise the impact of that doctrine upon the Strasbourg Court’s analysis of the meaning and implications of the broad terms of the Convention provisions; which is the obvious of guidance as to those provisions,** (my emphasis) and a source that in any event the English Court will be obliged, once section 2(1) (a) of the 1998 Act has come into force, to take into account”*

29. Margin of appreciation is accorded to national authorities in the assessment of the need for an interference with a right<sup>20</sup>. It only becomes

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<sup>18</sup> P 1.066 at para 1.087

<sup>19</sup> [1999] 2 Cr App. R 276

<sup>20</sup> *Handyside v UK* (1981) 4 E.H.R.R. 737 at para 48, *Dudgeon v UK* (1981) 4 E.H.R.R.149 at para 42

relevant once the appropriate level of review has been decided by the court. In *Handyside v The United Kingdom* the Court held that

*It does not mean that the Court's supervision is limited to ascertaining whether the respondent state has exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are relevant and sufficient.*

The extent or scope of the margin of appreciation will vary according to the circumstance of the case. It will depend upon the aim of the restriction of the restriction and the nature of the activities involved<sup>21</sup>. In the RM case the court did not seek to interfere with an existing right it used the margin of appreciation to deny the existence of the right, refusing to find that marital status qualified to be recognised as an analogous ground.

30. Finally, the European Court has clearly stated that margin of appreciation is only applicable in respect to certain articles of the charters. It is not applicable in the right to be free from discrimination.

#### Standards on analogous grounds of discrimination

31. The mere fact that a prohibited ground of discrimination has not been listed or enumerated in the provision dealing with the prohibition of discrimination does not necessarily mean that discrimination on a non enumerated ground is permissible. International law has indicated that the

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<sup>21</sup> Leander v Sweden (1987) 9 E.H.R.R. 433 (Para 59), Buckley v UK (1996) 23 E.H.R.R. 101



failure to include a ground in enumerated categories does not mean that the ground is excluded.

### International treaties

32. The ICCPR does not mention the prohibition of discrimination on the basis of disability. However General Comment 5 on the ICESCR indicates that the ICESCR and ICCPR both prohibit discrimination on grounds of disability. The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended to have the same meaning. In *Broeks v the Netherlands*<sup>22</sup> the Human Rights Committee held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

### Comparative law

38. Domestic courts have expanded on the meaning and purpose of analogous grounds of discrimination. Recognition of different grounds of discrimination comports with the understanding of what the right to equality and the prohibition of discrimination entails. The exclusion of non-enumerated grounds cannot have the impact of absolutely barring protection or the prohibition of discrimination on all grounds.
39. In *Dow v Botswana*, the judgments of both the High Court and Court of Appeal concern the interpretation of Section 15 of the Constitution, this prohibited discriminatory laws on a number of grounds but omitted discrimination on the basis of sex. The High Court adopted an aggressive interpretation of Section 15. It found that the fact that Botswana was party

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<sup>22</sup> (No. 172/1984, ICCPR)

to a number of international human rights instruments that clearly prohibit discrimination on grounds of sex indicated that the Constitution was not intended to omit discrimination on grounds of sex even if the international instruments were not incorporated into domestic law. The High Court could not accept that Botswana would deliberately discriminate against women in its legislation while internationally supporting nondiscrimination against women and it interpreted the Constitution accordingly in finding that the Citizenship Act breached, among other rights, the right not to be subjected to degrading treatment and the right not to be discriminated against on the grounds of sex.

40. In dealing with discrimination courts are also increasingly looking at the discrimination in to the context of discrimination. In *Egan v Canada*<sup>23</sup> the court held that:

*“This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society... More than any other right in the Charter, s. 15 gives effect to this notion. . . . Equality, as that concept is enshrined as a fundamental human right within s. 15 of the Charter means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity”*

In *Law v Canada (Minister of Employment and Immigration)* the court further held:

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<sup>23</sup> 1995) 29 CRR (2d) 79 at 104-5.

*"It may be said that the purpose of section 15(1) [of the Charter] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all person enjoy equal recognition at law as human beings or members of Canadian society, equally capable and equally deserving of concern, respect and consideration."<sup>24</sup>*

41. Canadian Courts have formulated a test for what will constitute an analogous ground. When looking at the discrimination complained of it is important to enquire into the following:

- 35.1 The characteristic is actually or constructively immutable that is it cannot be changed without high personal cost;
- 35.2 Whether historically there has been a basis for discrimination or animosity against persons with that characteristic;
- 35.3 Important to the claimant's identity, personhood or belonging?
- 35.4 Whether it is associated with the claimant's lack of political power, disadvantage or vulnerability?

42. The European Court of Human Rights has made the test for what constitutes an analogous ground in a manner that looks at whether the difference in treatment is compatible with the test for discrimination in general. In *Marckx v Belgium*<sup>25</sup>, the court said:

*"Article 14 safeguards individuals who are 'placed in analogous situations' against discriminatory differences of treatment . . . For the purposes of article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification',*

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<sup>24</sup> [1999] 1 SCR 497:

<sup>25</sup> (1979) 2 EHRR 330, para 33

*that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'."*

#### Other arguments

43. It maybe easy to distinguish the Kenyan Constitutions from the South African or Canadian Constitutions in that they expressly include provisions that allow courts to adjudicate on discrimination based on other grounds or analogous grounds. The purpose of distinguishing between analogous grounds is mainly there to establish where the burden of proof should lie. In enumerated grounds of discrimination there is a presumption that the discrimination is unfair and therefore the onus will be on the respondent but in analogous grounds there applicant will have to prove that the conduct complained of is unfair.

#### Discrimination on the basis of disability

##### Discrimination on the basis of disability in Kenya

44. To therefore suggest that the framers of the Kenyan Constitution intended to sanction discrimination on the basis disability will seem at odds with the measures taken by the Kenyan executive and the legislature to prohibit discrimination on the basis of disability.
45. In 2003, the Kenyan legislation passed the Persons with Disability Act no.14 of 2003. Article 2 of the legislation defined disability to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation. It further defined to "discriminate" 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. In article 11 it further imposed an obligation on the state to take steps to the maximum of its available resources with a view to achieving the full realisation of the rights of persons with disabilities set out in the part.

#### Standards on disability discrimination

46. It has only recently been acknowledged that disabled persons require protection against discrimination. Traditionally, disabled persons have been depicted not as subjects of legal rights but as objects of welfare, health and charity programmes.
47. None of the main international human rights instruments included disability within the list of protected categories. However, there is a growing body of binding and non-binding international law addressing the rights of people with disabilities. The UN General Assembly has adopted international human rights instruments that protect and advance the human rights of people with disabilities.
48. The recently adopted Convention on the Rights of People with Disabilities<sup>26</sup> provides a comprehensive framework for the protection of the

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<sup>26</sup> A/61/611 Distr.:General 6 December 2006

rights of people with disabilities<sup>27</sup>. On 30 March 2007, the Kenyan executive acceded to the Convention for person with disabilities. The date is important in so far as it signals a commitment to the convention in that this was the first day that the signature was opened for signature. Whilst the convention has not been domesticated it provides a useful benchmark and content of what the right to be free from discrimination entails

49. The convention defines discrimination on the basis of disability means 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... Non-discrimination constitutes one of the general principles of the convention.<sup>28</sup> State parties further give an undertaking to ensure the full realization of all human rights and freedoms for all persons with disabilities without discrimination on the basis of any kind on the basis of disability<sup>29</sup> and to take all appropriate measures....to modify or abolish existing law, regulations, customs and practices that constitute discrimination against persons with disabilities.<sup>30</sup> The convention further enshrines a provision that urges state parties to recognise the right to be

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27 Article 1 provides as follows: « Purpose, The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.»

<sup>28</sup> Article 3(b)

<sup>29</sup> Article 4 (1)

<sup>30</sup> Article 4(1)(b)

equal before the law and to equal protection of the law for all individuals.<sup>31</sup> It further mandates the prohibition of disability and obliges the states to provide equal and effective legal discrimination on all grounds

50. At the regional level, the Organization of American States (the “OAS”) and the Council of Europe have both taken measures to address disability discrimination. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted by the OAS in 1999<sup>32</sup> is the first treaty on disability adopted by an inter-governmental organisation. While it does not contain individual rights, it is the first regional treaty to define disability-based discrimination. Article 1 paragraph 2 states:

*“(a) The term ‘discrimination against persons with disabilities’ means any distinction, exclusion, or restriction based on disability, record of disability, condition resulting from a previous disability, or perception of a disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.*

*“(b) A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the rights of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state's internal law, a person can be declared legally incompetent,*

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<sup>31</sup> Article 5(1) and (2)

<sup>32</sup> see, <http://www.cidh.org/Basicos/disability.htm>),

*when necessary and appropriate for his or her well being, such declaration does not constitute discrimination.”*

51. In 1975, the Declaration of Rights of Disabled Persons<sup>33</sup> affirmed, for the first time under international law, the right of people with disabilities to have the same civil and political rights as other human beings. Since then, the UN has adopted specialized human rights conventions on behalf of other groups, but again, none specifically address the rights of people with disabilities.
52. There are also non-binding instruments on disability that provide guidance on the interpretation of more general international law instruments, systematise best practice and suggest how international law may be evolving. During the 1980s, the UN passed a series of resolutions culminating in the 1982 World Program on Action Concerning Disabled Persons. They also clearly identify the right to equality for people with disabilities<sup>34</sup>“The principle of equal rights implies that the needs of each and every individual are of equal importance that those needs must be made the basis for the planning of society and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.”
53. In 1994, the CESCR issued General Comment 5 on how to interpret the ICESCR, as applied to people with disabilities. CESCR General Comment 5 (at paragraph 15) defines disability-based discrimination under the ICESCR as including “*any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.*”

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<sup>33</sup> (see, <http://www.unhchr.ch/html/menu3/b/72.htm>)

<sup>34</sup> (see UN General Assembly Resolution No. 48/96, 20/12/1993, p.204):



*Application of the law to the facts and the test for discrimination*

54. Anne was forcibly sterilized because she is disabled. The reason given for the sterilization was that she will not have to worry about giving birth to more children because she was blind.
55. The test for discrimination that has now been generally accepted is to comprise of the following:
56. First, the complainant must establish a prima facie case of discrimination. In other words the complainant must show that he or she has been treated or impacted negatively as a consequence of membership in a group. It should be easy to prove this as the Doctor told her that the reason for the forced sterilization was because she was blind and that the procedure would relive her from worrying about giving birth to more children.
57. If the complainant succeeds in proving a prima facie case of discrimination, then the burden of proof shifts to the defendant. If the burden of proof shifts, defendants must then provide evidence to justify the discriminatory action or show that the prima facie case is ill founded.
58. In the justification the state must show that there is a legitimate goal (i.e., that is reasonable and non-discriminatory) for the forced sterilization. The state will have to adduce reasons for this disparity in treatment. It will not suffice to say that she had more children as people in Kenya are not restricted to the number of children that they can have. There is also no restriction to the number that people who are indigent can have. It is in this section that reference to reproductive freedom and autonomy and all rights associated with it has to be made in order to make out a case that the in forced sterilization the state's goal is not legitimate.

59. The Kenyan Constitution does not enshrine rights to health, reproductive autonomy and information. Although these are not self standing rights, it is nevertheless still important to deal with how the discrimination complained of violates other internationally recognized rights to undermine the argument that forced sterilization can ever be in pursuance of a legitimate goal.

#### 54.1 *Violation of the rights to health*

Kenya does not have a provision that recognises the right to health. International law and policy recognize the fundamental right to health. Treaty monitoring bodies have expounded on the right to health in the context of forced sterilization at length in their comments, recommendations and observations, and have linked it to issues of consent.

#### *Committee on Economic, Social and Cultural Rights:*

In its General Recommendation no.14 the committee stated that the right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health.

#### *Committee on the Elimination of Discrimination against Women*

In its recommendation on Article 12 on health, the CEDAW Committee has described access to quality health services as those “. . . delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization . . . that violate women’s rights to informed consent and dignity.” The CEDAW committee has also defined the link between involuntary sterilization and the right to health “Compulsory sterilization . . . adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.”

#### *International Conference on Population Development*

The ICPD Programme of Action specifically noted the importance of reproductive health care for women. It stated that the State should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion . . .

#### 55.2 Violation of the right to reproductive autonomy

55.2 The convention refers to the respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.<sup>35</sup>

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<sup>35</sup> Article 3(a)

55.3 Article 14 of the protocol urges states to ensure that the right to health of women, including sexual and reproductive health is respected and promoted; this will include the right to control their fertility, the right to decide whether to have children, the number of children and the spacing of children; the right to choose any method of contraception<sup>36</sup>

55.3 Violation of the right to information

55.3.1 The violation of the right to information is two fold. In the first instance, it was violated when she was not allowed to make a decision on whether she wanted to be sterilized or not. This is the right which is central to reproductive autonomy, making decisions regarding how many children to have, when to have and with whom to have them.

55.3.2 In the second instance the rights is violated by refusing her access to her medical records. This right is essential to notions of autonomy, informed and responsible decision-making, and open and just societies in that it informs what treatment to get and where to get it.

55.3.3 The right to access one's own medical information has also been underscored by the World Health Organisation, Declaration on Patients' Rights, which declared that,

*"Patients have the right of access to their medical records and technical records and to any other files and records pertaining to their diagnosis, treatment and care and to receive a copy of their own files and records or parts thereof."*

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<sup>36</sup> Article 15(1)(a)-(c)

55.3.4 CEDAW has no less than three articles that affirm the right to information in matters of family planning.

Article 10(h) requires states parties to take measures to guarantee access to “. . . information to help to ensure the health and well-being of families, including information and advice on family planning”;

Article 14(2) (b) protects rural women’s “. . . access to adequate health-care facilities, including information, counselling and services in family planning”; and

Article 16(1) (e) ensures access to the “information, education and means” to enable women to exercise their right to decide the number and spacing of their children.

55.3.5 The CEDAW Committee has further elaborated on these rights:

*“Some reports disclose coercive practices which have serious consequences for women, such as forced . . . sterilization. Decisions to have children or not . . . must not . . . be limited by . . . Government. In order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in article 10(h) of the Convention.”*

56. The objective link between this goal or goals and the discriminatory treatment or impact. In the event that the state adduces a goal it will have

to be able to make a link between how this goal could be attained by forcibly sterilizing the applicant; and

57. That the relationship between the goal and the discriminatory policies or provisions is proportional. A reasonable but minor goal cannot justify a disproportionately large discriminatory result. If the applicant can argue that other less discriminatory regulations or policies could meet the reasonable goals presented, then the defendant may still be found liable for discrimination. An example here could be if the state argues that it wanted to ensure that people with disabilities did not have many children than they can look after. The counter-argument will be there are less restrictive means of achieving that purpose like birth control.

#### Discrimination on the basis of sex

##### International standards on sex discrimination

58. *Forced sterilization is a form of sex discrimination.* There are several different ways of understanding what constitutes sex and thus what constitutes discrimination on these grounds. Increasingly, however, courts and tribunals have extended the understanding of sex to include discrimination with regard to the activities or responsibilities biologically or traditionally associated with being female, such as pregnancy and childcare. Forced sterilization is therefore a form of sex based discrimination in that it is absolutely sex specific because only women can get pregnant.
59. The 1999 report of the UN Economic and Social Council by the Special Rapporteur on Violence against Women included a section on forced sterilization. The report elaborated that

*“Forced sterilization is a method of medical control of a woman’s fertility without the consent of a woman. Essentially involving the battery of a woman—violating her physical integrity and security, forced sterilization constitutes violence against women.”*

*The link between discrimination based of sex and disability*

60. Increasing there has been a need to make a link between sex discrimination and disability in that women who are disabled often find themselves in a position where they confront multiple-discrimination. The convention recognises this problem and urges states to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.<sup>37</sup>
61. Article 23 of the protocol provides for special protection of women with disabilities and urges state parties to ensure protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs it further urges states to ensure the right of women with disabilities to freedom from violence and discrimination based on disability and the right to be treated with dignity<sup>38</sup>
62. In CESCR General Recommendation no.5 the committee elaborated on the link.

*Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected. Despite frequent calls by the international community for particular emphasis to be placed upon their situation, very few efforts have been undertaken during the Decade. The neglect of*

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<sup>37</sup> Article 6 (1) of the Convention

<sup>38</sup> Article 23 (a) and (b)

women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action. The Committee therefore urges States parties to address the situation of women with disabilities, with high priority being given in future to the implementation of economic, social and cultural rights-related programmes.

...

Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood". The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide. Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10 (2).

#### The violation of the right to be free from torture, inhuman and degrading treatment

63. Article 74(1) of the Kenyan Constitution provides that no person shall be subject to torture or to inhuman or degrading punishment or other treatment.

#### Standards on inhuman and degrading treatment

64. The prohibition of freedom from torture, inhuman and degrading treatment is a prohibition that exist in a number of human rights instruments that Kenya is a signatory to. The Human Rights Committee has specifically



noted that forced sterilization would be a practice that violates Article 7, which covers torture or cruel, inhuman or degrading treatment or punishment and free consent to medical and scientific experimentation. In its General Recommendation no.20 at para 5 The Human Rights Committee noted that the protection against cruel, inhuman and degrading treatment applies to medical institutions.

## CONCLUSION

65. I am therefore of the opinion that the matter be referred to the High Court in accordance with section 84 (1)<sup>39</sup> of the Kenyan Constitution. There are two advantages to the referral, in the event that there are other proceedings on the same facts that the person would like to pursue section 84 allows the referral to proceed without prejudice to any other action with respect to the same matter which is lawfully available to that person. Second, the Constitutional litigation would avert the procedural requirements and incidentally the costs of a civil trial brought under tort law.
66. Finally, if the matter is framed as a human rights violation it will be easier to refer the matter to the East African Court of Justice, the African Commission on People and Human's rights or treaty bodies.

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39 . (1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

67. In brief, the main argument to be made is that the applicant was discriminated on the basis of two grounds, sex and disability. The sex discrimination case will be easy to make in that sex is a prohibited ground and that there is increasingly a recognition that forced sterilisation is a form of violence against women and therefore a sex discrimination issue. There is not much in the form of disproving that forced sterilisation is a form of sex discrimination as only women get pregnant and they are the only people who can be forcibly after child-birth. The court will therefore have to justify its action. The arguments to be used in rebuttal are similar for both grounds. The second ground is a different ground to make in that we'd be asking the court to find that disability constitutes an analogous ground. The biggest hurdle is getting the court to recognise that reading in new grounds will not only enhance the constitution but also give effect to the right to equality in a comprehensive manner. In making the case for discrimination on the basis of disability, the test is similar to the test for the other ground. Finally, there is an argument to be made for the violation of the right to be free from inhuman and degrading treatment based on the general comments that define forced sterilisation to constitute such treatment. The remedy to be asked for is a declarator to the effect that rights have been violated and also financial compensation for the damages suffered.
68. From the facts it emerges that a substantial number of rights are violated but it is not possible to plead the violation of all the other rights because the Kenyan Constitution does not provide for the protection of those rights although some of them are now part of customary international law.
69. It is also important to create a paper trail by requesting that certain steps be taken by the authorities:

- 66.1 A letter of demand citing the constitutional violations to the relevant office requesting that steps are taken to ameliorate the hardships suffered by the complainant.
- 66.2 Another letter of demand must be sent to the Attorney General requesting that they take appropriate steps in terms of Article 49 of the Persons with Disabilities Act<sup>40</sup>. In the event that a council, which must be set up in terms of the Act, has not been constituted a letter must be written to the Attorney General directly – this will be indicative of the state's failure to comply with its obligation set out in its own legislation.
70. The statutory period for prescription of legal claim is sometimes limited when instituting an action against the state. It will be three years in May since the cause of action arose. It is therefore important to look at whether it is possible to get condonation for non-compliance with rules and times.
71. Perusal of cases brought as constitutional reference seems to suggest that most of the cases have been brought by way of originating summons. Constitutional challenges are much easier to do by way of motion proceedings. If there is no legal obstacle to launching the constitutional reference by way of motion proceedings, I would suggest that be the preferred mode.

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40 ) The Council may request the Attorney-General to take appropriated legal action if the Council believes that –

- (a) a person or group of persons is engaged in a practice which is discriminatory under this Act; and
- (b) the discrimination is a significant and substantial infringement of the rights of persons with disabilities and raises issues of public interest.

72. In 2007, FIDA-KENYA and the Centre for Reproductive Rights launched a report of a study entitled 'failure to deliver'<sup>41</sup> which documents human rights violations in the field of reproductive rights in Kenya.

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<sup>41</sup> <http://www.fidakenya.org/readingcorner.html>

### **List of reviewed treaties**

- a. Universal Declaration of Human Rights
- b. Convention on Civil and Political Rights
- c. International Covenant of Economic social and Cultural Rights
- d. Convention on the Elimination of Discrimination against
- e. The Convention on the Rights of Persons with Disabilities
- f. African Charter on Human and People's Rights
- g. Protocol to the African Charter on Human and People's rights on the Rights of Women in Africa

## **National laws**

Persons with Disabilities Act no.14 of 2003.

THE PERSONS WITH DISABILITIES ACT 2003

NO 14 OF 2003

DATE OF ASSENT: 31st DECEMBER, 2003

DATE OF COMMENCEMENT: BY NOTICE

ARRANGEMENTS OF SECTIONS

SECTION

PART I – PRELIMINARY

1 SHORT TITLE AND COMMENCEMENT

2 INTERPRETATION

PART 2 –NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES

3 ESTABLISHMENT

4 MEMBERSHIP

5 TENURE OF OFFICE

6 DIRECTOR

7 FUNCTIONS OF THE COUNCIL

8 FUNDS OF THE COUNCIL

9 ANNUAL ACCOUNTS

10 ANNUAL REPORT

PART 3 – RIGHTS AND THE PRIVILEGES OF PERSONS WITH DISABILITIES

11 REALISATION OF RIGHTS OF PERSONS WITH DISABILITIES

12 EMPLOYMENT

- 13 RESERVATION OF EMPLOYMENT
- 14 APPRENTICESHIP
- 15 DISCRIMINATION BY EMPLOYERS PROHIBITED
- 16 INCENTIVES TO EMPLOYERS
- 17 RECORDS FOR JOB PLACEMENT
- 18 EDUCATION
- 19 SPECIAL AND NON-FORMAL EDUCATION
- 20 HEALTH
- 21 ACCESSIBILITY AND MOBILITY
- 22 PUBLIC BUILDINGS
- 23 PUBLIC SERVICE VEHICLES
- 24 ADJUSTMENT ORDERS
- 25 DENIAL OF ADMISSION INTO PREMISES ETC
- 26 OFFENCES – ADJUSTMENT ORDERS AND DISCRIMINATION
- 27 ADJUSTMENT ORDERS AGAINST GOVERNMENT INSTITUTIONS
- 28 SPORTS AND RECREATION
- PART 4 – CIVIC RIGHTS
- 29 VOTING
- 30 POLLING STATIONS
- 31 REGISTRATION OF ORGANISATIONS
- PART 5 - NATIONAL DEVELOPMENT FUND FOR PERSONS WITH DISABILITIES
- 32 ESTABLISHMENT OF THE FUND
- 33 SOURCES OF AND PAYMENTS FROM FUND

34 TRUSTEES TO MANAGE FUND

PART 6 – RELIEF AND INCENTIVES

35 EXEMPTIONS

36 INCENTIVES

37 CREDIT

PART 7 – MISCELLANEOUS

38 LEGAL SYSTEM

39 TELEVISION PROGRAMMES

40 TELEPHONE SERVICES

41 POSTAL CHARGE EXEMPTION

42 EXEMPTIONS AND DEDUCTIONS – GENERAL REQUIREMENTS

43 INSPECTORATE UNITS AND COUNCIL INSPECTORS

44 REGULATIONS

PART 8 – OFFENCES AND PENALTIES

45 CONCEALMENT OF PERSONS WITH DISABILITIES

46 NEGLIGENCE BY DOCTOR

47 GIVING FALSE INFORMATION TO GET REGISTERED

48 GENERAL PENALTY

49 REQUEST FOR LEGAL ACTION BY ATTORNEY-GENERAL

SCHEDULE

PROVISIONS AS TO THE CONDUCT OF BUSINESS AND AFFAIRS OF THE  
COUNCIL



An Act of Parliament to provide for the rights and rehabilitation of persons with disabilities; to achieve  
Equalisation of opportunities for persons with disabilities; to establish the  
National Council for Persons with Disabilities; and for connected purposes

ENACTED by the Parliament of Kenya as follows:-

(Comment in margin against next paragraph) Short title and commencement

1 This Act may be cited as the Persons with Disabilities Act, 2003 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint and different dates may be appointed for different provisions.

(Comment in margin against next paragraph) Interpretation

2 In this Act, unless the context otherwise required –

“adjustment order” means an order made by the Council under section 24;

“aged person” includes a person with a disability who has been forced into retirement from employment due to his disability;

“assistive devices and services” means implements, tools and specialised services (including the services of qualified interpreters for the deaf and qualified teachers for the blind) provided to persons with disabilities to assist them in education, employment or other activities;

“Council” means the National Council for Persons with Disabilities established under section 3;

“disability” means a physical, sensory, mental or other impairments, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation;

“discriminate” means 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;

(comment in margin against next paragraph) Cap253

“doctor” means a person registered or licensed as a medical practitioner under the Medical Practitioners and Dentists Act;

Fund” means the National Development Fund for Persons with Disabilities established under section 32;

“organisations for persons with disabilities” means associations or societies formed for the purposes of rendering services to persons with disabilities;

“organisations of persons with disabilities” means association or societies formed by persons with disabilities for their welfare and protection;

“usual day-to-day activities” means the activities of daily living which an ordinary person would reasonably be expected to carry out.

## PART II – NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES

(comment in margin against next paragraph) Establishment

3 (1) There is hereby established a council to be known as the National Council for Persons with Disabilities.

(2) The Council shall be a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of suing, being sued, and acquiring, holding and disposing of movable and immovable property.

(comment in margin against next paragraph) Membership

4 (1) The Council shall consist of the following members appointed by the Minister –

- (a) not more than eight persons nominated, in a manner approved by the Minister, by organisations representing persons with various categories of disabilities;
- (b) three members appointed from a panel of names submitted to the Minister by the organisation for persons with disabilities;
- (c) eight members representing the Ministries responsible for the following –
  - (i) culture and social services;
  - (ii) local government;
  - (iii) health;
  - (iv) education;
  - (v) economic planning
  - (vi) housing
  - (vii) transport; and
  - (viii) labour;
- (d) one member representing the Attorney General;
- (e) one member appointed from a list of not less than three persons submitted by an organisation which the Minister responsible for labour deems to be representative of employers in Kenya.
- (f) one member appointed on consultation with the organisation for the time being recognised by the Government as the umbrella organisation representing the interests of workers in the country; and
- (g) such other members as may be co-opted by the Council with the approval of the Minister:

Provided that –

- (i) the membership of the Council shall not exceed twenty-seven persons, out of whom at least twenty members shall be persons with disabilities;
    - (ii) the members nominated under paragraph (a) shall equitably represent the types of disabilities occurring in the country; and
    - (iii) one of the members of the Council shall be from a rural-based organisation.
  - (2) The Minister shall appoint of the members appointed under subsection (1) (a) as the chairman.
  - (3) The Minister shall appoint one of the members, other than a member appointed under subsection (1) (c) or (d), as the vice-chairman.
  - (4) The member appointed under subsection (1) © to represent the Ministry of Education shall be a child psychologist.
- (comment in left hand margin against next paragraph) Tenure of office
- 5 (1) The chairman, vice-chairman and members appointed under paragraphs (a), (b), (c), (f) and (g) of section 4 (1) shall hold office for a period not exceeding three years and shall be eligible for re-appointment for a further term not exceeding two years.
- (2) The provisions of the Schedule shall have effect with respect to the membership and procedures of the Council.
- (comment in left hand margin against next paragraph) Director
- 6 (1) There shall be a Director of the Council who shall be employed by the Council pm such terms as the Council may determine.
- (2) The functions of the Director shall be -
- (a) to consult with Ministries and local authorities to secure the implementation of measures recommended under this Act by the Council for the benefit of persons with disabilities;
  - (b) to work together with institutions, associations and organisations concerned with the duration, social and cultural circumstances of persons with disabilities; and
- (3) The Council shall employ such other staff in its secretariat as may be necessary for the discharge of its functions under this Act, on such terms and conditions as the Council may determine.
- (comment in margin against next paragraph) Functions of the Council
- 7 (1) The functions of the Council shall be –
- (a) to issue adjustment orders under section 24 of this Act:
  - (b) to formulate and develop measures and policies designed to –
  - (i) achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they obtain education and employment, and participate fully in sporting, recreational and

- cultural activities and are afforded full access to community and social services;
- (ii) co-operate with the Government during the national census to ensure that accurate figures of persons with disabilities are obtained in the country, for purposes of planning;
  - (iii) advise the Minister on the provisions of any international treaty or agreement relating to the welfare or rehabilitation of persons with disabilities and its benefits;
  - (iv) recommend measure to prevent discrimination against persons with disabilities;
  - (v) put into operation schemes and projects for self-employment for the generation of income by persons with disabilities;
  - (vi) encourage and secure the rehabilitation of persons with disabilities within their own communities and social environment;
  - (vii) encourage and secure the establishment of vocational rehabilitation centres and other institutions and other services for the welfare, rehabilitation and employment of persons with disabilities; and
  - (viii) co-ordinate services provided in Kenya for the welfare and rehabilitation of persons with disabilities and to implement programmes for vocational guidance and counselling.
- (c) to register –
- (i) persons with disabilities;
  - (ii) institutions, associations and organisations, including those controlled and managed the Government and local authorities, that provide services for the rehabilitation and welfare of persons with disabilities;
  - (iii) places at which services for the rehabilitation of persons with disabilities are provided; and
  - (iv) persons with disabilities whose condition requires constant medical attention for the purposes of availing subsidized medical services.
- (d) to provide, to maximum extent possible –
- (i) assistive devices, appliances and other equipment to persons with disabilities; and
  - (ii) access to available information and technical assistance to all institutions, associations and organisations concerned with the welfare and rehabilitation of persons with disabilities including those controlled and managed by the Government;
- (e) to consult with the Government in the formulation of suitable curricula for vocational rehabilitation centres and other training facilities for persons with disabilities;
- (f) to make provision for assistance to students with disabilities in the form of scholarships, loan programmes, fee subsidies and other similar forms of assistance in both public and private institutions;
- (g) to assess and report to the Minister on the welfare and rehabilitation of persons with disabilities and to advise on the

relative priorities to be given to the implementation of those measures;

- (h) to consult with the Government in the provision of suitable and affordable housing for persons with disabilities;
- (i) generally to carry out measures for public information on the rights of persons with disabilities and the provision of this Act;
- (j) to perform such other functions in relation to the welfare and rehabilitation of persons with disabilities as the Council may deem necessary and
- (k) to perform such other functions as may be assigned to the Council under this or any other Act.

- (2) Without prejudice to the provisions of sub-section (1), the Council shall have power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions and in particular –

- (a) to conduct inquiries into any matter relating to the welfare and rehabilitation of persons with disabilities;
- (b) to constitute committees consisting of its members, and where necessary to co-opt experts to serve on such committees with the approval of the Minister'
- (c) to vest in or delegate to any committee constituted under paragraph (b) such of the functions of the Council as the Council may with the approval of the Minister determine; and
- (d) with the approval of the Minister, to engage or make other arrangements with any other person to carry out research on, or supply information on, any matter relating to the welfare and rehabilitation of persons with disabilities

- 8 The funds of the Council shall consist of the following –

- (a) funds voted by Parliament; and
- (b) funds the Council may receive as a result of public and private appeal from local and international donors or agencies for the purposes of carrying out its functions.

- 9 (1) the financial year of the Council shall be from the 1st July of one year to the 30th June of the following year.

(2) The Council shall ensure that proper accounts and other records are kept in relation to the revenue and expenditure of the Council and ensure that , within three months of the end of each financial year of the Council, a statement of accounts of the Council is prepared and audited by an external auditor appointed by the Council and approved by the Minister.

(comment in margin against next paragraph) Annual report

- 10 The Council shall prepare an annual report of its activities which shall be presented to the Minister and

all other Government agencies involved in the work of the Council.

### PART III – RIGHTS AND THE PRIVILEGES OF PERSONS WITH DISABILITIES

(comment in margin against next paragraph) Realisation of rights of persons with disabilities

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

(comment in margin against next paragraph) Employment

- 12 (1) No person shall deny a person with a disability access to opportunities for suitable employment.

(2) A qualified employee with a disability shall be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits incentives or allowance as qualified able-bodied employees.

(3) An employee with a disability shall be entitled to exemption from tax on all income accruing from his employment.

(comment in margin against next paragraph) Reservations of employment

- 13 The Council endeavour to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities.

(comment in margin against next paragraph) Apprenticeship

- 14 Subject to the provisions of the Employment Act, persons with disabilities shall be eligible for engagement as apprentices or learners where their disability is not such as to impede their performance in particular occupations for periods for which they are hired.

(comment in margin against next paragraph) Discrimination by employers prohibited

- 15 (1) subject to subsection (2), no employer shall discriminate against a person with a disability in relation to –
- (a) the advertisement of employment;
  - (b) the recruitment for employment;
  - (c) the creation, classification or abolition of posts;
  - (e) the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment;
  - (f) the provision of facilities related to or connected with employment; or

- (g) any other matter related to employment.
- (2) Notwithstanding subsection (1), an employer shall be deemed not to have discriminated against a person with a disability if –
  - (a) the act or omission alleged to constitute the discrimination was not wholly or mainly attributable to the disability of the said person;
  - (b) the disability in question was a relevant consideration in relation to the particular requirements of the type of employment concerned; or
  - (c) special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with disability, which the employer cannot reasonably be expected to provide.
- (3) A complaint by a person with a disability that his employer has discriminated against him in a way which is contrary to this Act may be presented to the industrial Court through the appropriate trade union.
- (4) Any contract for employment or for provision of goods, facilities or services, or any other agreement, shall be void insofar as it purports to deny any person any rights or privileges conferred under this Act or in any other way to limit the operation of this Act.
- (5) An employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities.
- (6) The minimum retirement age for persons with a disability shall be sixty years.

(comment in margin against next paragraph) Incentives to employers

- 16 (1) A private employer who engages a person with a disability with the required skills or qualifications either as a regular employee, apprentice or learner shall be entitled to apply for a deduction from his taxable income equivalent to twenty five percent of the total amount paid as salary and wages to such employee:

Provided that –

- (i) such an employer shall present proof certified by the Ministry responsible for labour that the persons with disabilities in respect of whom he claims the deduction are under his employ; and
- (ii) the persons with disabilities so employed are accredited with the Council as to their disabilities, skills and qualifications.

(2) A private employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities shall be entitled to apply for additional deductions from his net taxable income equivalent to fifty percent of the direct costs of the improvements, modifications or special services.

(comment in margin against next paragraph) Records for job placement

- 17 The Council shall establish and maintain a record of persons with disabilities who are in possession of various levels of skills and training and shall update such records regularly for the purpose of job placements.

- 18 (1) No person or learning institution shall deny admission to a person with a disability to any course of study by reason only of such disability, if the person has the ability to acquire substantial learning in that course.

(2) Learning institutions shall take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations.

(3) Special schools and institutions, especially for the deaf, the blind and the mentally retarded, shall be established to cater for formal education, skills development and self-reliance.

(comment in margin against next paragraph) Special and non-formal education

- 19 The Council shall work in consultation with the relevant agencies of Government to make provisions in all districts for an integrated system of special and non-formal education for persons with all forms of disabilities and the establishment where possible of Braille and recorded libraries for persons with visual disabilities.

(comment in margin against next paragraph) Health

20 The Council shall be represented in the implementation of the national health programme under the Ministry responsible for health for the purpose of –

- (a) prevention of disability;
- (b) early identification of disability;
- (c) early rehabilitation of persons with disabilities;
- (d) enabling persons with disabilities to receive free rehabilitation and medical services in public and privately owned health institutions.
- (e) availing essential health services to persons with disabilities at an affordable cost;
- (f) availing field medical personnel to local health institutions for the benefit of persons with disabilities; and



(g) prompt attendance by medical personnel to persons with disabilities.

- 21 (comment in margin against next paragraph) Accessibility and mobility  
Persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, road and other social amenities, and assistive devices and other equipment to promote their mobility.

- 22 (comment in margin against next paragraph) Public buildings  
(1) A proprietor of a public building shall adapt it to suit persons with disabilities in such manner as may be specified by the Council.  
(2) All proprietors of public buildings shall comply with subsection (1) within five years after this section comes into operation.

- 23 (comment in margin against next paragraph) Public service vehicles  
(1) An operator of a public service vehicle shall adapt it to suit persons with disabilities in such manner as may be specified by the Council.  
  
(2) All operators of public service vehicles shall comply with subsection (1) within two years after this section comes into operation.

- 24 (comment in margin against next paragraph) Adjustment orders  
(1) This section shall apply to –  
(a) any premises to which members of the public are ordinarily admitted whether on payment of a fee or otherwise; and  
(b) any services or amenities ordinarily provided to members of the public.  
  
(2) Without prejudice to the provisions of section 22, if the Council considers that any premises, services or amenities are inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment to such access, the Council may, subject to this section, serve upon the owner of the premises or the provider of the services or amenities concerned an adjustment order –  
(a) setting out –  
(i) a full description of the premises, services or amenities concerned; and  
(ii) the grounds upon which the Council considers that the premises, services or amenities are inaccessible to persons with disabilities;  
(b) requiring the owner or provider concerned to undertake at his own expense such action as may be specified in order to secure reasonable access by persons with disabilities to the premises, services or amenities concerned; and  
(c) stipulating the period within which the action referred to in paragraph (b) shall be commenced and completed.

- (3) Before serving an order under subsection (2) the Council shall serve notice upon the person concerned –
  - (a) specifying the ground upon which the adjustment order is to be issued and the nature of the action which the Council considers necessary to rectify the situation which has given rise to the proposed order;
  - (b) stipulating the maximum period that the Council considers reasonable for the implementation of the action it proposes to order; and
  - (c) calling upon the person concerned, if he wishes to do so, to make representations to the Council within thirty days from the date of the service notice.
- (4) After considering any representations described in subsection (3) the Council may issue, or refrain from or defer the issuing of, an adjustment order.
- (5) Within thirty days after an adjustment order is confirmed or issued under subsection (4), the person concerned may appeal against the confirmation or issue to the High Court in the prescribed manner on any grounds including on the grounds that –
  - (a) he cannot reasonably be expected to bear the whole or any part of the expense required in implementing the adjustment order;
  - (b) the period stipulated for implementing the adjustment order is unreasonable;
  - (c) the nature of the action required to be taken in terms of the adjustment order is, in the circumstances of the case, unreasonable; or
  - (d) adequate access to the premises, services or amenities concerned may be secured without recourse to the action required by the adjustment order.
- (6) Upon hearing an appeal under subsection (5) the Court may –
  - (a) confirm, vary or set aside the adjustment order appealed against; and
  - (b) make such order as to the costs of the appeal as it thinks fit.

(comment in margin against next paragraph) Denial of admission into premises, etc

- 25 (1) No person shall, on the ground of disability alone, deny a person with a disability –
- (a) admission into any premises to which members of the public are ordinarily admitted; or
  - (b) the provision of any services or amenities to which members of the public are entitled,

unless such denial is motivated by a genuine concern for the safety of such person.

- (2) The proprietor of premises referred to in subsection (1) (a) shall not have the right, on the ground of a person's disability alone, to reserve the right of admission to his premises against such a person.
- 3) A person with a disability who is denied admission into any premises or the provision of any service or amenity contrary to subsection (1) shall be deemed to have suffered an injury and shall have the right to recover damages in any court of competent jurisdiction.
- (4) Without prejudice to subsection (3), damages awarded under that subsection shall be recoverable summarily as a civil debt.

(comment in margin against next paragraph) Offences – adjustment orders and discrimination

- 26 (1) A person is guilty of an offence if he –
- (a) fails to comply with an adjustment order served under section 24;
  - (b) contravenes section 12 (1) or discriminates against a person contrary to section 12;
  - (c) discriminates against a person contrary to section 15 (1);
  - (d) contravenes section 25 (1) or discriminates against a person contrary to section 25; or
  - (e) on the ground of any ethnic, communal, cultural or religious custom or practice, discriminates against a person with a disability.
- (2) A person who is convicted of an offence under subsection (1) is liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.
  - (3) A person found guilty of an offence under this section may in addition to the penalty imposed by the Court be ordered to pay the person injured by the offence such sums of money in compensation as the Court may deem appropriate.

(comment in margin against next paragraph) Adjustment orders against Government institutions

- 27 (1) The Council shall not serve an adjustment order upon -
- (a) any hospital, nursing home or clinic controlled or managed by The Government or registered under the Public Health Act except with the consent of the Minister responsible for health; or

(b) any school or educational or training institution controlled or managed by the Government or registered under the Education Act except with the consent of the Minister responsible for the administration of the institution or Act concerned.

(2) Within sixty days after being requested to consent under subsection (1) the Minister shall either give or refuse his consent and if he fail to do so within that period the Council may proceed to serve the adjustment order as though the Minister had consented.

(comment in margin against next paragraph) Sports and recreation

28 (1) All persons with disabilities shall be entitled, free of charge, to the use of recreational or sports facilities owned or operated by the Government during social, sporting or recreational activities.

(2) Persons with disabilities shall be entitled to participate in all national and international sports events.

(3) For the purpose of subsection (2) the Ministry responsible for sports shall, in consultation with the Council, provide the necessary suitable environment including –

- (a) architectural infrastructure;
- (b) apparatus and equipment;
- (c) training and medical personnel; and
- (d) transportation facilities for the participants.

(4) Section (1) shall not apply in cases where there is exclusive private hire of such facilities.

## PART IV – CIVIC RIGHTS

- (comment in margin against next paragraph) Voting
- 29 (1) All persons with disabilities shall be entitled, at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections.
- (2) A person who undertakes to render assistance under subsection (1) shall do so strictly in accordance with the instructions of the voter.
- (3) A person described in subsection (2) shall bind himself, in the prescribed form, to comply with that subsection.
- (4) A person who contravenes subsection (2) is guilty of an offence.
- (comment in margin against next paragraph) Polling stations
- 30 Polling stations shall be made accessible to persons with disabilities during elections, and such persons shall in addition be provided with the necessary devices and assistive devices and services to facilitate the exercise of this right under this section.
- (comment in margin against next paragraph) Registration of organisations
- 31 (1) The Council shall register all organisations of or for persons with disabilities.
- (2) All existing organisations of or for persons with disabilities shall, within twelve months after this section comes into operation, apply in the prescribed manner to the Council for registration.
- (comment in margin against next paragraph) No 19/1991 Cap 108
- (3) Notwithstanding the provisions of any other law, organisations of or for persons with disabilities that this Act shall be exempt from registration under the Non-Governmental Organisations Co-ordination Act and the Societies Act.

## PART V – NATIONAL DEVELOPMENT FUND FOR PERSONS WITH DISABILITIES

- (comment in margin against next paragraph) Establishment of the Fund
- 32 (1) There shall be established a Fund to be known as the National Development Fund for  
Persons with Disabilities.

- (2) The Fund shall be established as a permanent fund and the income therefrom shall be used for the benefit of persons with disabilities in Kenya.
- (3) The Fund shall be administered by the Council through a board of Trustees as hereunder provided under Section 34.

(comment in margin against next paragraph) Sources of and Payments from Fund

- 33 (1) The sources of the Fund shall be –
  - (a) such moneys as may be appropriated thereto by Parliament;
  - (b) income generated by investments made by the trustees; and
  - (c) any other donations which the Council may receive for purposes of the Fund.
- (2) Without limiting the generality of section 32 (2), the Board of Trustees may, out of the Fund –
  - (a) contribute to the expenses, including capital expenses, of organisations of or for persons with disabilities;
  - (b) contribute to the expenses, including capital expenses, of institutions that train persons in the care of persons with disabilities;
  - (c) contribute to the capital expenses of projects undertaken by the Government for the benefit of persons with disabilities;
  - (d) provide or contribute to the cost of assistive devices and services;
  - (e) pay allowances to persons with disabilities falling in the following categories and who have no other source of income –
    - (i) persons with severe disabilities and who are therefore not trainable in any skills;
    - (ii) aged persons with disabilities; and
    - (iii) single parents with children with disabilities and who cannot therefore seek employment; and
  - (f) make payments or contributions for such purposes as may be prescribed by the Council.

(comment in margin against next paragraph) Trustees to Manage Fund

- 34 (1) The Fund shall be managed by a Board of Trustees which shall consist of –
  - (a) the Chairman of the Council
  - (b) the Director of the Council who shall be the secretary to the Board;
  - (c) a representative of the Minister appointed by the Minister;
  - (d) a representative of the Ministry responsible for finance appointed by the Minister responsible for finance;
  - (e) four representatives appointed by the Council consisting of –
    - (i) one representative nominated by organisations of persons with visual disabilities;

- (ii) one representative nominated by organisations of persons with hearing disabilities;
  - (iii) one representative nominated by organisations for persons with mental disabilities; and
  - (iv) one representative nominated by organisations for persons with physical disabilities; and
  - (f) not more than three persons co-opted by the Council to represent the donors that in its opinion have substantially supported the welfare of persons with disabilities.
- (2) The Minister shall appoint one of the persons appointed under subsection (1) (e) to be the treasurer to the Fund.
  - (3) The Board shall conduct its affairs in accordance with regulations prescribed by the council subject to any law relating to trustees.

## PART VI – RELIEF AND INCENTIVES

- (comment in margin against next paragraph) Exemptions
- 35 (1) All persons with disabilities who are in receipt of an income may apply to the Minister responsible for finance for exemption from income tax and any other levies on such income.
- (2) The Minister responsible for finance shall, in consultation with the Council, assess all applications received under subsection (1) and make such order thereon, if any, as he deems fit, exempting the applicant wholly, or to the extent provided by the order, from income tax or other levies specified therein, and any such order shall, notwithstanding the provisions of any other Act, have effect according to its terms.
  - (3) Materials, articles and equipment, including motor vehicles, that are modified or designed for the use of persons with disabilities shall be exempt from import duty, value added tax, demurrage charges, port charges and any other government levy which would in any way increase their cost to the disadvantage of persons with disabilities.
  - (4) All goods, items, implements or equipment donated to institutions and organisations of or for persons with disabilities shall be exempt from import duties, value added tax, demurrage charges, port charges and any other government levy which would in any way defeat the purposes of or increase the cost of the said donations.

(comment in margin against next paragraph) Incentives

- 36 (1) Any donations, bequest, subsidy or financial aid which may be made to government agencies involved in the rehabilitation of persons with disabilities or to organisations involved in such rehabilitation and registered with the Council for the purposes of this section shall, subject to the provisions of the Income Tax Act, be allowed as deductions from the donor's gross income for the purpose of computing taxable income.
- (2) The Minister responsible for finance or other appropriate authority shall endeavour to provide, subject to the provisions of any other relevant law, incentives to local manufacturers of technical aids and appliances used by persons with disabilities including but not limited to, the following –
- (a) additional deductions for labour expenses;
  - (b) tax and duty exemptions on imported capital equipment;
  - (c) tax credits on domestic capital equipment;
  - (d) simplified customs procedures;
  - (e) unrestricted use of consigned equipment;
  - (f) employment of foreign nationals;
  - (g) exemptions from taxes and duties on raw materials; and
  - (h) access to bonded manufacturing systems.

(comment in margin against next paragraph) Credit

- 37 It shall be the duty of the Minister responsible for matters relating to credit unions, co-operatives and other lending institutions to encourage the extension by such institutions of credit to persons with disabilities.

## PART VII – MISCELLANEOUS

(comment in margin against next paragraph) Legal system

- 38 (1) The Attorney-General, on consultation with the Council and the Law Society of Kenya, shall make regulations providing for free legal services for persons with disabilities with respect to the following –
- (a) matters affecting the violation of the rights of persons with disabilities or the deprivation of their property;
  - (b) cases involving capital punishment of persons with disabilities; and
  - (c) such matters and cases as may be prescribed in the regulations made by the Attorney-General.
- (2) The Chief Justice shall make rules providing for –
- (a) the exemption, for persons with disabilities from the payment of fees in relation to matters or cases described in subsection (1); and



- (b) the provision, to persons with disabilities who attend court, of free sign language interpretation, Braille services and physical guide assistance.
  - (3) Accused persons who are denied bail shall be entitled to be held in custody in facilities modified in accordance with regulations made by the Minister.
  - (4) The Chief Justice shall endeavour to ensure that all suits involving persons with disabilities are disposed of expeditiously having due regard to the particular disability and suffering of such persons.
- 39 (comment in margin against next paragraph) Television programmes  
All television stations shall provide a sign language inset or sub-titles in all newscasts and educational programmes, and in all programmes covering events of national significance.
- 40 (comment in margin against next paragraph) Telephone services  
All persons providing public telephone services shall as far as possible install and maintain telephone devices or units for persons with hearing disabilities and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system.
- 41 (comment in margin against next paragraph) Postal charge exemption  
The following shall be exempt from postal charges –
- (a) printed and recorded literature, articles, equipment and other devices for the use of persons with disabilities which are sent out by mail within and outside Kenya; and
  - (b) aids and orthopaedic devices for persons with disabilities sent outside Kenya by mail for repair: provided that the aforesaid items are for personal or institutional purposes and are recommended for this exemption by the Council , and that the person with a disability or the organisation is registered with the Council.
- 42 (comment in margin against next paragraph) Exemptions and deductions – general requirements  
(1) The following apply with respect to exemptions and deductions described in subsection (2) –
- (a) no person is eligible for an exemption or deduction unless the exemption or deduction has been recommended by the council and approved by the appropriate government authority;
  - (b) no person is eligible for an exemption or deduction unless any additional requirements or conditions prescribed in the regulations made by the Minister are satisfied;

- (c) an exemption or deduction may be refused on the basis that it has not been provided for in the allocation of public resources.
- (2) The exemptions and deductions referred to in subsection (1) are the exemptions and deductions under the following –
  - (a) section 12;
  - (b) section 16;
  - (c) section 35;
  - (d) section 36 (1); and
  - (e) section 40.

(comment in margin against next paragraph) Inspectorate units and Council inspectors.

- 43 (1) All Government ministries shall, under the provisions of this Act, establish and maintain an inspectorate unit for the purpose of ensuring the implementation and compliance with the provisions of this Act.
- (2) The Council shall appoint an inspector who shall be empowered to investigate and recommend prosecution or other remedy against infringement of this Act.
- (3) The inspector appointed under subsection (2) shall report, to the Council or the relevant committee of the Council, any person or persons whose conduct is in violations of this Act or the regulations made thereunder.

(comment in margin against next paragraph) Regulations

- 44 The Minister may make regulations generally for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make regulations –
- (a) prescribing the procedures, forms and fees applicable under this Act;
  - (b) specifying and describing the nature of acts of discrimination against persons with disabilities; and
  - (c) prescribing the procedure and forms for persons entitled to subsidised medical care under this Act.

## PART VIII – OFFENCES AND PENALTIES

(comment in margin against next paragraph) Concealment of persons with disabilities

- 45 (1) No parent, guardian or next of kin shall conceal any person with a disability in such a manner as to deny such a person the opportunities and services available under this Act.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction to a fine not exceeding twenty thousand shillings.

(comment in margin against next paragraph) Negligence by doctor

- 46 (1) Any person who, being a doctor or other medical practitioner, negligently causes a disability to a patient is guilty of an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.
- (2) The Court may order a doctor convicted under this section to pay to the patient such sums of money in compensation as it may deem appropriate.

(comment in margin against next paragraph) Giving false information to get registered

- 47 A person is guilty of an offence if he knowingly gives false information to the Council for the purpose of being registered or for the purpose of acquiring any privilege due to persons so registered.
- 48 Any person is found guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding ten thousand shillings or imprisonment for a term not exceeding one year, or both such fine and imprisonment.
- 49 (1) The Council may request the Attorney-General to take appropriated legal action if the Council believes that –
- (a) a person or group of persons is engaged in a practice which is discriminatory under this Act; and
  - (b) the discrimination is a significant and substantial infringement of the rights of persons with disabilities and raises issues of public interest.
- (2) Any person or group of persons aggrieved by an order made in a legal action commenced pursuant to a request under subsection (1) may within sixty days after the making of such order apply in the prescribed form to the High Court for the review of such order.

## SCHEDULE (S.5(2))

### PROVISIONS AS THE CONDUCT OF BUSINESS AND AFFAIRS OF THE COUNCIL

- 1 A member of the Council may –
- (a) resign his office by notice in writing to the Minister; or

- (b) be removed by the Minister by notice in writing if he –
  - (i) is subject to a vote calling for his removal by a two thirds majority of all members of the Council;
  - (ii) has been absent from five consecutive meetings of the Council without permission of the chairman;
  - (iii) is so incapacitated by prolonged physical or mental illness as to be unable to attend to and perform his duties;
  - (iv) is an undischarged bankrupt;
  - (v) is convicted by a Court of an offence punishable by a term of imprisonment; of
  - (vi) is otherwise unable or unfit to discharge his functions.
- 2 Where the office of a member become vacant the vacancy may with the approval of the Minister be filled through the majority vote of the members for the remainder of the term.
- 3 The Council shall pay to its members such remuneration as the Minister may approve.
- 4 The Council shall meet not less than four times in every year and not more than four months shall elapse between the date of one meeting and the date of the next meeting.
- 5 A meeting of the Council shall be held on such date and at such time as the Council shall decide, or in the absence of such a decision if the chairman decides that a meeting is necessary, on a date and at a time determined by the chairman.
- 6 Unless otherwise decided by two-thirds majority of the members of the Council, at least fourteen days' written notice of every meeting of the Council shall be given to every member of the Council.
- 7 The quorum of a meeting of the Council shall be fifteen members.
- 8 (1) The chairman, or in his absence, the vice-chairman, shall preside at every meeting of the Council.  
  
(2) In the absence of both the chairman and the vice-chairman, the members present may choose one of their number to preside at the meeting.
- 9 A decision of the majority of members of the Council present at any meeting of the Council shall be deemed to be the decision of the council and if upon any question the voting shall be equal, the chairman, vice-chairman or other person presiding shall have a second and casting vote.

- 10 No act, decision or proceedings of the Council shall be invalid on account of a vacancy in the membership thereof or on account of the appointment of a member of the Council being defective.