



**Supported Decision-Making: Assessing Kenya’s Legal Framework against the  
Benchmark of Article 12 of The Convention on the Rights of Persons with Disabilities**

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By

Paula Mukami Nkonge

102344

Prepared under the supervision of

Mr James Mutua Mabuti

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## DECLARATION

I, PAULA MUKAMI NKONGE , do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... *Paula Nkonge* .....

Date: .....29/07/2021.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ..... *Mabuti Mutua* .....

[James Mutua Mabuti]

## ABSTRACT

The Convention on the Rights of Persons with Disabilities (The CRPD) is *the* authority on International Disability Law. Taking it as the benchmark, this paper seeks to assess the Kenyan Legal Framework on disability as against *Article 12* of The CRPD. The research is undertaken using doctrinal methodology, which entails using the law and legal commentary from primary and secondary sources such as; statutes, case law, books, journals, newspapers and reports. The paper reaches the finding that Kenyan laws are yet to implement Article 12 of The CRPD. There are several outdated provisions found in the Children's Act, The Mental Health Act and The Marriage Act which deny the legal capacity of Persons with Disabilities (PWDs) contrary to The CRPD. The overall aim of this paper is to reconcile the legal obligations under The CRPD with the law and practice in Kenya. In light of the converse findings, this paper makes a case for the incorporation of Supported Decision-Making into the Kenyan Legal Framework to remedy the situation and bring Kenyan laws in line with The CRPD.

## **LIST OF ABBREVIATIONS**

CPRD – The United Nations Convention on the Rights of Persons with Disabilities

PWDs – Persons with Disabilities

SDM – Supported Decision Making

## LIST OF CASES

### Kenyan Case law

*Wilson Morara Siringi v the Republic* (2014) eKLR.

### Canadian Case law

*Auton v. British Columbia* (2004) Supreme Court of Canada

*Eldridge v. British Columbia* (1997) Supreme Court of Canada.

*Granovsky v. Canada* (2000) Supreme Court of Canada.

*British Columbia v. British Columbia* (1999) Supreme Court of Canada.

*Nova Scotia v. Laseur* (2003) Supreme Court of Canada.

*Council of Canadians with Disabilities v. VIA Rail Canada Inc* (2007) Supreme Court of Canada.

## **LIST OF LEGAL INSTRUMENTS**

### Kenyan Laws

*Children's Act* (No.8 of 2001).

*Constitution of Kenya* (2010).

*Marriage Act* (2014).

*Mental Health Act* (2012).

*Persons With Disability Act* (2003).

### Kenyan Bills

*Mental Health Amendment Bill* (2015)

### International Conventions

*United Nations Convention on the Rights of Persons with Disabilities* (2006).

### Canadian Laws

*Representation Agreement Act* (1993).

*Canadian Charter of Rights and Freedoms* (1982).

*Substitute Decisions Act* (1992).

# CHAPTER 1

## INTRODUCTION

### 1.0 BACKGROUND

The entry into force of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006 is still the fastest Convention ratification to date.<sup>1</sup> The compelling objective of The CRPD was to ensure all human rights and fundamental freedoms were enjoyed fully and equally by Persons with Disabilities and for their inherent dignity to be respected.<sup>2</sup>

Article 12 is described as the lynchpin of the entire Convention; it requires State Parties to recognize the legal capacity of Persons with Disabilities (PWDs). Legal capacity is a twofold concept referring to an individual's *capacity to have rights* and *the power to exercise those rights*.<sup>3</sup> It is necessary for both concepts to exist concurrently. Legal capacity is what confers legal effect to actions and decisions. As such, without legal capacity, a person lacks agency and is not recognized before the law. The loss of legal capacity is said to be comparable to a civil, political, economic, social and cultural death.<sup>4</sup> It results in the permissibility of institutionalization, forced treatment, loss of liberty and the withdrawal of fundamental citizenship rights including the right to, marry, vote and own property.

Historically, legal practice equated disability with incapacity, thereby absolving Persons with Disabilities (PWD) of legal capacity. As it stands in Kenya, the State retains legal authority to withdraw the legal capacity of persons with mental disability.<sup>5</sup> This derives from the philosophy that we should act in the 'best interests' of PWDs rather than 'according to the will or preferences of the PWD.'<sup>6</sup> In line with this school of thought, the Kenyan State may empower an appointed guardian to make decisions on behalf of PWDs.<sup>7</sup> Other possible

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<sup>1</sup> < <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-10th-anniversary-of-the-adoption-of-convention-on-the-rights-of-persons-with-disabilities-crpd-crpd-10.html>> on 21<sup>st</sup> January 2021.

<sup>2</sup> Article 1, Convention on the Rights of Persons with Disabilities (2006).

<sup>3</sup> The Kenya National Commission On Human Rights And The Open Society Initiative For Eastern Africa, *How To Implement Article 12 Of Convention On The Rights Of Persons With Disabilities Regarding Legal Capacity In Kenya: A Briefing Paper*, 2016.

<sup>4</sup> Council of Europe Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*, April 2012.

<sup>5</sup> Section 26, *Mental Health Act* (2012).

<sup>6</sup> Bigby C, Whiteside M and Douglas J, 'Providing support for decision making to adults with intellectual disability: Perspectives of family members and workers in disability support services' 44(4) *Journal of Intellectual & Developmental Disability*, 2017.

<sup>7</sup> Section 26, *Mental Health Act* (2012).

actions include the involuntary confinement and treatment of a person suffering a mental illness.<sup>8</sup>

In contrast, The CRPD brings a paradigm shift to this view of disability law.<sup>9</sup> Article 12 of addresses the misperceptions around legal capacity and clarifies the position of legal capacity for PWDs. The CRPD committee stated authoritatively that mental capacity and legal capacity are different and distinct concepts that are often conflated.<sup>10</sup> According to Article 12, legal capacity is the capacity to have rights and to exercise those rights. This is something that is inherent to all. On the other hand mental capacity is the ability of an individual to make decisions. This will vary from person to person. The conclusion being that mental capacity cannot be equated to legal capacity. In which case, deficits in mental capacity cannot be used as the basis for denying legal capacity.”<sup>11</sup>

This reverses the legal presumption that disability equates to incapacity and enshrines the right to for PWDs to retain their legal capacity despite their disability.<sup>12</sup> The effect of this provision is to make centuries of legal practice now at loggerheads with International law on disability. It requires States to examine their legislation and bring it into conformity with The CRPD.

## 1.1 STATEMENT OF THE PROBLEM

Having established that The CRPD sets the international standards for the protection of disability rights, and that *article 12* of the same requires States to implement a system that protects the legal capacity of Persons with Disabilities (PWDs), the problem that arises is domestic compliance with the International laws. This paper presumes that the Kenyan legal framework does not fully implement the right to legal capacity for PWDs in accordance with article 12 of The CRPD. It seeks to assess the gaps in the implementation of article 12 within the Kenyan legal framework and goes further to propose the adoption of Supported Decision-Making to remedy these shortfalls.

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<sup>8</sup> Section 14, *Mental Health Act* (2012).

<sup>9</sup> Quinn G, ‘Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD’, HPOD Conference at Harvard Law School, Boston, 20 February 2010.

<sup>10</sup> CRPD General Comment No.1, Article 12: Equal recognition before the law Committee on the Rights of Persons with Disabilities, 31 March–11 April 2014.

<sup>11</sup> CRPD General Comment No.1, Article 12: Equal recognition before the law Committee on the Rights of Persons with Disabilities, 31 March–11 April 2014, paragraph 13.

<sup>12</sup> Article 12, *United Nations Convention on the Rights of Persons with Disabilities*.

## **1.2 JUSTIFICATION OF THE STUDY**

This study holds both practical and policy relevance. It is beneficial to law makers and policy makers as it assesses the compliance of Kenya's laws with the International Human Rights standards and the Constitution. Practically, this study is beneficial to PWDs in Kenya who are denied their right to legal capacity. It acts as evidence with which to engage policy makers on the need for change.

## **1.3 RESEARCH OBJECTIVES**

### **General Objective:**

The overall aim of this study is to reconcile the Convention on the Rights of Persons with Disabilities with the law and practice in Kenya.

### **Specific Objectives:**

1. To assess the Kenyan Legal Framework against the benchmark of Article 12 of the Convention on the Rights of Persons with Disability (The CRPD) in Kenya.
2. To assess Supported Decision-Making (SDM) as a solution to the implementation of Article 12 of The CRPD and to analyse the SDM Model adopted by the Canadian legal system.
3. To make recommendations appropriate to the Kenyan legal system

## **1.4 HYPOTHESIS**

- i. That Kenya has not fully implemented the provisions of Article 12 the CRPD.
- ii. That Supported Decision Making can be used to implement Article 12 of the CRPD

## **1.5 RESEARCH QUESTIONS**

This research seeks to answer the following questions:

- i. Are the laws in Kenya consistent with Article 12 of the CRPD?
- ii. Can Supported Decision- Making be used to implement the provision of Article 12 of the CRPD?

## **1.6 LIMITATIONS**

1. This research will be constrained to a time period of 1 year; however, the scope of the project is adjusted to meet this timeline.
2. This research will be limited to desktop research with no fieldwork; however, there is sufficient research material in existence on the subject matter.

3. This research will receive limited monetary funding; however, the doctrinal research methodology does not require a large monetary funding.

## **1.7 THEORETICAL FRAMEOWRK**

### **1.7.1 The Human-Rights Model of Disability**

The study is founded on the Human Rights Theory of disability which underpins the Convention on the Rights of Persons with Disabilities (The CRPD). Human Rights theories are known to be based on fundamental values and principles. The values of Dignity, Autonomy, Equality and Solidarity are the basic values of human right theories.<sup>13</sup> It is these values that conceptualise the system of basic freedoms.

Historically, disability law applied Human Rights values differently to Persons with Disabilities (PWDs). Gerard Quinn and Theresia Degener describe this as being in a position of invisibility. It is demonstrated by the marginalization of PWDs in nearly all cultures and societies across history. The tendency has been to view PWDs as objects of charity rather than subjects of the law in their own right. As a result legal protections and the rule of law were not applied or were severely curtailed to this group of persons.<sup>14</sup> Abortions on the basis of disability and euthanasia legislation in violation of the right to life of PWDs are but some examples. Selective medical non-treatment violating the right to health, institutionalization violating the right to freedom from torture, cruel, degrading and inhuman treatment and the enjoyment of Social and Economic rights demonstrate a similar plight.

The Human Rights Theory of Disability seeks to bring visibility to PWDs.<sup>15</sup> Gerard Quinn and Theresia Degener conclude that the solution to invisibility is to insist all Human Rights apply equally to PWDs.<sup>16</sup> Seeing PWDs as subjects rather than objects of the law entails

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<sup>13</sup> Quinn G and Degener T, *'Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability'* Office of the High Commissioner for Human Rights, Geneva, 2002.

<sup>14</sup> Quinn G and Degener T, *'Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability'* Office of the High Commissioner for Human Rights, Geneva, 2002.

<sup>15</sup> Quinn G and Degener T, *'Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability'* Office of the High Commissioner for Human Rights, Geneva, 2002.

<sup>16</sup> Quinn G and Degener T, *'Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability'* Office of the High Commissioner for Human Rights, Geneva, 2002.

accessing the full benefit of rights and basic freedoms in a way that is respectful and accommodating of their differences.<sup>17</sup>

The Human Rights Theory of Disability highlights the special nature of fundamental human rights. They are an inherent birth right universal to all persons and they cannot be given or taken away from an individual or a group. Given that every human being is a subject of human rights, proponents of this theory conclude that it is not prerequisite to have an absence of impairment to be a subject of human rights.<sup>18</sup>

The Human Rights Model of Disability is echoed in The Convention on the Rights of Persons with Disabilities and is said to be codified by it. This is evident from the object of the Treaty alone which is to ensure that PWDs enjoy all human rights fully and equally.<sup>19</sup>

The characteristic features of The Human Rights Model of Disability are further defined by Theresia Degener in six points.<sup>20</sup> It does not permit disability as a ground for denying legal capacity. It is inclusive of first and second generation rights. The Human Rights model acknowledges the role of impairment in the life of Persons with Disabilities (PWDs). This is achieved through the recognition that PWDs may require different levels of support to realise their rights. A Human Rights Model recognizes the different layers that compose identity. In addition to having a disability, persons may be male or female, of different races, a migrant or a child and therefore face discrimination on several bases. This speaks to the issue of intersectionality of discrimination and double invisibility. In addition this model of disability provides a roadmap for non-discriminatory preventative health policy. This is to eliminate stigma towards disabled persons. A campaign for safe driving that uses a poster of a disabled person which implies that being crippled is worse than death, abuses PWDs as a result. The Human Rights Disability Model promotes sensitivity to the dignity of Persons with Disability. Finally, The Human Rights Model provides a roadmap for disability inclusive

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<sup>17</sup> Quinn G and Degener T, '*Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability*' Office of the High Commissioner for Human Rights, Geneva, 2002.

<sup>18</sup> Quinn G and Degener T, '*Human Rights and Disability The current use and future potential of United Nations human rights instruments in the context of disability*' Office of the High Commissioner for Human Rights, Geneva, 2002.

<sup>19</sup> Preamble, United Nations Convention on the Rights of Persons with Disabilities (2006).

<sup>20</sup> Degener T, 'A New Human Rights Model of Disability' in Fina V, Cera R and Palmisano G, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (ed) Springer International Publishing, Switzerland, 2017.

development and humanitarian aid. It is proactive and goes beyond explaining why a situation exists to offering a roadmap for change.<sup>21</sup>

In summary, the gist of The Human Rights Theory of Disability is the opposition of presumptions that impairment may hinder a person's capacity for human rights.

## **1.8 RESEARCH METHODOLOGY**

This research will be undertaken using doctrinal methodology. This involves using the law and legal commentary from primary and secondary sources; such as the use of statutes, case law, books, journals, newspapers and reports to obtain information on the topic of research. It is a qualitative research in that I will focus on secondary sources of information based in the library and internet searches without field research. This methodology will be used to analyse existing disability laws within the Kenyan and International framework. This paper will also assist in coming up with the best practices for Kenya to adopt through a comparative assessment of measures adopted by other countries such as Canada in implementing disability rights.

## **1.9 LITERATURE REVIEW**

An abundance of literature related to Article 12 of the Convention on the Rights of Persons with Disabilities (The CRPD) and its implementation is in existence. A number of scholars have expounded on the requirements for the implementation of Article 12 and the paradigm shift it brings about. However, few scholars have written on the extent to which implementation has been successful in domestic legal frameworks as well as on the implementation of Supported Decision-Making in fulfilment of Article 12.

This paper will assess Kenya's implementation of the CRPD with the aim of showing the shortfalls in this regard. Moreover it assesses the best model of Supported Decision-Making implemented in other jurisdictions to borrow a leaf for Kenya's context. This has not been widely written on.

In the paper *Article 12 CRPD: Equal Recognition before the Law*, Lucy Series and Anna Nilsson assert that *Article 12* of the CRPD is about legal personality and legal capacity. Together these are the ability to shoulder rights and duties under the law, and the ability to claim those rights and assume legal liability for those duties. They argue that *Article 12*

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introduces ‘universal legal capacity’ where everybody possesses the right to legal capacity irrespective of disability or mental incapacity.<sup>22</sup>

In his paper ‘*Legal capacity, mental capacity and supported decision-making: Report from a panel event*’ Sándor Gurbai argues that *Article 12* expressly requires States not to restrict legal capacity based on mental incapacity. This would amount to discrimination. While an adults’ legal capacity can be validly deprived on the grounds of imprisonment or bankruptcy, article 12 establishes that impairment or disability are no longer valid grounds. He draws basis from the CRPD Committee who state explicitly that the status as a PWD or the existence of an impairment will never be a basis for denying legal capacity.<sup>23</sup>

Anna Nilsson prepared the issue paper for the Council of Europe commissioner of human rights entitled ‘*Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*’. In it she discussed the working definition of legal capacity. She highlighted the tendency to distinguish between having rights and exercising or acting on these rights. Having rights makes you a subject before the law and in possession of all the rights provided for by domestic legislation. Exercising the rights includes the power to claim those rights before a court. She concludes that Human Rights scholars such as Amita Dhanda, Michael Bach, Lana Kerzner and Tina Minkowitz argue convincingly that *Article 12* of the CRPD vests both of these capacities to PWDs. In the context of the Convention, holding rights automatically involves the exercise of those rights with the required supports accepted by each individual.<sup>24</sup>

The Mental Disability Advocacy Centre in the paper ‘*The Right to legal capacity in Kenya*’ undertook an analysis of Kenya’s law.<sup>25</sup> It concluded that Kenya did not fully meet the requirements of the Convention on the Rights of Persons with Disabilities. It highlighted the provisions of Section 107 of the Children’s Act which extends the appointment of a guardian beyond the age of eighteen and Section 26 of the Mental Health Act. It recommended abolishing substituted decision-making arrangements and initiating Supported Decision-Making pilot projects.

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<sup>22</sup> Serie L and Nilsson A, ‘Article 12 CRPD: Equal Recognition before the Law’ Oxford University Press, 2018- < <https://www.ncbi.nlm.nih.gov/books/NBK539188/> > on 5th January 2020.

<sup>23</sup> Gurbai S, Craigie J, Bach B, Kanter A, Kim S, Lewis O and Morgang G, ‘Legal capacity, mental capacity and supported decision-making: Report from a panel event’ 62 *International Journal of Law and Psychiatry*, 2019.

<sup>24</sup> Council of Europe Commissioner for Human Rights, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*, April 2012.

<sup>25</sup> Mental Disability Advocacy Center, *The Right to Legal Capacity in Kenya*, March 2014, 8.

Arlene Kanter further interprets article 12 of the CRPD in her paper *The Development of Disability Rights under International Law: From Charity to Human rights*.<sup>26</sup> She adds that the right to support needs to accompany the paradigm of universal legal capacity. Such support, as recognised in *Article 12* enables PWD to exercise their rights. She argues that this provision requires the elimination of substituted decision-making regimes such as the prevalent guardianship laws to be replaced with systems of support.

Piers Gooding wrote a paper entitled *Supported Decision-Making: A Rights Based Disability Concept and its Implications for Mental Health Law*.<sup>27</sup> In it he clarifies the concept of Supported Decision-Making and considers its effect on mental health law. The author concludes that the support mechanism for exercising legal capacity will take disability rights beyond focusing primarily on civil and political rights in mental health law discussions to include second generation rights as well.

In their paper ‘*Supported Decision making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice*’.<sup>28</sup> The contributing authors conclude that the link between Supported Decision Making and legal capacity is strong.

Nina A. Kohn, Jeremy A. Blumenthal and Amy T. Campbell in their paper ‘*Supported Decision-Making: A Viable Alternative to Guardianship?*’ conclude that Supported Decision-Making is an appealing alternative to surrogate decision-making.<sup>29</sup> An example of surrogate decision making is the much maligned process of guardianship. The authors conclude Supported Decision-Making can achieve the self-determination of PWD in accordance with international legal norms.

## 1.10 CHAPTER BREAKDOWN

**Chapter Two; Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities** This chapter identifies the relevant laws on legal capacity of Persons With

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<sup>26</sup> Kanter A, *The Development of Disability Rights Under International Law: From Charity to Human rights*, Routledge, New York, 2015, 235.

<sup>27</sup> Gooding P, ‘Supported Decision-Making: A Rights Based Disability Concept and its Implications for Mental Health Law’ -<  
<https://www.tandfonline.com/doi/abs/10.1080/13218719.2012.711683?src=recsys&journalCode=tppl20>> on 10th October 2020.

<sup>28</sup> Browning M, Bigby C and Douglas J, ‘Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice’1 *Research and Practice in Intellectual and Developmental Disabilities*, 2014, 5.

<sup>29</sup> Kohn N, Blumenthal J and Campbell A, ‘Supported Decision-Making: A Viable Alternative to Guardianship?’ 117(4), *Penn State Law Review*, 2013, 1128.

Disability and assesses this against the standards of *Article 12* of the Convention on the Rights of Persons with Disabilities (CRPD). It will highlight the gaps hypothesised to exist in the implementation of the the CRPD.

**Chapter Three; Supported decision-making: Making a case for Kenya’s legal framework** This chapter analyses whether a model of Supported Decision Making can fill the gaps in the implementation of *Article 12* within Kenya’s legal framework. It seeks to analyse the best practice of Supported Decision-Making from the Canadian jurisdiction offering the opportunity for Kenya to import the same.

**Chapter Four; Conclusions and Recommendations**

The final chapter summarizes the findings of the paper and gives possible recommendations to bring Kenyan law in line with its obligations under *article 12* of The CRPD.

## CHAPTER 2

# IMPLEMENTATION OF ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: OPPORTUNITIES AND CHALLENGES

### 2.0 Introduction

The Convention on the Rights of Persons with Disabilities (CRPD) is part and parcel of Kenyan law due to *article 2(5) And 2(6)* of the Constitution.<sup>30</sup> This provides that a ratified Convention forms a part of the laws of the land.<sup>31</sup> In light of the ratification of the CRPD in 2008, this chapter seeks to analyse to what extent the Kenyan legal framework implements the CRPD. Using *article 12* of the CRPD as a benchmark this chapter will undertake an analysis of domestic legislation concerning the legal capacity of Persons with Disabilities (PWD) - the topic of *article 12*. The numerous relevant laws include the Constitution, The Mental Health Act, The Mental Health Bill, The Persons with Disabilities Act, The Children's Act and The Marriage Act.

### 2.1 The Opportunities and Challenges of Article 12

The CRPD titles Article 12 - *Equal Recognition before the Law*. The crux of this article is the protection of legal capacity for PWD on an equal basis with others.<sup>32</sup> This effectively means that the presence of impairment is not grounds for denying legal capacity.<sup>33</sup> In the CRPD, the right to legal capacity is attached to a corresponding duty. State Parties are required to provide PWD the support they may need to exercise their legal capacity.<sup>34</sup> Article 12 thus recognizes that a person cannot lose his or her legal capacity merely for having a disability. However because some require assistance to exercise their right, the role of the government is to ensure they have support and that support is not abused through necessary safeguards. According to Gerard Quinn, Legal capacity forms part of what it means to be human. The life choices a person makes are part and parcel of their personhood and of who they are.<sup>35</sup> Giving PWD legal agency terminates the label of incompetency that persons with disability are

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<sup>30</sup> Article 2(6), *Constitution of Kenya* (2010).

<sup>31</sup> Article 2(6), *Constitution of Kenya* (2010).

<sup>32</sup> Article 12(2), *United Nations Convention on the Rights of Persons with Disabilities* (2006).

<sup>33</sup> CRPD General Comment No.1, Article 12: Equal recognition before the law Committee on the Rights of Persons with Disabilities, 31 March–11 April 2014,

<sup>34</sup> Article 12(3), *United Nations Convention on the Rights of Persons with Disabilities* (2006).

<sup>35</sup> Quinn G, 'Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD', HPOD Conference at Harvard Law School, Boston, 20 February 2010.

subjected to and which more often than not becomes a self-fulfilling prophecy. Giving the decisions of PWD legal effect ends the cycle of third parties systematically making decisions on their behalf and engraining helplessness and dependence.<sup>36</sup> All this is the promise of article 12.

However, of all the provisions in the CRPD, Article 12 was the most strongly contested. The major opposition was towards the CRPD's definition of legal capacity and the duty to provide support.<sup>37</sup> Some State's sought a definition of legal capacity that distinguished the capacity to have rights from the capacity to act where, the latter could be limited but the former could not.<sup>38</sup> As earlier enumerated, legal capacity is a twofold concept that requires both of these elements to exist. The basis of State opposition was the fact that national laws have routinely limited the ability of PWD to act on their rights and implementing article 12 would require an overhaul of this.<sup>39</sup>

With reference to the duty to provide support, States strongly opposed a reading of article 12 that would require the abolition of substituted decision-making systems. The system of guardianship is one such example. This is to be replaced with Supported Decision-Making.<sup>40</sup> The Committee on the Rights of Persons with Disabilities tasked with implementing the CRPD, stated that the article will require the progressive abolition of all substitute decision making systems.<sup>41</sup> At the conclusion of the treaty, several countries placed reservations on article 12 allowing them to continue with substituted decision-making together with supported decision-making.<sup>42</sup> The resistance to the support paradigm by State's highlights the heavy attachment to a paternalistic model towards PWD.

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<sup>36</sup> Dhanda A, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' 34, *Syracuse Journal of International Law and Commerce*, 2006, 436.

<sup>37</sup> Fina V, Cera R and Palmisano G, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (ed) Springer International Publishing, Switzerland, 2017.

<sup>38</sup> Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm> on 11 December 2020.

<sup>39</sup> Fina V, Cera R and Palmisano G, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (ed) Springer International Publishing, Switzerland, 2017.

<sup>40</sup> Fina V, Cera R and Palmisano G, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (ed) Springer International Publishing, Switzerland, 2017.

<sup>41</sup> CRPD General Comment No.1, Article 12: Equal recognition before the law Committee on the Rights of Persons with Disabilities, 31 March–11 April 2014.

<sup>42</sup> Minkowitz T, 'The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non-consensual psychiatric interventions' 34 *Syracuse Journal of International Law and Commerce*, 2006, 405.

It is evident that while Article 12 promises a paradigm shift to the way in which Persons With Disabilities are viewed, it poses several challenges in implementation as it will require an overhaul of traditional practices.<sup>43</sup>

## **2.2 The Kenyan Legal Framework**

Since the ratification of the CRPD in 2008, Kenya has taken some measures to incorporate the provisions of article 12 of the CRPD into its Legal Framework.

### **2.2.1 The Constitution of Kenya 2010**

The supremacy of the Kenyan constitution means that it holds priority over all other conflicting laws of the State. Constitutional guarantees that protect the rights of Persons With Disability (PWD) have been put in place. *Article 40* ensures the equal right to own or inherit property for PWD. This guarantees that PWD can own and acquire.<sup>44</sup> Through this the government gives effect to the provisions of *article 12* of the CRPD.<sup>45</sup>

The constitution further, prohibits the practice of discrimination on the grounds of disability. It ensures equality before the law for PWD which involves being protected equally by the law and benefitting equally from the law. This is provided in *Article 27* on equal treatment in all spheres of life such as political, economic, cultural and social spheres.<sup>46</sup>

The right to political participation for PWDs is protected in *Article 38* which provides that every adult citizens have the right, to be registered voters; to vote; to run for public office and, to hold office if elected.<sup>47</sup>

A whole substantive provision specifically on the rights of PWDs is found in *Article 54*. It provides PWDs are entitled to be treated with dignity and respect. It also provides for the progressive realisation of PWDs making up at least five percent of members in elective and appointive bodies.<sup>48</sup>

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<sup>43</sup> Watson J, 'The right to supported decision-making for people rarely heard' Published PHD Thesis, Deakin University, Australia, 2016.

<sup>44</sup> Article 40, *Constitution of Kenya* (2010).

<sup>45</sup> Kenya National Commission on Human Rights, Compendium on the Convention on the rights of persons with disabilities, 2016, 18.

<sup>46</sup> Article 27, *Constitution of Kenya* (2010).

<sup>47</sup> Article 38, *Constitution of Kenya* (2010).

<sup>48</sup> Article 54 (2) *Constitution of Kenya* (2010).

### **2.2.2 The Persons with Disabilities Act 2003**

*Section 37* of the 2003 Act encourages credit unions, co-operatives and other lending institutions to extend credit to Persons with Disabilities (PWDs).<sup>49</sup> This goes towards ensuring the financial security of PWDs.

Additionally the Persons with Disability Amendment Bill of 2015 will explicitly recognise the legal capacity for Persons with Disability in *section 26*.<sup>50</sup>

### **2.2.3 Judicial Interpretation**

In *Wilson Morara Siringi v the Republic*, the court correctly evoked article 12 of the CRPD. The case involved the appeal of a 5year rape sentence by the appellant who was convicted of raping the victim who suffered mental impairment at the time. The magistrate court's ruling held that due to mental impairment the victim was incapable of consenting to sexual intercourse. Justice Majanja clarified that the decision of the magistrate was contrary to the Convention on the Rights of Persons with Disabilities and 'an affront to the dignity of Persons with Disabilities to label any person as mentally retarded and declare them incapable of making a free choice to engage in sexual intercourse on that basis.'<sup>51</sup> The correct interpretation of the Sexual Offences Act according to Justice Majanja, is to require proof beyond reasonable doubt that the mental impairment rendered the complainant incapable of consenting at the time the act of penetration is committed'<sup>52</sup> The existence of impairment alone does not amount to incapacity to consent, this initial approach of the prosecution and magistrate viewed the complainant as an object of social project rather than a subject capable of having rights according to Justice Majanja. This judicial interpretation is consistent with Convention on the Rights of Persons with Disabilities and gives effect to the provisions of Article 12 on legal capacity.<sup>53</sup>

### **2.3 Gaps in the Implementation of the CRPD**

Despite the strides in the provisions highlighted above, there still exist crucial gaps towards the full implantation of *article 12* of the CRPD.

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<sup>49</sup> Section 37, *Persons with Disabilities Act* (2003)

<sup>50</sup> Article 26, *Mental Health Amendment Bill* (2015)

<sup>51</sup> *Wilson Morara Siringi v the Republic* (2014) eKLR.

<sup>52</sup> *Wilson Morara Siringi v the Republic* (2014) eKLR.

<sup>53</sup> *Wilson Morara Siringi v the Republic* (2014) eKLR.

### **2.3.1 The Constitution of Kenya 2010**

In qualifying who can be registered as a voter, *Article 83(1)* of the Constitution excludes persons ‘declared to be of unsound mind’ from eligibility.<sup>54</sup> This is in direct contradiction to Article 38 of the same constitution which provides the right for every adult citizen to be registered as a voter.<sup>55</sup> It is also contrary to the CRPD which ensures the capacity of PWD to have rights and exercise those rights on an equal basis with others. Thus, denial of the right to vote due to disability amounts to discrimination.

### **2.3.2 The Mental Health Act 2012**

This Act regulates the estate management of persons with mental disorder along with the care and custody of people suffering from mental disorder.<sup>56</sup> Under this act, a court process or the director of a mental health hospital can deprive a person of their legal capacity. Through *Section 26* the court is empowered to make orders for the management of the estate, and for the guardianship of persons suffering from a mental disorder. It gives these powers to any near relative or other suitable person.<sup>57</sup> Where there is no such persons the powers are given to the Public Trustee.<sup>58</sup>

Section 26 does not attain the standards of Article 12 of the CRPD. In vesting the power to manage the estate of PWDs in another person or granting guardianship rights over PWDs amounts to a regime of substituted decision making. Implementation of the CRPD requires the elimination of substituted decision making systems in favour of systems that give effect to the ‘will and preferences’ of PWDs. Further the violating section permits the partial and full restriction of legal capacity of a person with a ‘mental disorder’ based on the mere fact of disorder. This would amount to discrimination under article 12.

The Mental Health Act permits persons suspected of suffering a “mental disorder” to be involuntarily admitted.<sup>59</sup> This runs contrary to the statements of the CRPD Committee which uphold the right to free and informed consent to health care services provided to PWDs and

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<sup>54</sup> Article 83(1) *Constitution of Kenya* (2010).

<sup>55</sup> Article 38 (3) *Constitution of Kenya* (2010).

<sup>56</sup> Preamble, *Mental Health Act* (2012).

<sup>57</sup> Section 26, *Mental Health Act* (2012).

<sup>58</sup> Section 26(2), *Mental Health Act* (2012).

<sup>59</sup> Section 14, *Mental Health Act* (2012).

which requires laws on involuntary treatment and confinement to be repealed.<sup>60</sup> This is seen in the right to decide protected by *article 12* of the CRPD.

### **2.3.3 The Mental Health Bill 2018**

The Mental Health Amendment Bill of 2018 empowers the court to make a determination about the legal capacity of a person suffering from mental illness. Where the court determines a lack of legal capacity, it shall appoint a representative to manage their affairs.<sup>61</sup> This is a discriminatory provision that bases the deprivation of legal capacity on mental disability which is contrary to article 12. Further it permits a system of substituted decision-making where a representative makes decisions for the PWD also contrary to article 12.

### **2.3.5 The Children’s Act No. 8 of 2001**

The general rule under the Children’s Act is that where a guardian is appointed to a child, the guardianship arrangement is envisioned to end upon the attainment of the age of majority. *Section 107* of the Children’s Act provides that in exceptional circumstances the guardianship of a child may continue past 18 years of age. Where the child suffers from a mental or physical disability requiring assistance for their maintenance, managing of affairs or property this amounts to an exceptional circumstance permitting the extension of guardianship.<sup>62</sup> Under Article 12 of the CRPD this amounts to the deprivation of legal capacity on the basis of disability. The need for support does not extinguish the legal capacity for PWDs. The CRPD places a duty on states to provide the necessary supports in order for PWDs to exercise their legal capacity.

### **2.3.6 The Marriage Act 2014**

Several provisions in the Marriage Act violate the CRPD by explicitly denying persons with ‘mental conditions’ the right to marry on an equal basis with others. *Section 11(1)* of the Marriage Act declares that any union is not a marriage if consent is not freely given. According to the above stated Act a person suffering from a permanent or temporary mental condition cannot give the free consent required.<sup>63</sup> These provisions are discriminatory provisions against persons with mental disabilities in assuming that the disability amounts to incapacity. Further Section 12 of the same Act states that a marriage is voidable if either

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<sup>60</sup> Kenya National Commission on Human Rights, *Compendium on the Convention on the rights of persons with disabilities*, 2016, 68.

<sup>61</sup> Section 3k, Mental health (amendment) bill (2018).

<sup>62</sup> Section 107, *Children’s Act* (No.8 of 2001).

<sup>63</sup> Section 11, *Marriage Act* (2014).

party was subject to recurrent acts of insanity.<sup>64</sup> The CRPD Committee has instructed State parties to amend such laws in order to guarantee the exercise of civil rights for PWD.<sup>65</sup>

## **2.4 Conclusion**

Whereas there have been developments in the Kenyan legal framework in terms of implementation of article 12 of the CRPD, there still remain critical gaps. Provisions that deprive the legal capacity of persons with disability are seen in the Children's Act, The Civil Procedure Act and The Mental Health Act. Discriminatory provisions on the basis of disability persist in the Marriage Act as well as the constitution in contradiction of its non-discrimination provisions. Additionally there is still heavy reliance on a system of substituted decision making such as a court ordered guardian, next friend or representative. The standards of article 12 are therefore yet to be met by Kenyan statutes.

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<sup>64</sup> Section 12, *Marriage Act* (2014).

<sup>65</sup> Kenya National Commission on Human Rights, *Compendium on the Convention on the rights of persons with disabilities*, 2016, 66.

## CHAPTER 3

# SUPPORTED DECISION -MAKING: MAKING A CASE FOR KENYA'S LEGAL FRAMEWORK THROUGH A CANADIAN COMPARATIVE ANALYSIS

### 3.0 Introduction

Probing a plethora of Kenya's laws in the previous chapter uncovered that Kenyan statutes do not fully meet the standards of article 12 of the CRPD. This dissertation proposes that the adoption of supported decision-making into the legal framework will bring Kenya closer to the ideals of the CRPD. Article 12 envisions a transition from substituted decision-making systems to supported decision-making arrangements.<sup>66</sup>

This chapter seeks to explore how Kenya can adopt Supported Decision-Making (SDM) into its legal framework utilising the guidance of foreign legislation. As it stands the jurisdictions of Australia, Ireland, Sweden, Canada, Bulgaria, Croatia Israel, and Peru are leading the planning and implementation of supported decision-making. Canada particularly implemented SDM as early as 1993.<sup>67</sup> This chapter shall proceed to undertake an analysis of Canada's legal framework around supported decision making vis a vis that of Kenya.

### 3.1 The problem with Substituted Decision- Making

The term Substituted decision-making refers to systems in which the legal capacity of the person concerned is removed without their consent, and vested in a third party.<sup>68</sup> The characteristic features of substituted decision-making systems are; that the legal capacity is removed from a person; a substituted decision maker can be appointed against the person's will and; the substitute decisions are to be made in the "best interests" of the person rather than according to their 'will and preferences.'<sup>69</sup> The central concern of substituted decision

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<sup>66</sup> Article 12, *United Nations Convention on the Rights of Persons with Disabilities* (2006).

<sup>67</sup> <<https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>> on 5th January 2021.

<sup>68</sup> CRPD Committee, General Comment No 1

<sup>69</sup> Dhanda A, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' 34, *Syracuse Journal of International Law and Commerce*, 2006, 436.

making is for persons other than the individual concerned to make decisions in the best interest of the individual concerned.

In practice the wide discretion left to substitute decision makers has laid grounds for abuse. Common abuses in Kenya of guardianship laws and other substituted decisions making is by families or caregivers of persons with disabilities. The Courts stated that about 80% of guardianship cases filed with the Family Court Division involve applications for guardianship over elderly parents who may or may not be suffering from an age related disability. About half of the cases are not genuine as the main objective of the case is children trying to defraud their elderly parents.<sup>70</sup>

According to Article 12(4) of the CRPD the contemporary position of disability law requires the abolishment of substituted decision-making to be replaced with the various support options which give primacy to a person's will and preferences and respect human rights norms.<sup>71</sup>

### **3.2 History of Supported Decision-Making**

Supported decision- making (SDM) is an approach where supporters assist an individual concerned to make his or her own decision or express his or her will. Supported decision-making does not refer to a single model but to a cluster of different models that can come in different variations.<sup>72</sup> The characteristic element is that the individual concerned is positioned at the centre of the decision-making. Necessary safeguards are also required to ensure that the supporter does not exert undue influence over the individual or entertain conflicts of interest.

In terms of implementing this approach, there is no single universally accepted model.<sup>73</sup> Salzman however, has managed to identify four primary characteristics of a SDM model. Most crucially is that the individual retains legal decision-making authority, that support relationships are entered into freely and terminated at will; that the individual participates in

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<sup>70</sup> The Kenya National Commission On Human Rights And The Open Society Initiative For Eastern Africa, *How To Implement Article 12 Of Convention On The Rights Of Persons With Disabilities Regarding Legal Capacity In Kenya: A Briefing Paper*, 2016, 30.

<sup>71</sup> Article 12(4), *United Nations Convention on the Rights of Persons with Disabilities* (2006).

<sup>72</sup> Mental Disability Advocacy Center, *The Right to Legal Capacity in Kenya*, March 2014, 8

<sup>73</sup> CRPD General Comment No.1, Article 12: Equal recognition before the law Committee on the Rights of Persons with Disabilities, 31 March–11 April 2014.

decision-making actively; and that decisions made with support are legally enforceable generally.<sup>74</sup>

Historically, the concept of Supported Decision-Making (SDM) stemmed from a movement by disability organisations in Canada in the 1990's. The movement sought to overcome the barriers preventing persons with disabilities from being self-determining citizens and particularly persons with intellectual disabilities. The objections were especially with regard to the removal of the legal right to make decisions by appointing guardians and financial administrators.<sup>75</sup> The concept of Supported Decision Making was aimed at providing support to persons with intellectual disabilities in order for them to make decisions and communicate their choices.<sup>76</sup>

Supported decision-making finds its motivation from a rights based angle. According to the rights-based arguments if there is the possibility for a person to make decisions about their own life with support, then such appropriate support should be provided and their subsequent decisions respected.<sup>77</sup> This will enable individuals to exercise their legal capacity to its fullest possible extent.

The Canadian Association for Community Living Taskforce wrote the first clearly articulated principles of SDM in their report on Alternatives to Guardianship in August 1992. These principles were refined overtime. From 1993 SDM was recognised through legislation in some Canadian provinces such as British Columbia. This marked the first codification of Supported Decision-Making (SDM). The SDM conceptual framework established that personal autonomy could be expressed through others and not strictly independently.<sup>78</sup>

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<sup>74</sup> Kohn N, Blumenthal J and Campbell A, 'Supported Decision-Making: A Viable Alternative to Guardianship?' 117(4), *Penn State Law Review*, 2013, 1128.

<sup>75</sup> Browning M, Bigby C and Douglas J, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' 1 *Research and Practice in Intellectual and Developmental Disabilities*, 2014, 5.

<sup>76</sup> Browning M, Bigby C and Douglas J, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' 1 *Research and Practice in Intellectual and Developmental Disabilities*, 2014, 5.

<sup>77</sup> Davidson G, Kelly B, Macdonald G, Rizzo M, Lombard L, Abogunrin O, Clift-Mathews V, Martin A, 'Supported decision making: A review of the international literature' 38, *International Journal of Law and Psychiatry*, 2015.

<sup>78</sup> Browning M, Bigby C and Douglas J, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' 1 *Research and Practice in Intellectual and Developmental Disabilities*, 2014, 35.

SDM was thus proposed as an alternative to the existing modes of substituted decision-making.<sup>79</sup> The decisive feature distinguishing the two models is the central concern of SDM which is to give effect to the will and preferences of the person concerned. A further clarifying distinction was drawn by the International Disability Caucus. It highlighted that Supported Decision-Making can range from zero to 100 per cent. This essentially means that Supported Decision-Making could achieve what Substituted Decision-Making does with 100 percent support. However unlike Substituted Decision-Making, SDM is dynamic and a need for 100 per cent support could be incrementally reduced to a lower percentage.<sup>80</sup>

### **3.3 Justification for Comparative Analysis**

Being a pioneer in Supported decision-making (SDM), Canada is used in this paper as a benchmark for its implementation. Canada is credited with the development of the concept of supported decision-making and has since developed a wide legal jurisprudence on the subject matter. This is especially relevant to the Kenyan context which is comparably a common law jurisdiction.

### **3.4 Concerns on Supported Decision-Making**

Despite its appeal, the call for Supported Decision-Making (SDM) has raised significant policy and practical questions. Scholars have pointed to the equal risk in Supported Decision-Making as with substituted decision-making for legitimising potential exploitation and abuse. Legally recognising supporters may allow third parties that are largely unaccountable to influence the decisions of Persons With Disabilities improperly, thereby disempowering them.<sup>81</sup> SDM may thus subject Persons With Disability to new forms of coercion which undermine the Human Rights it seeks to protect. To ensure that such arrangements are truly consensual, Supported Decision-Making systems will need to ensure the safeguards provided in Article 12 (4) are complied with.<sup>82</sup>

Other concerns arise from the question of PWD that lack supports around them. SDM arrangements are based on relationships of trust. However not all persons that would benefit from SDM agreements have close relationships with people capable of being a trusted

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<sup>79</sup> Kohn N, Blumenthal J and Campbell A, ‘Supported Decision-Making: A Viable Alternative to Guardianship?’ 117(4), *Penn State Law Review*, 2013, 1128.

<sup>80</sup>Series L and Nilsson A, ‘Article 12 CRPD: Equal Recognition before the Law’ in Bantekas I, Stein MA and Anastasiou D *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, 2018.

<sup>81</sup> Kohn N, Blumenthal J and Campbell A, ‘Supported Decision-Making: A Viable Alternative to Guardianship?’ 117(4), *Penn State Law Review*, 2013

<sup>82</sup> Article 12(4), *United Nations Convention on the Rights of Persons with Disabilities* (2006).

associate or representative. Supported Decision-Making is largely understood in conjunction with the element of family involvement. Family members often serve as the closest support of the person concerned. This makes it particularly a problem for people with intellectual disabilities, who have been cut off from family and the normal community engagement or who are living longer than their parents who predecease them.<sup>83</sup> In such instances it would be essential for governments to step in and dedicate funding to the provision of supports and assistance to individuals, to develop support networks particularly those who are isolated.<sup>84</sup>

Practical considerations include the resources required to implement a system of supports. In response to this concern disability rights scholars have argued the current decision-making systems such as guardianship and court appointed next friends involve the same amount of costs. Funding should therefore be redirected to implementing a system of SDM.

### **3.5 Supported Decision-Making in Canada**

Supported decision-making (SDM) in Canada is anchored in three different legislation. The Representation Agreement Act contains an SDM model which explicitly codifies supported decision-making. Secondly the duty to accommodate provided in Canadian human rights law such as the Canadian Charter on Rights and Freedoms. Finally the Alternative- Course Of Action in Canadian guardianship laws which indirectly provides for Supported Decision-Making.

#### **3.5.1 The Representation Agreement Act**

The Representation Agreement Act was enacted in 1993 in British Columbia and is the first Act in the world to provide a legal basis for Supported Decision-Making. The Act empowers individuals to formalise a support relationship between two or more adults through a contractual agreement without the courts involvement. Under the agreement the person deciding can nominate other people (associates) to make decisions with them.<sup>85</sup> Decisions may be related to health, personal care, financial decision-making, and legal affairs.<sup>86</sup> The

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<sup>83</sup> Stainton T, 'Supported decision-making in Canada: principles, policy, and practice' *Research and Practice in Intellectual and Developmental Disabilities*, 2015, 6 -< <http://dx.doi.org/10.1080/23297018.2015.1063447>> on 5<sup>th</sup> January 2021.

<sup>84</sup> Kerzner L, 'Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective' In *From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century*, British Columbia, April 2011, 71.

<sup>85</sup> <<https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>> on 5th January 2021.

<sup>86</sup> Gooding P, 'Supported Decision-Making: A Rights Based Disability Concept and its Implications for Mental Health Law' 20(3) *Psychiatry, Psychology and Law*, 2013.

Representation Agreement signals to third parties such as; doctors, financial institutions and service providers that the individuals network of people were given the authority to assist in the making of decisions and to represent the individual concerned in certain matters.<sup>87</sup> The benefits of this arrangement are that it is a simple and inexpensive means of support.

Under the Representation Agreement Act, envisions two differing types of Representation Agreements that can be created. These are set out in *section 7* and *section 9* of the act which define the scope of powers of a representative. Section 7 sets out the Standard Powers and includes the management of financial affairs; health care; personal care; and obtaining legal services and legal instructions.<sup>88</sup> These agreements are commonly referred to as ‘section 7 agreements and their mandate is routine decisions.’<sup>89</sup> Decisions beyond the ambit of section 7 include the purchase or sale of real property or refusal of life-supporting care.<sup>90</sup> This Section requires two witnesses and does not require legal consultation or notarisation and has no upfront or specific test of capability. A person may create a section 7 agreement despite lacking the capacity to enter into contracts or manage their personal or financial affairs.<sup>91</sup>

Section 9 of the Act has a broader set of powers and more stringent criteria for establishing an agreement. There is no role of supporter; the role of the representative is not to help in decision-making but to undertake the activities they are authorized to do. These powers include: a binding authority to refuse health care including life supporting care; authority to deal with “restricted” types of health care including electroconvulsive therapy, abortion, etc.; making arrangements for minor children; consent to health care you want when well but may refuse when ill; and power to physically restrain or move you when necessary and even if you object.<sup>92</sup>

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<sup>87</sup> Secretariat for the Convention on the Rights of Persons with Disabilities, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, 2007, 90.

<sup>88</sup> Section 7, *Representation Agreements Act* (1993).

<sup>89</sup> Kerzner L, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ In *From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century*, British Columbia, April 2011, 38

<sup>90</sup> Kerzner L, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ In *From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century*, British Columbia, April 2011, 38.

<sup>91</sup> Kerzner L, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ In *From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century*, British Columbia, April 2011, 39.

<sup>92</sup> Section 9, *Representation Agreements Act* (1993).

Setting up a Representation Agreement under Section 9 requires the consultation of a lawyer who may also act as the witness. It also requires that the individual making the agreement is capable of understanding the nature of the agreement and the effect of the authority he or she is giving to the representative. This requirement that the individual understands the powers conferring on the representative would preclude those with permanent, severe intellectual impairment from accessing the powers found in Section 9 of the Act. The section 9 agreement evidently confers more severe powers on the representative. It is similar to a substituted decision making arrangement in that the will and preference of the individual may be overridden.

## **Strengths**

The key strengths of the Act include its low cost and relatively straightforward means of setting up. There is also the ability for the instruments to be adapted to the unique needs of the person. The basis for representation is a trusting relationship between the person requiring support and their representative and, at least under Section 7, the traditional requirement to formally express understanding of the nature and effect of decisions is removed.<sup>93</sup>

From this, it is evident that the Representation Agreement Act recognizes that a black and white notion of full vs. no capacity is better regarded as shades of grey with different levels of capacity. The design of the Act was to create a flexible arrangement where a person could receive different degrees of assistance in making decisions with substitute decision-making being a last resort.

### **3.5.2 Human Rights Laws and the Duty to Accommodate**

#### **The Canadian Charter of Rights and Freedoms 1982**

The Canadian Charter of Rights and Freedoms applies to the Canadian Parliament and government; as well as each provincial legislature and government as stated in *section 32(1)* of the Charter.<sup>94</sup>

A prominent feature of Canadian human rights law and jurisprudence is the duty to accommodate.<sup>95</sup> The courts have stated that ‘Accommodation’ is carrying out the necessary

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<sup>93</sup> Stainton T, ‘Supported decision-making in Canada: principles, policy, and practice’ *Research and Practice in Intellectual and Developmental Disabilities*, 2015, 6 -< <http://dx.doi.org/10.1080/23297018.2015.1063447>> on 5th January 2021.

<sup>94</sup> Section 32, *Canadian Charter of Rights and Freedoms* (1982).

actions in the circumstances to avoid discrimination.<sup>96</sup> The duty to accommodate is thus closely linked to the prohibition on discrimination. This is evident in *Section 15* of the Canadian charter which enshrines the right to non-discrimination on the basis of mental or physical disability and equality.<sup>97</sup> The Supreme Court in *Eldridge v. British Columbia* of Canada interpreted the equality and non-discrimination clause to include a duty to make reasonable accommodation up to the point of undue hardship.<sup>98</sup> The court held that a lack of positive action towards ensuring the equal benefit by disadvantaged groups from services offered to the general public can amount to discrimination.<sup>99</sup> This places a positive duty on the State to ensure persons with disability are accommodated. It amounts to a similar obligation placed by the CRPD to provide ‘support’ to PWD.

A fundamental principle of the duty-to-accommodate is that the duty has to be individualized. This was conveyed by the Supreme Court of Canada in *Nova Scotia v. Laseur*.<sup>100</sup> The Supreme Court recognized that accommodation must respond to individual needs and must be implemented on case to case basis making it a highly individualized process that.<sup>101</sup> This means that accommodating a person with an intellectual disability may look different to accommodating an individual with an acquired brain injury and so on.<sup>102</sup>

### **Limitations of the Duty to Accommodate**

The duty to accommodate in Canadian law however, is a limited duty. The Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada* introduced the point of undue hardship. In the context of PWD, reasonable accommodation is requires service providers to provide Persons with Disability the same access to services as those without disabilities. However the court held that this duty terminates at the point the service provider

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<sup>95</sup> Kerzner L, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ In *From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century*, British Columbia, April 2011, 39.

<sup>96</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*(1999) Supreme Court of Canada.

<sup>97</sup> Section 15, *Canadian Charter of Rights and Freedoms* (1982).

<sup>98</sup> *Eldridge v. British Columbia* (1997) Supreme Court of Canada.

<sup>99</sup> *Eldridge v. British Columbia* (1997) Supreme Court of Canada.

<sup>100</sup> *Nova Scotia (Workers’ Compensation Board) v. Laseur* (2003) Supreme Court of Canada.

<sup>101</sup> Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate*, 2000.

<sup>102</sup> Kerzner L, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ In *From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century*, British Columbia, April 2011, 69.

experiences undue hardship.<sup>103</sup> The duty to accommodate is thus limited up to the point of hardship.

Additionally, once the state provides a benefit to the population, it has an obligation to do so in a non-discriminatory manner. The limitation is this obligation does not extend to providing services they were not already providing. This was demonstrated in the case *Auton (Guardian ad litem of) v. British Columbia*. In this case, the parents of autistic children alleged that the failure to provide an emerging form of therapy amounted to discrimination contrary to the duty to accommodate. The Chief Justice held that the government was not compelled to provide such therapy by the equality and non-discrimination provision. Its duty to accommodate was limited to ensuring that benefits already provided by the state are conferred in a non-discriminatory manner.<sup>104</sup>

### **3.5.3 Alternative Course of Action in Guardianship Laws**

#### **Substitute Decisions Act 1992**

Canadian Guardianship laws underwent reform which incorporated Supported Decision-Making. An Alternative Course of Action prohibits a court from appointing a guardian if an *alternative course of action* exists. One such statute is the Substitute Decisions Act of Ontario, Canada. The law sought to respond persons with intellectual and cognitive disabilities primarily.

The Ontario Legislative Assembly adopted the Alternative Course of Action to guardianship provision in the Substitute Decisions Act in 1992.<sup>105</sup> The provision is with respect to court-appointed guardianship applications relating persons and to property. The provisions specify that supports are a legally recognized alternative course.<sup>106</sup> The provision was designed to address the concerns that persons with significant intellectual, cognitive and psychosocial disabilities were falling too easily under guardianship.<sup>107</sup>

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<sup>103</sup> *Council of Canadians with Disabilities v. VIA Rail Canada Inc* (2007) Supreme Court of Canada.

<sup>104</sup> *Auton (Guardian ad litem of) v. British Columbia* (2004) Supreme Court of Canada.

<sup>105</sup> *Substitute Decisions Act* (1992).

<sup>106</sup> Bach M, Park P and Kerzner L, 'Lessons Learned from the Canadian Experience: Supported Decision-Making Models' The Supported Decision-Making Webinar Series Presented by Quality Trust for Individuals with Disabilities, March 26 2014.

<sup>107</sup> <<https://communitylivingontario.ca/wp-content/uploads/2017/08/Coalition-Brief-to-LCO-Oct-2014-final.pdf>> on 5<sup>th</sup> January 2021.

### **Limitations of Alternative Course of Action**

The Alternative Course of Action has several limitations. It is not a formal codification of supported decision-making but rather a backdoor route through which supported decision-making is permissible. The Government did not legally recognise people's support networks and other assistance which leaves them to operate largely informally.

Additionally the prohibition only affects court-appointed guardianship ignoring statutory guardianship or the appointment of substitution decision makers through the Health Care Consent Act. This in effect maintains Substitute Decision Making as a prominent reality.<sup>108</sup>

### **3.6 Conclusion**

Canada's most successful codification of Supported decision-making into its legal regime was The Representation Agreement Act. This can serve as useful guidance to achieve the same in the Kenyan context. However Canada's obligations under The CRPD, differs to Kenya's. Canada's declaration and reservation to Article 12 permits the retention of substitute decision making regimes. Kenya will have to go further than Canada in eliminating substituted decision-making entirely and replacing it with SDM in order to comply with its obligations under the CRPD.

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<sup>108</sup><<https://communitylivingontario.ca/wp-content/uploads/2017/08/Coalition-Brief-to-LCO-Oct-2014-final.pdf>> on 5<sup>th</sup> January 2021.

## CHAPTER 4

### CONCLUSIONS AND RECOMMENDATIONS

#### 4.0 Conclusions

This paper has discussed the Kenyan legal framework on disability based on article 12 of the Convention on the Rights of Persons with Disabilities (The CRPD) as the benchmark. Having found as hypothesised, that Kenya's legal framework does not fully meet the standards set out by article 12, this paper proposes the concept of supported decision-making as a remedy to fulfil the requirements of article 12.

Chapter one established the basic structure of the paper. It gave a background to the problem of legal capacity for Persons with Disability as well as the theoretical basis for the arguments in this paper. The Human Rights Theory of Disability which argues that all human rights should apply equally even to Persons with Disability is the foundation of the CRPD and the basis of this paper.

The paper then sought to answer the question of whether the laws in Kenya are consistent with Article 12 of the CRPD. It was found that the standards of article 12 of the CRPD require stricter measures than have been implemented in Kenya. The substituted decision-making provisions found in section 107 of the Children's Act and section 26 of the mental health act are not in line with the Article 12 of the Convention. Discriminatory provisions on the grounds of disability persist in the Marriage Act and the outlier article 83(1) of the constitution. This is also inconsistent with article 12 of the CRPD.

The ensuing chapter sought to discuss the concept of Supported Decision-Making and highlight the best practices in countries that have implemented this approach. This involved a finding that supported decision making comes in various models which give effect to the will and preferences of Persons with Disability. This paper made the case that the Canadian model of Supported Decision-Making in the Representation Agreement Act would be beneficial in the context of Kenya. It would move towards meeting the obligations under the Convention and giving effect to the non-discrimination and equality provisions envisioned by the Kenyan constitution in article 27. This chapter was followed by conclusions and recommendations.

## **4.01 Outdated Provisions**

Kenya's laws maintain provisions that represent an outdated perception of Persons with Disability where disability equates to incapacity. The Marriage Act prohibits persons with mental disability from entering into a valid marriage declares that suffering from attacks of mental illness makes a marriage voidable. This violates the Civil right of PWDs to marry and amounts to discrimination on the basis of disability. The children's Act and the Mental Health Act allow for the legal capacity of persons with disability to be deprived through guardianship. These outdated laws need to reflect the contemporary understanding of PWDs as holders of rights on an equal basis with others.

## **4.02 Inadequate legal framework on Supported Decision-Making**

To date the Kenyan legal framework lacks any provisions on supported decision-making which as highlighted in this paper is an important element in the achievement of article 12 of the CRPD. It is however acknowledged that the government of Kenya expressed commitment to moving away from substituted decision-making towards SDM in its report to the Committee on the Rights of Persons with Disabilities in 2011.<sup>109</sup> This is a promise in the right direction however yet to be implemented.

## **4.1 RECOMMENDATIONS**

### **4.1.1 Legal Reforms**

Existing Legislation which deprives the legal capacity of Persons with Disabilities on the basis of disability should be repealed. The violating provisions identified in chapter 2 include *Section 26* of the Mental Health Act and *Section 107* of the Children's Act for enforcing substituted decision-making regimes. These provisions should be repealed in efforts towards the elimination of all forms of substituted decision-making in accordance with the CRPD. *Sections 11 and 12* of the Marriage Act and *Article 83(1)* of the Constitution which violate the non-discrimination provision of the CRPD and deprive the legal capacity to enter into marriage and the right to vote on the basis of disability should be repealed and replaced with disability neutral laws.

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<sup>109</sup> Initial Report to the CRPD Committee, 31 August 2011, 26.

### **4.1.2 Codification of Supported Decision-Making**

Supported Decision-Making has been established as a viable alternative to substituted decision-making regimes that avoids stripping Persons with Disability of their legal capacity. As substituted decision-making provisions are repealed in accordance with the CRPD, Supported Decision-Making should be given legal recognition.

#### **Legislation**

Legislation recognising Supported Decision-Making should be enacted. Provisions that are key to such Legislation include:

- *The recognition of the duty of the State to provide access to support.* The State has a duty to provide access to support necessary to enable PWD to exercise legal capacity. This should be guided by Article 12 (3) of the CRPD.
- *The recognition of Supported Decision – Making arrangements.* Supported Decision-Making comes in various forms. Legislation should provide at least two ways for the establishment of formal supported decision-making arrangements for adults. This should involve providing adults with access to persons recognized by third parties that will assist in decision making. This paper suggests codification of Supported-Decision Making modelled off the Section 7 and section 9 agreements provided under The Representation Agreement Act of British Columbia.
- *The establishment of Monitors:* Provision should be made for the appointment of ‘monitors’ of SDM arrangements. This should be guided by Article 12 (4) of the CRPD on necessary safeguards for Support systems.

#### **Statutory Guidance Framework on Supported Decision-Making**

The legislation on Supported Decision-Making should be accompanied by a Statutory Guidance Framework to guide the implementation of Article 12. A Statutory Guidance Framework is a comprehensive outline of procedures underpinning legislation as well as

detailing the substantive elements of the legislation.<sup>110</sup> This would benefit relevant parties such as police, healthcare professionals, judges and legal practitioners by aiding their understanding of supported decision making and how to implement it.

The statutory guidance would consist of:

- *A Preamble.* The preamble provides the background and rationale for legislation. Given that Article 12 is said to bring about a paradigm shift in disability law a preamble is necessary to explain the shift and enhance the appreciation and understanding of the law of legal capacity.
- *Key Definitions.* A statutory framework should generate definitions of key terms that are consistent with the CRPD. This serves to clarify conflated concepts such as legal capacity and mental capacity.
- *The Purpose and Principles.* Principles are essential in guiding the actions of actors. Supported decision making involves many parties such as the persons concerned, supporters, third parties and government among others. The purpose provides a clear statement that outlines the obligations of the government and other actors and the principles ensure that decision-making processes are truly supportive in character and not just in name.
- *The duties, powers and liabilities of the Parties.* A statutory framework should state clearly the duties and responsibilities of parties involved in the decision-making system and the extent of their authority.

#### **4.1.4 Advocacy**

The Government and interested parties should undertake mass public awareness campaigns geared towards ending the stigma around Persons With Disability that is entrenched in society. Public advocacy for the rights of PWD and especially the right to legal capacity is needed to bring the practices in the country up to speed with the state of disability law. This is necessary in reversing the traditional conceptions of disability and the misconceptions around the state of their rights that are still prominent in Kenya today.

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<sup>110</sup> The Working Group on Legal Capacity and Supported Decision Making, *a statutory framework for the right to legal capacity and supported decision making For Application in Provincial/Territorial Jurisdictions in Canada*, February 2014, 7.

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