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Genga, Shirley Anne Awuor

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SHIRLEY ANNE AWUOR GENGA

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LEGAL RESPONSES TO EMPLOYMENT DISCRIMINATION ON THE BASIS OF PSYCHOSOCIAL DISABILITIES: KENYA'S AND SOUTH AFRICA'S COMPLIANCE WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

SUPERVISOR: DR. MERYL DU PLESSIS

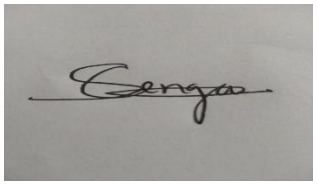
This thesis is presented in partial fulfilment for the Degree of Doctor of Philosophy in Law to the Faculty of Commerce, Law, and Management, University of the Witwatersrand.

May 2021

DECLARATION

I, Shirley Anne Genga, declare that this PhD thesis dissertation entitled, 'Legal responses to employment discrimination on the basis of psychosocial disabilities: Kenya's and South Africa's compliance with the convention on the rights of persons with disabilities', is my own unaided work. I have acknowledged, attributed, and referenced all ideas sourced elsewhere. I am hereby submitting it in partial fulfilment of the requirements of the degree of Doctor of Philosophy in Law at the Wits School of Law, University of the Witwatersrand, Johannesburg. I have not submitted this PhD thesis dissertation before for any other degree or examination to any other institution.

Shirley Anne Genga



DEDICATION

I dedicate my research to my mother who is no longer with us, but her work ethic, discipline and zeal for life lives on with all of us.

ABSTRACT

This thesis investigates whether Kenya and South Africa, as states parties to the CRPD, comply with its employment antidiscrimination provision which is enshrined in Article 27(1)(a). It focuses on the legal responses afforded to employees with psychosocial disabilities at CRPD level, as well as in the two domestic systems studied. Existing literature in Africa and further afield has mostly focused on employment discrimination against people with disabilities in general terms and not many studies have been comparative in nature. This research seeks to contribute to the development of laws that seek to prohibit and otherwise address discrimination against persons with psychosocial disabilities. It does so by critically analysing the CRPD antidiscrimination provisions and by then examining how two African countries have fared in complying with these aspects of the CRPD. This research relies on the social model of disability as lenses through which to engage critically with the antidiscrimination laws in both states and at CRPD level. It engages critically with the national Constitutions, legislation and case law of Kenya and South Africa. It also considers and reflects on commentaries from law and other disciplines in the social sciences, including sociology, psychology and disability studies. The text of the CRPD, its preparatory documents, General Comments by the CRPD committee applications and decisions by the CRPD Committee are also analysed. It is concluded that the laws in both Kenya and South Africa are based on medicalised, individual approaches to disability. These approaches not only affect who qualifies for protection from discrimination on the basis of disability, but filter through to aspects such as whether discrimination can be proven, the scope, application, and even the enforcement of antidiscrimination laws in both states. It is concluded that both Kenya and South Africa could improve the working definitions of disability adopted and applied, particularly in the context of psychosocial conditions. Both countries could also improve employees' access to expeditious, accessible forums. Furthermore, both jurisdictions, as well as the CRPD, could provide more guidance on the standard of proof complainants have to meet in order to prove discrimination. Kenyan law is unnecessarily restrictive in its requirements that only persons with disabilities who are registered may qualify as disabled for antidiscrimination purpose. In addition, Kenya also has to clarify the place of harassment and reasonable accommodation within its antidiscrimination framework. Finally, Kenyan legislation could expand the remedies courts are empowered to award, particularly to combat structural discrimination in employment policies and practices. South African law has to provide more clarity on the approach to discrimination on the basis of association with persons with psychosocial disabilities or conditions. While Kenya and South Africa have to address shortcomings and can improve their compliance with the CRPD in protecting persons with psychosocial disabilities or conditions from discrimination in employment, both jurisdictions have solid bases to work from in their respective Constitutions. Positive developments in mental health policy and access to mental health care are also crucial to employment outcomes.

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I would like to thank my supervisor, Dr. Meryl du Plessis, for her guidance, insight, patience, time and support throughout this project. I am also grateful for support of my father Prof. R.O Genga who consistently checked in on me and never lacked a word of encouragement, and my late mother Florence Genga who although is no longer with us steered me on with the example she left behind. In addition, I would like to thank my siblings whose support has been a blessing: Dr. Eugene Genga, Prof. Rodney Genga, Cheryl Genga, Dr. Yuval Genga, Chloe Genga and Pinky Genga.

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LIST OF ABBREVIATIONS

CRPD	Convention on the Rights of Persons with Disabilities
CESCR	The Committee on Economic, Social and Cultural Rights
KNCHR	Kenya National Commission on Human Rights Act and the Commission
SAHC	South Africa through the South African Human Rights Commission
OAU	Organization of African Unity
WHO	World Health Organization
WNUSP	World Network of Users and Survivors of Psychiatry
MNS disorders	Mental health, neurological, and substance
DSM-V	Diagnostic and Statistical Manual of Mental Disorders, 5th Edition
ICD-11	International Classification of Diseases 11th *Revision*
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
IDC	International Disability Caucus
PWD Act	Persons with Disability Act
ELRC	Employment and Labour Relations Court
KSMH	Kenya Society for the Mentally Handicapped
NCPWD	National Council for Persons with Disabilities
UDHR	The Universal Declaration of Human Rights
CCMA	Commission for Conciliation, Mediation and Arbitration
IMATU	Independent Municipal and Allied Trade Union and Another
ICESCR	International Covenant of Economic, Social and Cultural Rights
TAG	Technical Assistance Guidelines on The Employment of Persons with
ENUSP	European Network of (ex)Users and Survivors of Psychiatry
CJEU	Court of Justice of the European Union
BCEA	Basic Conditions of Employment Act
IDeA	Impact of Depression at Work Audit
EEA	Employment Equality Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
KEMRI	Kenya Medical Research Institute

CHAPTER ONE. INTRODUCTION

I. INTRODUCTION

In 2017 the World Health Organization (WHO) estimated that one in five people at the workplace experience a mental health condition, worldwide.[1] According to growing evidence worldwide, mental illness is a major contributor to the burden of disease and disability.[2] Five of the 10 leading causes of disability are mental health conditions.[3] Mental ill health is a universal phenomenon that cuts across different social and cultural divides. [4] It is as relevant in high-income countries as it is in low-income countries.[5]

Mental health challenges impact workplaces through increasing absenteeism, reduced productivity, and increased healthcare costs.[6] Many mental health conditions may affect the cognitive functioning of an affected person. These includes: attention, concentration, memory, reasoning, and problem-solving ability of an affected persons.[7]

The comparative difficulties psychosocial ill health presents in terms of expectations of conduct and accommodation needs, means that employers must be creative in order to find solutions for accommodating persons with psychosocial conditions.[8] Many employers are not willing or able to rise to this challenge.

Disclosure of a psychosocial disability is not usually met with empathy and support by employers and colleagues.[9] There is often a lack of understanding, ignorance, stigma and prejudice.[10] Employees with mental health conditions may find that once they disclose their conditions or their conditions become known in other ways, 'they experience discrimination

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[1] 'WHO Fact Sheet Mental Health in the workplace' 10 October 2017, available at *https://www.paho.org/hq/index.php?option=com_content&view=article&id=13739%3Aworld-mental-health-day-2017&catid=9485%3Amental-health-day&Itemid=42130&lang=en*, accessed on 26 January 2021.

[2] Gaston Harnois & Phyllis Gabriel *Mental health and work: Impact, issues and good practices* (2000) 1.

[3] Ibid.

[4] Dinesh Bhugra, Allan Tasman & Soumitra Pathare et al 'The Future of Psychiatry Commission – Authors' reply' (2018) 5:1 *The Lancet Psychiatry*; Drew N, Funk M, Tang S, et al. 'Human rights violations of people with mental and psychosocial disabilities: an unresolved global crisis' (2011) 378 *The Lancet Psychiatry* at 1664.

[5] Kaaren Mathias, Hira Pant & Manju Marella et al 'Multiple barriers to participation for people with psychosocial disability in Dehradun district, North India: a cross-sectional study' (2018) 8:2 *BMJ Open* at 1.

[6] Willene Holness 'The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32(3) *SAJHR* 510.

[7] Nene Ernest Khalema and Janki Shankar 'Perspectives on Employment Integration, Mental Illness and Disability, and Workplace Health' (2014) 2014 *Advances in Public Health* 2.

[8] Ibid.

[9] Willene Holness op cit note 6 at 510-511.

[10] Ibid; Shirley Genga 'The link between the right to live independently and to be included in the community for persons with psychosocial disability, and the right to work and employment: A critical analysis of Kenyan law' (2021) 8 *ADRY* 101 at 107.

from co-workers, feel socially marginalised, have to cope with negative comments from workmates, and have to return to positions of reduced responsibility'.[11]In addition, employers often make the assumption that persons with psychosocial disabilities not only require greater supervision, but are untrustworthy, unable to use initiative, and not able to appropriately deal with members of the public.[12] As a result of interpersonal and other related social difficulties, persons with psychosocial disabilities are often unable to thrive in and successful maintain employment.[13]

a) Defining psychosocial disabilities

This proposed research will use the term 'persons with psychosocial disabilities' to refer to 'persons who, regardless of self-identification or diagnosis of a mental health condition or mental illness,[14] are restricted from exercising their rights and barriers to participation including discrimination.[15] This restriction is done on the basis of an actual or perceived impairment.[16]The term 'psychosocial disability' highlights that the disabling effect of an individual's mental illness or 'mental health condition needs to be understood in its social context'.[17] Though, some member States still use the term 'mental disability' or psychiatric disabilities,[18] "psychosocial" disability is favoured within the disability community to refer to mental health conditions.[19] Further, 'mental illness' for the purposes of this research will

[11] Paul Schnabel 'Protecting and Including Vulnerable People in Times of Economic Crisis' in A Baumann & M Muijen (eds) *Mental Health and Well-being at the Workplace – Protection and Inclusion in Challenging Times* (2010) 9.

[12] Willene Holness op cit note 6 at 511.

[13] Ibid.

[14] "Condition" and "illness" will be used interchangeably for purposes of your research, although there may be technical differences between the two terms that may affect whether someone benefits from legal protection or not.; Willene Holness 'The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace'(2016) 32:3 *SAJHR* 510; Sheila Wildeman 'Protecting rights and building capacities: challenges to global mental health policy in light of the convention on the rights of persons with disabilities'(2013 Spring) 41: 1 *J Law Med Ethics* 48 ; George Szmukler et el 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37(3) *Int J Law Psychiatry* 246.

[15] Kaaren Mathias op cit note 5.

[16] Report of the United Nations High Commissioner for Human Rights 'Mental health and human rights' 31 January 2017 available at https://digitallibrary.un.org/record/861008#record-files-collapse-header, accessed on 26 April 2021; Kaaren Mathias op cite note 5.

[17] Kaaren Mathias op cite note 5.

[18] Mark Bell and Lisa Waddington (European network of legal experts in gender equality and non-discrimination) 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' December 2016 1-131 at 32; Kaaren Mathias op cite note 5.

[19] Sheila Wildeman 'Protecting rights and building capacities: challenges to global mental health policy in light of the convention on the rights of persons with disabilities' (2013) 41(1) J *Law Med Ethics* at 48 . It is even accepted by the Committee on the Rights of Persons with Disabilities that people with a 'mental illnesses are referred to as having a 'psychosocial disability'. George Szmukler, Rowena Daw, Felicity Callard 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37 *International Journal of Law and Psychiatry* 37 (2014) at 246. Additionally, according to World Network of Users and Survivors of Psychiatry (WNUSP), an organisation that participated actively in the negotiations of the *Convention on the Rights of Persons*

include all disorders that are recognised clinically in one of, or both the American Psychiatric Association's Diagnostic and Statistical Manual 5th Edition (DSM V)[20] and the 11th Revision of the WHO's International Classification of Diseases (ICD-11).[21] Additionally, in the discussion of legal provisions or papers, policy documents or reports, this proposal will use the language of the relevant documents in order to be precise. Consequently, the word mental illness, mental distress, madness, mental health conditions, mental disorders, mental health concerns, mental health disorders and mental health problems, mental ill health, mental disease, mental distress, madness or any similar language will be used to refer to psychosocial conditions. Also, the term 'persons with disabilities' will be used and not 'disabled people' or 'disabled persons'.[22]

Not all individuals who are affected by mental illness or mental health conditions may experience disability.[23] As a result, though persons using 'mental health services (current or potential users of mental health and community services), persons with mental health conditions and persons with psychosocial disabilities'[24] are three categories that may sometimes overlap, but are not synonymous. A user of mental health services may not have a mental health condition. Some persons with mental health conditions may face no restrictions or barriers to their full participation in society and are therefore not regarded as persons with psychosocial disabilities.[25] It should also be noted that 'psychosocial disability' can and has been used interchangeably with 'mental disability', but the former does not refer to intellectual disability, as 'intellectual impairment' is mentioned separately in the Convention on the Rights of Persons with Disabilities *(*CRPD).[26]

*with Disabilities (*CRPD), despite using the term mental impairment in the CRPD, the preferred terminology was "persons with psychosocial disabilities." The World Network of Users and Survivors of Psychiatry, 'Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities' February 2008 at 9, available at http://www.wnusp.net/index.php/wnusp-and-a-new-human-rights-treaty.html, accessed 26 April 2021.

[20] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (2013).

[21] World Health Organization *International Classification of Diseases* 11 ed (2019). While ICD-11 was adopted in 2019, it will only come into effect on 1 January 2022.

[22] Although there is no consensus among disabled persons themselves on the terminology, the Convention on the Rights of Persons with Disabilities has endorsed people-first terminology, in this case persons with disabilities. Meryl Candice du Plessis 'Access to work for disabled persons in South Africa: A rights critique' (2017) at 10.

[23] Nene Ernest Khalema op cit note 8.

[24] Report of the United Nations High Commissioner for Human Rights op cit note 16.

[25] Ibid.

[26] T Minkowitz 'Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities', in Bernadette McSherry and Penelope Weller(ed) *Rethinking Rights-Based Mental Health Laws* 2010 154.

In order to avoid conceptual confusion, this research will use the term psychosocial disabilities interchangeably with the term psychosocial conditions. Psychosocial conditions refer to mental health conditions that trigger legal protection, regardless of whether they qualify as disabilities.

b) Psychosocial disabilities in the Kenyan and South African in employment sector

Although mental health has become a national health priority in some countries, it is still an overlooked issue in most African countries.[27] In fact, 64 per cent of African countries do not have any mental health legislation or fail to adequately promote the rights of persons with mental illnesses.[28]

In Kenya the rights of persons with psychosocial conditions are often ignored or given little attention. This is fuelled by the misconceptions people have about such conditions. One in 20 Kenyans would prefer to take their family member with a psychosocial condition to a faith healer or witch doctor rather than seeking medical intervention.[29] This is fuelled by the fact that psychosocial conditions are believed to be as a result of a familial defect or witchcraft. [30]Many also are of the view that persons who self-identify or are diagnosed with mental disorders as a result of alcohol or substance abuse, are responsible for their own illness.[31] Besides that, there is not only a lack of awareness on mental health, but deep-rooted stigma and discrimination against persons with mental illness.[32] Consequently, persons with mental disorders are assumed to be less competent and unable to live productive lives.[33]

Notably, the most current national survey was in 2019 and it found that Kenya has national disability rate of 2.2 per cent.[34] However, it failed to capture psychosocial disabilities

[27] Grace-Cecile & Eya Obame 'Developing Mental Health Laws in Ghana, Kenya, and Zambia' (2017) 8 *Columbia Social Work Review* at 1.
[28] Ibid.
[29] Ibid at 39.
[30] (KNCHR) Kenya National Commission on Human Rights 'Silenced Minds: The Systematic Neglect of the Mental Health System in Kenya: A Human Rights Audit of the Mental Health System in Kenya' November 2011 at 38, available at *http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT*.pdf, accessed on 26 April 2021.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] It adopted the Washington Group short set of questions on disability in data collection. Questions on the six domains of disability (visual, hearing, mobility, cognition, selfcare and communication) were asked of persons aged five years and above while that of albinism was administered to everyone. See Kenya National Bureau of Statistics '2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics' 12 February 2020 at 12 and 394; Eastone Owino 'Status of disability in Kenya Statistics from the 2019 census background paper' May 2020 at 1 and 1.

as a disability category.[35] A 2017 WHO report on the prevalence of depression and anxiety disorders in Africa estimated that Kenya had 1.9 million persons who are clinically depressed, which constitutes 4.4 per cent of the total population.[36] It also indicated that there are 1.3 million cases of anxiety disorders, which constituted 3.1 percent of the total population at the end of 2016.[37] Worth noting, however, is that it is common for mental health cases to go unreported and undiagnosed, thus such figures just give a glimpse of the prevalence of mental health conditions in Kenya.[38]

There is no available accurate data on the employment of persons with disabilities in Kenya. As a result, it is not possible to get a holistic view of the prevalence of psychosocial conditions in Kenya, nor on access to and maintenance of employment. Statistics on disability are not always available and this is part of the overall challenges of planning, implementing and monitoring mental health and antidiscrimination policies.

In South Africa the treatment of persons with psychosocial disabilities is similar to what is experienced in Kenya. Although there have been numerous advancements in disability discourse in South Africa, persons with mental illness are among the most disadvantaged groups.[39] They experience stigmatisation, discrimination,[40] marginalisation, and victimisation.[41] In fact, according to Swanepoel, these challenges are caused, in part, by the failure of the South African society to recognise the rights of persons with psychosocial disabilities as being equal to those of able-bodied persons.[42]

Further, similar to Kenya there are no current and accurate figures on the number of persons with psychosocial conditions. A Statistics South Africa (Stats SA) report, using the Washington Group Model,[43] estimated a disability prevalence of 7.5 per cent, as derived from

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[35] Ibid.

[36] World Health Organization 'Depression and Other Common Mental Disorders Global Health Estimates' 2017 at 17 *http://www.who.int/mental_health/management/depression/prevalence_global_health_estimates/en/* , accessed on 30 March 2021.

[37] Ibid.

[38] Meggie Mwoka 'Mental Health in Kenya: The Unspoken Agenda Global Health' Next Generation Network 7 November 2017, available at *http://ghnetwork.org/article/mental-health-in-kenya-the-unspoken-agenda*, accessed on 26 April 2021.

[39] Manfred Swanepoel 'Human Rights that Influence the Mentally Ill Patient in South African Medical Law: A Discussion of sections 9; 27; 30 and 31 of the Constitution**'** (2011) 14(7) *PER / PELJ* 2011 at 1-2.

[40] Ibid.

[41] Faraaz Mahomed 'Stigma on the basis of psychosocial disability: a structural human rights violation' (2016) 32 *SAJHR* 490.

[42] Ibid.

[43] For more on the Washington Group Model on Disability Statistics see Meryl Candice du Plessis *Access to work for disabled persons in South Africa: A rights critique* (2017) 207-208.

the 2011 South African National Census. This, however is not helpful as it excluded, among others, persons with psychosocial disabilities.[44] Additionally, it worth noting that in the 'Stats SA 'Disability Profile', it is implied the census was not able to determine with authority what were the causes of the unemployment experienced by disabled persons.[45]

The 2017 WHO report on the burden of depression and anxiety disorders in Africa, estimated that South Africa had 2.4 million persons diagnosed as clinically depressed, which represents 4.8 per cent of the total population,[46] and 1.7 million cases of anxiety disorders, which represents 3.4 percent of the total population at the end of 2016.[47] Nevertheless, these figures also do not provide a holistic picture as it only covers depression and anxiety disorders.

When it comes to employment rates of persons with disability, estimations in South Africa suggest that on average, eight in ten persons are unemployed.[48] Also, although there are no exact figures on the representation of persons with psychosocial disabilities in the workplace in South Africa, unlike Kenya there exist figures that at least represent persons with disabilities in the workplace, in general. According to the 20th Commission for Equity Employment Report 2019-2020,[49] not only did the representation of Persons with Disabilities in the total workforce remain at constant low of 1 per cent of the workforce for the previous three years (2017, 2018, and 2019), but persons with disabilities are grossly underrepresented in all six levels of employment. [50] These figures are alarming; however, they also do not paint a clear enough picture as they are not disaggregated according to the type of impairments persons with disabilities experience. Thus, if employers in South Africa prefer to employ persons with physical disabilities over persons with psychosocial disabilities in order to meet employment equity targets, the lack of disaggregation does not shed light on this issue. [51] These statistics

[44] White Paper on the Rights of Persons with Disabilities (Published in 9 December 2015) 23.
[45] Du Plessis op cit note 43 at 208.
[46] Holness op cit note 6.
[47] Ibid.
[48] (SAHC) South African Human Rights Commission 'Research Brief on Disability and Equality in South Africa' (,2013 – 2017), available at *https://www.sahrc.org.zIbid a/home/21/files/RESEARCH%20BRIEF%20ON%20DISABILITY%20AND%20EQUALITY%20IN%20SOUTH %20AFRICA%202013%20to%202017.pdf,* accessed on 22 February 2021.
[49] Commission for Employment Equity (CEE) '20th Commission for Employment Equity Annual Report (2019-2020), available at, http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf, accessed on 22 February 2021.
[50] Ibid at 35.
[51] Holness op cit note 6 at 13.

are also based on reports submitted by 'designated employers', as defined in the Employment Equity Act 55 of 1998 (the EEA).

c) The right to work

The right to work and employment for persons with mental illness is significant for social integration.[52] The right is protected in the International Covenant of Economic, Social and Cultural Rights (ICESCR),[53] the Universal Declaration of Human Rights (UDHR),[54] the African Charter on Human and Peoples' Rights,[55] and the International Labour Organisation's Convention concerning Vocational Rehabilitation and Employment (Disabled Persons).[56]

Further, the right to work and employment is provided for in Article 27 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The CRPD was passed by the General Assembly of the United Nations in December 2006.[57] The treaty is an important international instrument when it comes to protecting the rights of persons with psychosocial disabilities in employment. Importantly, the CRPD is based on a social model of disability, as it views disability as part of human diversity and not as a pathological condition.[58]

Prior to the CRPD, no other human rights instrument contained an explicit right for all persons with disabilities to live as equal citizens.[59] The treaty has in fact been hailed as the most revolutionary international human rights document ever created that applies not only to

[52] Renuka Nardodkar & Soumitra Pathare et al 'Legal protection of the right to work and employment for persons with mental health problems: a review of legislation across the world' (2016) 28 (4) *International Review of Psychiatry* 375.

[53] Article 6, 7 and 8 of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at *http://www.refworld.org/docid/3ae6b36c0.html*, accessed on 26 April 2021.

[54] Article 23.1 of the General Assembly, 'Universal Declaration of Human Rights', 10 December 1948, 217 A (III), available at *http://www.refworld.org/docid/3ae6b3712c.html*, accessed on 26 April 2021.

[55] Article 1 of the Organization of African Unity (OAU), 'African Charter on Human and Peoples' Rights ("Banjul Charter")', 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at *http://www.refworld.org/docid/3ae6b3630.html*, accessed on 26 April 2021.

[56] 1983 (No. 159) available at *http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312304* , accessed on 26 April 2021.

[57] United Nations Department of Economic and Social Affairs Disability, 'Convention on the Rights of Persons with Disabilities (CRPD)', available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html, accessed on 11 October 2021.

[58] Damian John Viviers *Mental Health and the World of Work: A Comparative Analysis of the Legal Frameworks Governing Categories of Mental Health Conditions* (unpublished PHD Thesis, University of The Free State, 2016) at 42-43.

[59] Elizabeth Kamundia 'Contemporary Housing Issues in a Changing Europe Independent Living for People with Disabilities in Kenya: Charting the Way Forward' in Padraic Kenna(ed) *Contemporary Housing Issues in a Globalized World* (2014) ch 7.

disabled persons in general, but also to persons with psychosocial disabilities.[60] In addition, the fact that disabled persons' organisations, including the World Network of Users and Survivors of Psychiatry (WSNUP), were actively involved in the drafting and negotiations of the CRPD, was a plus for persons with psychosocial disabilities.[61] Significantly, it is accepted by the Committee on the Rights of Persons with Disabilities (henceforth the Committee) that persons with psychosocial disabilities fall under the Convention.[62]

The right to employment is protected in art 27 of the CRPD. The article recognises that every person with a disability has the right to work.[63] It acknowledges that employment is vital to the self-worth of persons with disabilities. Further, art 27 of the CRPD places specific obligations on governments to eliminate of discrimination in the workplace and to promote equal access to employment. Article 27 lays the foundation upon which persons with psychosocial disabilities can not only get access to, equal treatment and the opportunity to thrive in the work environment. Key measures outlined in art 27(1) (a) include the prohibition of discrimination on the basis of disability with regard to all the different stages of employment, from the recruitment stage all the way to career advancement.[64] In addition, "discrimination on the basis of disability" is defined in the CRPD as:

> 'Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'[65]

Furthermore, General comment No. 6 [66] provides that discrimination can take place individually or simultaneously, and in four ways, which include: direct discrimination, indirect discrimination, denial of reasonable accommodation and harassment.[67] State parties are under

[60] Michael L Perlin 'Striking for the Guardians and Protectors of the Mind: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law' (Spring 2013) 117(4) *Penn State Law Review* at 1173.
[61] George Szmukler et el 'Mental health law and the UN Convention on the rights of persons with disabilities' (May 2014) 37:3 *Int J Law Psychiatry* 246.
[62] Ibid.
[63] Ibid.
[64] SAHC op cit note 48 at 13.
[65] Article 2 of the UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: *http://www.refworld.org/docid/45f973632.html*, accessed 12 April 2021.
[66]. UN Committee on the Rights of Persons with Disabilities 'General comment No. 6 Equality and Non-Discrimination *(Art 5 of the Convention)* (2018) CRPD/C/GC/6.
[67] Ibid.

the obligation to promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination based on their disability.[68]

Nevertheless, although the main focus of the proposed research will be on compliance with art 27(1)(*a*), other Articles that impact on the planning and implementation of this Article will also be discussed. Examples include Articles that deal with access to education,[69] healthcare,[70] statistics and data collection,[71] access to justice,[72] and adequate standard of living and social protection.[73]

Kenya ratified the CRPD on 5 May 2008. However, it did not sign the Optional Protocol, which allows the Committee to receive individual complaints from ratifying countries.[74] On the other hand**,** South Africa ratified both the CRPD and its Optional Protocol on 30 November 2007.[75] Therefore, both countries have a wide range of responsibilities and are obligated to respect and implement the rights of persons with disabilities as required by the Convention.[76] To take all appropriate measures, to modify or abolish existing laws, regulations, customs and practices that discriminate against persons with disabilities,[77] and to eliminate discrimination on the basis of disability by any person, organisation or private enterprise.[78] Legislation enacted in Kenya and South Africa in relation to persons with psychosocial disabilities must adhere to the various articles and demands of the CRPD. Additionally, where legal protections do not yet exist, that ought to be created to give effect to the rights protected by the CRPD.

The CRPD has been praised for The CRPD has put the spotlight on the positive obligations of States Parties to facilitate the enjoyment of rights for persons with disabilities.[79] As a result, it

[68] Article 4 and 5 of the CRPD.
[69] Article 24 of the CRPD.
[70] Article 25 of the CRPD.
[71] Article 31 of the CRPD.
[72] Article 13 of the CRPD.
[73] Article 28 of the CRPD.
[74] Global Disability Rights Now 'Formal Operation of the CRPD in Kenya' available at <*http://www.globaldisabilityrightsnow.org/law/kenyacrpd*>, accessed 23 February 2021.
[75] Ilze Grobbelaar-du Plessis 'Africa Disability Year Book: South Africa' available at *http://www.adry.up.ac.za/index.php/2013-1-section-b-country-reports/south-africa*> accessed 27 February 2018.
[76] MC Marumoagae 'Disability Discrimination and the Right of Disabled Persons to Access the Labour Market' (2012) 15(1) *PER / PELJ* 354.
[77] Article 4(a) of the CRPD.
[78] Article 4(e) of the CRPD.
[79] Beverley Clough ''People like that': Realising the Social Model in Mental Capacity Jurisprudence' (2014) 23(1) *Medical Law Review* 51 at 52.

has been praised for securing rights to persons with disabilities.[80] Despite these promises of equality and dignity, much still has to change in both Kenya and South Africa. Neither country has reliable data on the employment of persons with psychosocial disabilities or even persons with disabilities in general, a requirement set by article 31 of the CRPD.[81] Some discriminatory laws are still entrenched and are steeped in an outdated medical approach to disability. Many of these laws preceded ratification of the CRPD, but some were enacted after ratification by the respective countries that are considered in this study. For example, in Kenya under the Matrimonial Causes Act,[82] divorce can be petitioned on the ground that the respondent is found to be of unsound mind.[83] Persons of unsound mind are not only disqualified from voting in elections, but also in standing for election to Parliament or a County Assembly.[84] In addition, there is a lack of clarity as to the meaning of "unsound mind" – a term which is not only based on a distinctly medical approach, but which is not defined under Kenyan law.[85] Similarly, in South Africa, although the right to vote is provided for in section 19 of the Constitution,[86] when read together with sections 47, 106 and 158 of the Constitution and the Electoral Act,[87] a different picture emerges. The Electoral Act[88]disqualifies persons of unsound mind from being registered on the voters' roll. Likewise, a person of unsound mind is not qualified to be a member of the National Assembly, [89] or a member a Municipal Council,[90] or a member of a provincial legislature.[91] This is discriminatory terminology and serves to exclude persons with psychosocial disabilities from voting and running for political seats.[92] Furthermore, in terms

[80] Beverley Clough ''People like that': Realising the Social Model in Mental Capacity Jurisprudence' (2014) 23(1) *Medical Law Review* 51 at 52.
[81] Maxwell P Opok &, Wisdom K Mprah 'Access to employment in Kenya at 1 and 2: the voices of persons with disabilities, (2016) 16 (1) *International Journal on Disability and Human Development*; Holness op cit note 6.
[82] Section 8(1)(d) of the Matrimonial Causes Act Chapter 152, Revised Edition 2012 [2010].
[83] Ibid; The Equal Rights Trust in Partnership with Kenyan Human Rights Commission 'In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya' ERT Country Report Series: 1 London' February 2012 at 141.
[84] Article 83(1)(b), 99(2)(e) of the Kenyan Constitution, 2010; s 9, 24(2)(e) and 25(2)(d) of the Elections Act no. 24 of 2011.
[85] Ibid.
[86] The Constitution of the Republic of South Africa, 1996.
[87] The Electoral Act 73 of 1998.
[88] Section 8(c) of the Electoral Act.
[89] Section 47(1)(d) of the Constitution of South Africa.
[90] Section 158(c) of the Constitution of South Africa.
[91] Section 106(1)(d) of the Constitution of South Africa.
[92] Heléne Combrinck 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' in Charles Ngwena et el (Chapter 4) *ADRY 4* (2014) *76.*

of South African law, mental illness of a party is also a ground for divorce in terms of the Divorce Act.[93]

In Kenya there is a general lack of realisation of the rights to non-discrimination.[94] As will be discussed in more detail in chapter 4, there are some gaps in protection and contradictions between legal provisions.[95] Additionally, definitions of key concepts are inconsistent or unclear.[96] Likewise, although the South African legal framework does provide protection for persons with psychosocial disabilities in the workplace, it is not sufficient.[97] As will be illustrated in chapter five, various areas of the law lack clarity.[98] Although it is arguable that appropriate antidiscrimination tools exist in the South Africa legal framework, improvements can still be made to facilitate the realisation of the rights of persons with psychosocial disabilities in the workplace.[99]

It is against this backdrop that the proposed study seeks to critically review the existing antidiscrimination laws in Kenya and South Africa while investigating the progress towards compliance with art 27(1)(*a*) of the CRPD. It will critically analyse the substantive law and relevant case law in both jurisdictions. The purpose of the proposed comparative study is to evaluate the nature and scope of the antidiscrimination legal frameworks that protect the rights of persons with psychosocial conditions in the workplace, to identify strengths, and deficiencies in these frameworks, and to suggest improvements that can be made in both jurisdictions, as well as within the CRPD framework.

One of the aspects that will be canvassed is that, despite the fact that the CRPD adopts a social approach to disability, both the legal systems in Kenya and South Africa are still heavily entrenched in traditional medicalised approaches. Medicalised approaches continue to predominate in the policy and legislation,[100] and that this is hampering effective compliance with art 27(1)(*a*) of the CRPD.

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[93] Section 5 of the Divorce Act 70 of 1979.
[94] The Equal Rights Trust in Partnership with KNCHR op cit note 83 at 36.
[95] Ibid.
[96] Ibid at 219.
[97] Viviers op cit note 59 at 6.
[98] Ibid.
[99] Rosalind Lake *Discrimination Against people with Mental Health Problems in the workplace: a comparative analysis* (Unpublished LLM thesis, Rhodes University, 2005) 6.
[100] Peter Beresford & Mary Nettle et al 'Towards a Social Model of Madness and Distress' Joseph Rowntree Foundation 2010 at 10, available at *https://www.jrf.org.uk/report/towards-social-model-madness-and-distress-exploring-what-service-users-say*, accessed on 26 April 2021.

II. LEGAL FRAMEWORKS IN KENYA AND SOUTH AFRICA

The legal frameworks in both Kenya and South Africa share some similarities, but also important differences. The Kenyan Constitution[101] prohibits discrimination based on disability,[102] unlike the previous constitution.[103] The right to non–discrimination is further entrenched in the Persons with Disabilities Act.[104] In addition, the Persons with Disabilities(Amendment) Bill (Senate Bill No. 29 of 2020)which has not been passed by parliament, also prohibits discrimination in the workplace based on disability.[105] The Persons with Disabilities Bill 2015, when passed by parliament, will replace the Persons with Disabilities Act, which was passed in 2003 before Kenya ratified the CRPD.[106] Lastly, the Employment Act prohibits both direct and indirect discrimination in employment on grounds that include disability.[107]

. The South Africa Constitution in s 9(3) and (4) prohibits discrimination by both public and private actors, on a number of non-exhaustive grounds, which include disability.[108] Although South Africa does not have a disability specific law like Kenya, s 9(4) of the Constitution provides for the enactment of legislation to further give effect to the prohibition on unfair discrimination. As a result, South Africa's parliament has passed two Acts: The Employment Equity Act (EEA);[109] the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act, [110] and the Labour Relations Act (LRA).[111] Additionally, unlike Kenyan law, South African also has codes of good practice, which although not binding, help in the interpretation of relevant statutes. The codes that are relevant to this study include: The Code of Good Practice on the Employment of Persons with Disabilities[112] (the Disability

[101] The Constitution of the Republic of Kenya, 2010.
[102] Article 27(4) of the Constitution.
[103] The Constitution of the Republic Kenya, 1963 no. 1968.
[104] Section 12 and 15(1) of the Persons with Disabilities Act, 2003 (no. 14 of 2003) (cap. 133).
[105] Section 19(1); The Bill went through the first senate reading on 4 March 2021 see National Council For 'Persons with Disability PWDs (Amendment) Bill (Senate Bill No. 29 of 2020)'available at https://ncpwd.go.ke/pwds-amendment-bill-senate-bill-no-29-of-2020, accessed on 19 0ctober 2021
[106]Helen Mudora, 'Review of Kenya persons with disabilities act overdue' Global disability watch 1 April 2016, available at *http://globaldisability.org/2016/04/01/review-kenya-persons-disabilities-act-2003-overdue* , accessed 20 February 2018.
[107] Section 5(3) of the Employment Act cap. 226 no. 11 of 2007.
[108] Anton Francois Van Staden, 'A Strategy for the Employment of Persons with Disabilities' (PHD Thesis, University of Pretoria)116-117.
[109] The Employment Equity Act 55 of 1998.
[110] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[111] Labour Relations Act 66 of 1996.
[112] Code of Good Practice on the Employment of Persons with Disabilities GN 1085 GG 39383 of 9 November 2015.

Code) and the Technical Assistance Guidelines on The Employment of Persons with Disability (TAG).[113]

III. RESEARCH QUESTIONS

It is against this backdrop that the following primary research question will be explored:

a) To what extent do Kenya and South African antidiscrimination laws protect persons with psychosocial disabilities in gaining and maintaining employment as required by Article 27(1)(*a*) of the CRPD?

In order to answer this primary research question, the following subsidiary questions need to be considered:

b) What are the antidiscrimination rights of employees and job applicants with psychosocial disabilities and responding obligations for employers and signatory states as provided for in art 27(1)(*a*) of the CRPD?

c)To what extent are persons with psychosocial disabilities protected from discrimination in the workplace under the Kenyan legal framework?

d) To what extent do the Kenyan, South African and CRPD frameworks protect persons with psychosocial conditions that do not qualify as disabilities from discrimination in the workplace?

e) To what extent are Kenya and South Africa in compliance with art 27(1)(*a*) of the CRPD? What are the challenges to compliance in these two jurisdictions?

f) What lessons can Kenya learn from the South African experiences and vice versa when it comes to antidiscrimination rights of persons with psychosocial disabilities in the workplace?

g) How can effective compliance with art 27(1)(*a*) be realised in both Kenya and South Africa in order to ensure adequate protection from discrimination to persons with psychosocial disabilities in the workplace?

IV. RESEARCH OBJECTIVES

The objectives of the proposed study are as follows:

[113] Department of Labour 'Technical Assistance Guidelines on the Employment of Persons with Disabilities' (2017) available at https://www.sun.ac.za/english/human-resources/Documents/HR%20WEB%20-%20MHB%20WEB/EMPLOYMENT%20EQUITY/2020/Technical%20Assistance%20Guidelines%20Disabilities.pdf, accessed on 28 April 2021.

a) To evaluate the compliance with art 27(1)(*a*) of the CRPD by both Kenya and South Africa by examining legislative actions that have been taken in these two countries in an effort to improve the protection afforded to persons with psychosocial disabilities against discrimination in the workplace.
b) To raise awareness and define the nature and scope of the rights of persons with psychosocial disabilities in the workplace.
c) To contribute towards the development of more comprehensive laws, and work towards effective provisions that will enhance access and maintenance of employment for persons with psychosocial disabilities in Kenya, South Africa, the rest of the African continent and all countries that are impacted by the CRPD.

V. RESEARCH METHODOLOGY

This research will be conducted through desktop or library-based methods. It will engage in a comparative analysis of substantive laws in Kenya and South Africa. This is because the study is limited to assessing compliance and does not consider the enforcement of the CRPD to any great extent.

Primary sources that will be analysed include the CRPD. This will help to identify the rights of employees with psychosocial disabilities, and subsequent duties of employers, and of both Kenya and South Africa as signatories of the CRPD. To supplement the CRPD, this research will also consider General Comments by the Committee on the Rights of Persons with Disabilities (the Committee).[114] The General Comments by the Committee will help to elaborate the meaning of the provisions of the CRPD and cross-cutting themes that revolve around art 27(1)(*a*) of the CRPD. General Comment No. 6 (2018) on equality and non-discrimination, for example, helps to clarify the rights and obligations of employers and the rights and obligations of employees with disabilities. Its aim is to clarify the obligations of States parties regarding non-discrimination and equality as enshrined in article 5 of the CRPD.[115]

[114] It is made up of 12 independent experts, and they monitor implementation of CRPD by the States Parties and have the legal authority to issue General Comments that elaborate the meaning of the provisions of the CRPD or cross-cutting themes. see art 34 of the CRPD; United Nations Human Rights Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' available at *https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html*, accessed on 23 April 2021.

[115] United Nations Human Rights Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' available at *https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html*, accessed on 23 April 2021.

The thesis will also review other relevant international treaties that Kenya and South Africa have ratified, as well as constitutional and statutory provisions that seek to protect persons with psychosocial conditions from discrimination in the workplace. It will also engage critically with decisions by courts and labour tribunals in the two jurisdictions, as well as the decisions on individual complaints by the CRPD Committee.

Further, this research will draw on textbooks, journal articles, conference and seminar papers, published and unpublished dissertations, government policy documents and news reports, which will assist in answering the above research questions.

Lastly, the complex nature of psychosocial conditions and disability in general requires the consideration and analysis of literature from the social sciences, including sociology, psychology and disability studies.[116]

VI. THEORETICAL FRAMEWORK

Psychosocial disabilities have historically been rooted in medical model of disability,[117] which are also referred to as the 'medical model' of disability.[118] This research, however, will adopt a social approach. The medical model has in the past hindered the enjoyment of human rights by persons with psychosocial disabilities.[119] It has been utilised to oppress persons with psychosocial disabilities. According to the medical approach, disability is considered an individual deficit and it is individuals' impairments that are disabling,[120] independent of societal structures and institutions.[121] In this model, medical personnel act as important gatekeepers in society and use diagnoses and labelling to determine which individuals receive services with everything from support services, to employment opportunities.[122] As a result, this approach takes away the voice of persons with disabilities and gives it to medical professionals who have control over their treatment. This is limiting because medical personnel

[116] Disabilities studies is now well accepted as a new field of academic inquiry. It applies social, cultural, historical, legal, philosophical, and humanities perspectives to understanding the place of disability in society. It explores disability as a social and cultural construct and as a phenomenon reflecting and constituting identity formation by incorporating the "real-lived" experiences of people with disabilities. Arlene S. Kanter 'The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies' (2011) 42(2) *Columbia Human Rights Law Review* 404.

[117] Rob Imrie 'Demystifying disability: a review of the International Classification of Functioning, Disability' (2004) 26 (3) *Health, Sociology of Health & Illness* at 278.

[118] Katerina Kazou, 'Analysing the Definition of Disability in the UN Convention on the Rights of Persons with Disabilities: is it really based on a 'social model' approach?' (2017) 23 International *Journal of Mental Health and Capacity Law* 25 at 30.

[119] Clough op cit note 79 at 55.

[120] Kazou op cit note 118.

[121] Ibid.

[122] Ibid at 196.

may not understand what individuals with disabilities value or even want, making persons with disabilities not only voiceless, but invisible.[123]

There are a variety of social approaches that have been developed over the years, Tom Shakespeare has stated that apart from the British approach, there exists a diversity of social approaches to disability and they include the Nordic 'relational' understanding and the North American 'minority group' approach.[124] Nonetheless, the most popular and influential[125] social approach within international law is the British approach, which is known as the 'social model of disability'.[126] Consequently, the social model of disability is often associated with the many social approaches to disability.[127] This is, however, deceiving because despite the fact that various social approaches share many similarities, they are not synonymous.[128]

According to the social model of disability, the terms disability and impairment are separated.[129] Although impairment is recognised as an abnormality of the body,[130] the cause of disability is found entirely within societal structures and institutions.[131] Consequently, if the causes of disability are social, the solutions should be found in society. [132]

The social model of disability has been criticised for denying a causal link between impairment and disability.[133] A major concern is that in taking this position the social model may not only limit the understanding of the lived experiences of impairment, but also fail to capture other relevant factors affecting the individual in different contexts.[134]This is especially relevant when looking at psychosocial conditions, which are heterogenous in nature and as a result so individual experiences often vary on a wide spectrum.[135] Despite the limitations of the social model of disability, it is recognised for being a major catalyst in not only changing

[123] Ibid.
[124] Kazou op cit 118 at 27-28.
[125] Kazou op cit 118 at 28.
[126] Beresford op cit note 100.
[127] Ibid.
[128] Ibid.
[129] Justin A Hegelese, & Samuel Hodge 'Disability Discourse: Overview and Critiques of the Medical and Social Models,' (2016) 68:2 *Quest* 193 at 197.
[130] Ibid.
[131] Ibid.
[132] Agustina Palacios 'The social model in the International Convention on the Rights of Persons with Disabilities' (2015) 4 *The Age of Human Rights Journal* 91 at 94.
[133] Clough op cit note 80.
[134] Ibid.
[135] Laura K. Guidry-Grimes, Mental Diversity and Meaningful Psychiatric Disabilities (unpublished PhD thesis, Georgetown University, 2017) 8.

the way that disability is viewed, but in giving a voice to persons with disabilities.[136] It provides a workable analytical framework with which to understand institutional discrimination encountered by people labelled as 'disabled'.[137]

Although, there have been recent discussions about a social model relating to psychosocial disability,[138] it has not been widely explored or developed yet.[139] In addition, this discussions have been fraught with resistance by mental health service users/ survivors [140] who believe that a social approach is not helpful for them or who are reluctant to identify as disabled.[141] Ann Plumb, for example does not support the adoption of the social model of disability by the psychiatric system survivor's movement. In fact, she highlights the importance of recognising the distinct identifies between the movements of disabled persons and psychiatric system survivors.[142] In contrast, scholars such as Mulvany,[143] Timander and Möller,[144]Spandler,[145] argue that the social model of disability could be utilised to enhance understanding of mental distress or mental health.[146] These arguments will be considered further in chapter 2.

VII. LIMITATIONS AND DELIMITATIONS OF THE STUDY

The proposed research will focus on compliance of the substantive provisions of the CRPD as opposed to enforcement mechanisms. Thus, its main focus will be substantive laws in Kenya and South Africa. This is motivated by the fact that currently there are no extensive studies on

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[136] Colin Barnes *'*A *Working Social Model*? *Disability* and *Work* in the *21st Century' (December 1999), Paper presented at the Disability Studies Conference and Seminar, Apex International Hotel, Edinburgh* at 5.
[137] Ibid at 6
[138] Ibid.
[139] Peter Beresford & Mary Nettle et al 'Towards a social model of madness and distress? Exploring what service users say' (2010) 186.
[140] Although service user and survivors are often used simultaneously, the two are not one and the same. While the term service user is neutral about the mental patient experience, the term survivor is more critical of the experience and in fact, seeks to denote people's survival of mental health services rather than of 'mental illnesses. Further, while some prefer the term survivor for its radical stance and reject service user for its passivity, for some survivor is too aggressive and they prefer the term service user. Because of a lack of agreement, this research will use the term mental health service user/survivor in an attempt to be as inclusive. See Peter Beresford 'Madness, Distress, Research and a Social Model' in Colin Barnes and Geof Mercer(eds) *Implementing the Social Model of Disability: Theory and Research* (2004) 3-5.
[141] Ann-Charlott Timander & Anders Möller 'Distress or disability? Could a theoretical framework drawn from disability studies be a way forward when trying to understand experiences of oppression on the grounds of mental distress?' (2016) 31(9) *Disability & Society* 1276.
[142] Peter Beresford 'What Have Madness and Psychiatric System Survivors Got to Do with Disability and Disability Studies?' (2000) 15:1 *Disability & Society* at 170.
[143] Ibid at 1277.
[144] Ibid.
[145] Ibid.
[146] Ibid.

enforcement of the CRPD yet. Also, there is not enough space to critique both substantive laws and enforcement mechanisms.

This research is limited by the fact that no empirical work has been done on this subject in order to create a more holistic picture of the experiences of persons with psychosocial disabilities or conditions in workplaces in Kenya and South Africa. As a result, this research will rely on secondary materials. It will focus on critically evaluating the legal frameworks in both Kenya and South Africa.

Furthermore, the conceptions of disability that this research adopts emanate from the global North. This is not to imply that these are the only perspectives that matter. They are merely the perspectives that underpin laws in Kenya, South Africa and perhaps the CRPD. Nevertheless, this limits this research as it may be that these conceptions may not work in all contexts and within all cultures. More varied and critical research on this is required. The concept of disability is understood differently across the continent of Africa.[147] This is influenced by the fact that the different cultures found in Africa affect how disability is viewed. Therefore, governmental bureaucrats who are in charge of programs for persons with disabilities are influenced by how disability is defined by culture.[148] That is why translation or vernacularisation or localisation of [149] international human rights norms is key so that they are accepted within communities.[150] However, vernacularisation can sometimes serve as a limitation on the transformative power of human rights.[151] Research shows that vernacularisation may lead to weakened form of human right ideas.[152] Nevertheless, from a practical perspective, I agree with Orr that this risk may be the price that has to be paid in order to make human rights norms more appealing in particular cultural contexts. [153]

[147] Eskay M, Onu V. C, Igbo J. N, et al 'Disability Within the African Culture US' (2012) B4 *China Education Review* 473.
[148] Ibid.
[149] It is the extraction of ideas and practices from the universal sphere of international organisations and their adaptation to local social, cultural, and political practices and norms. See Peggy Levitt and Sally Engle Merry 'The Vernacularisation of Women's Human Rights' in Leslie Vinjamuri, Jack Snyder, and Stephen Hopgood (eds) *Human Rights Futures* (2017) at 3; Sally Engle Merry 'Human Rights and Transnational Culture: Regulating Gender Violence through Global Law' (Spring 2006) 44(1) *Osgoode Hall Law Journal* at 74;Zvika Orr, 'The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO' (2012) 11:2 *Journal of Human Rights* 244.
[150] Sally Engle Merry 'McGill Convocation Address: Legal Pluralism in Practice' (2013) 59(1) *McGill Law Journal* 1 at 8.
[151] Zvika Orr, 'The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO' (2012) 11:2 *Journal of Human Rights* 243 at 244.
[152] Ibid.
[153] Orr note 151 at 243.

Additionally, this research will specifically deal with formal compliance and not actual compliance. Compliance is often defined as an actor's behaviour that conforms to a treaty's explicit rules,[154] and is divided into two stages: formal compliance and actual compliance. Formal compliance occurs when the legal requirements or obligations of international agreements are met by states parties to them;[155] its focus is on States Parties as the primary actors in international law.[156] States parties play a vital role in formal compliance with international law by enacting and enforcing domestic laws that implement international agreements.[157] Therefore, determining formal compliance involves examining the regulatory framework that nations have put in place to enforce international laws.[158] In contrast, actual compliance focuses on compliance by individual private actors (ordinary people and firms).[159] Worth noting, is that it has been argued that the true reflection of the effectiveness[160] of a treaty is when actual compliance occurs. However, Baradaran et al argue that while that is true, that in order to test the effectiveness of a treaty requires both formal and actual compliance are necessary.[161]

I agree with Baradaran et al for two reasons. First, when it comes to treaties, with few exceptions, States Parties are the architects;[162]they initiate treaty negotiations, determine their scope, and fix the content of international commitments collectively.[163] Secondly, through ratification of the treaty and the enforcement of domestic law aimed at fulfilling the goals of

[154]Kal Raustiala 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32(2) *Case Res. J. Int'l L*. 391 at 392; Compliance can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and noncompliance or violation occurs when actual behaviour departs significantly from prescribed behaviour. See more Beth A. Simmons, 'Compliance with International Agreements' (1998) 1 *The Annual Review of Political Science* 75 at 78.

[155] Ibrahim F. I. Shehata 'Implementation, Enforcement, and Compliance with International Environmental Agreements - Practical Suggestions in the Light of the World Bank's Experience' (1996) 9(1) *Geo. Int'l Envtl. L. Rev* 37.

[156] Shima Baradaran & Michael Findley et al 'Does International Law Matter?' (2013) 97(743) *Minn. L. Rev*18.

[157] Baradaran & Findley et al op cit note 156 at 18

[158] Shima Baradaran & Michael Findley et al 'Does International Law Matter?' (2013) 97(743) Minnesota Law Review (Minn. L. Rev) 743 at 771

[159] Baradaran & Michael op cit note 156 at 19.

[160] Effectiveness is the result not only of how governments implement a treaty, but also of how and to what extent they comply with it. It is the determination of whether the law has changed a state's behaviour from what it would have been in the absence of the law. Basically, effectiveness is identifying whether the treaty solves the underlying problem. See more at Harold K. Jacobson and Edith Brown Weiss 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a collaborative project' (1995) 1(2) *Global Governance* 120; Timothy Meyer, The Effectiveness of International Law (2014)108 *Proceedings of the Annual Meeting (American Society of International Law)* 169; Teall E. Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2003) 36 *bepress Legal Series.Working Paper* 6 at 8.

[161] Baradaran & Findley et al op cit note 156 at 21.

[162] Kal Raustiala op cit note 154 at 396.

[163] Ibid.

international agreements,[164] State actions help to establish an environment of compliance within a state. [165] The greater the effort by States Parties to be formally compliant with a ratified treaty, the more likely it is that private actors will follow such laws either because of norms or due to benefits or punishments.[166] Indeed, the actual compliance of private actors can only thrive under a compliant environment created by a sovereign government's formal compliance with a relevant treaty,[167] in this case the CRPD. Although formal compliance does not always lead to actual compliance, actual compliance cannot occur without formal compliance occurring first.[168] Indeed, without formal compliance there can be no actual compliance. Furthermore, actual compliance is much more difficult to ascertain as it examines whether the substantive requirements of the agreements are reflected in the actual behaviour of the States Parties concerned and not just upon the adoption of the required legal steps.[169] This research cannot review both formal and actual compliance, and will thus focus on formal compliance, with due cognisance of the limitations inherent in such an approach.

Due to space limitations, this thesis does not contain in-depth analyses and evaluations of the remedies available within the various frameworks. It does review the available remedies in both Kenyan and South African law, but the review is not as extensive as it could have been in the absence of space limitations.

Lastly, the consideration of antidiscrimination provisions will be limited to the legal responses available to employees, as defined in the various pieces of legislation, and specifically in cases of direct discrimination, indirect discrimination, harassment and denial of reasonable accommodation.

VIII. THESIS STRUCTURE

This chapter has set out, in very broad strokes, the contexts within which persons with psychosocial conditions in Kenya and South Africa have to live, the role that antidiscrimination legislative measures can play in providing protection to persons with psychosocial disabilities, particularly art 27(1)(*a*) of the CRPD and the relevant constitutional and legislative provisions in Kenya and South Africa. It has set out the research questions and objectives, as well as the

[164] Baradaran & Findley et al op cit note 156 at 18.
[165] Ibid.
[166] Ibid
[167] Raustiala op cit note 154 at 396.
[168] Baradaran & Findley et al op cit note 154 at 771.
[169] Shihata op cit note155 at 37 and 38; Baradaran & Michael op cit note 154 at 771.

research methodology that has been employed. It now proceeds to set out the structure of the thesis.

Chapter 2 investigates both the historical background, the current state and the theoretical underpinnings of both the disability rights and the mental health service user/ survivor movements.[170] It then delves into what is meant by psychosocial conditions before defining which psychosocial conditions qualify as disabilities in order to be eligible as a protected category against discrimination under art 27(1)(*a*) of the CRPD. Furthermore, it will examine whether psychosocial conditions have to be diagnosed clinically to qualify, and if yes, the diagnostic system that is used to perform such diagnoses. It also considers how a social approach to disability may affect the interpretation of, and compliance with, art 27(1)(*a*) of the CRPD and relevant laws in Kenya and South Africa.

Chapter 3 analyses the nature and scope of the rights and obligations created by art 27(1)(*a*) of the CRPD in the context of psychosocial conditions. Apart from investigating the obligations imposed on employers to accommodate persons with psychosocial disabilities in the workplace, it will also define the obligations of Kenya and South Africa as signatories to the treaty.

Chapter 4 proceeds to an examination and analysis of the legal framework protecting persons with psychosocial disabilities from discrimination in the Kenyan workplace. This includes an analysis of Kenya's Constitution, and specific policies and legislation that govern discrimination in the workplace. Chapter 5 deals with the South African framework on similar terms as chapter 4 considers Kenyan law.

Chapter 6 contains a comparative evaluation of Kenyan and South African substantive laws in order to compare the extent to which both countries have complied with art 27(1)(a) of the CRPD. It will highlight the progress and challenges faced by both countries in complying with the CRPD and identify the lessons that both Kenya and South Africa can learn from each other in order to protect the rights of persons with psychosocial disabilities more effectively.

Chapter 7 draws together the lines of reasoning that have flowed through the study, offers concluding remarks on the most important observations and offers recommendations on

[170] Peter Beresford 'Madness, Distress, Research and a Social Model' in Colin Barnes and Geof Mercer(eds) *Implementing the Social Model of Disability: Theory and Research* (2004) 3-5.

how to not only improve compliance with art 27(1)(a) of the CRPD, but further research that may enhance the protection of the rights of persons with psychosocial disabilities against discrimination in the workplace in Kenya and South Africa, as well as other jurisdictions that are impacted by the CRPD.

CHAPTER TWO: THE SOCIAL MODEL AS A LENS TO REVIEW ANTI-DISCRIMINATION LAW

I. INTRODUCTION

This chapter will explore why a social approach to disability, specifically the social model of disability, provides a useful way of understanding the experiences of discrimination experienced by employees with psychosocial disabilities in employment. It will be argued that the social model of disability provides more than a way of defining disability. It also provides a lens through which to analyse and critique the antidiscrimination laws which are supposed to protect employees with psychosocial disabilities from discrimination. It will highlight both the limitations and greater potential of the social model of disability, particularly in the context of how it informs policies and legislation on disability in general, and psychosocial disabilities in particular.

II. MODELS OF DISABILITY

There are various models of disability with which to conceptualise and define disability, both descriptively and normatively.[171] These include, but are not limited to: the moral or religious model,[172] the medical (individual) model,[173] social models,[174] the economic model,[175] the cultural model[176] and many more. In spite of a multiplication of models, a general distinction can helpfully be made between medical and social ones.[177] Some argue that the 'most important models of disability in the English-speaking world have been the medical and the social model

[171] Jonas-Sébastien Beaudry 'Beyond (Models of) Disability?' (2016) 41 *Journal of Medicine and Philosophy* at 210; Pardeck & Murphy cited by Marno Retief & Rantoa Letšosa 'Models of disability: A brief overview' (2018) 74(1) HTS *Teologiese Studies/Theological Studies* 1 and 2; Sophie Mitra 'The Capability Approach and Disability' (2006) 16 (4) Journal *of Disability Policy studies* 236 at 237.

[172] It is the oldest model of disability and is found in a number of religious traditions. Disability is regarded as a punishment from god for a particular sin or sins that may have been committed. See Marno Retief & Rantoa Letšosa 'Models of disability: A brief overview' (2018) 74(1) HTS *Teologiese Studies/Theological Studies* 1 at 2.

[173]Theresia Degener 'Disability in a Human Rights Context' (2016) 5(35) *MDPI* 1 at 2; The medical model will be explained with more depth in the section below.

[174] This is in reference to the many types of social approaches to disability that will be discussed below.

[175] Although it insists on the importance of 'respect, accommodations, and civil rights to people with disabilities', such concerns are subservient to the economic model's estimation of a disabled person's ability to work and contribute to the economy. See Marno Retief & Rantoa Letšosa 'Models of disability: A brief overview' (2018) 74(1) HTS *Teologiese Studies/Theological Studies* 172 at 6.

[176] It focuses on a range of cultural factors including medical and social factors and does not seek to define disability in any specific way but rather focuses on how different notions of disability and non-disability operate in the context of a specific culture. See Retief & Letšosa of cite note 172 at 6.

[177] Jonas-Sébastien Beaudry 'Beyond (Models of) Disability?' (2016) 41 *Journal of Medicine and Philosophy* at 210.

of disability.'[178] Notably, both models were developed in the UK and USA by disability studies scholars during the 1970s and 1980s.[179]

The medical model warrants consideration because psychosocial conditions have historically been rooted in medical approaches to disability.[180] It has permeated cultural consciousness and understandings of psychosocial conditions and as a result is the basis of political and public understandings of madness and mental distress.[181] Hence, it underpins current policy, practice and legislation on mental health.[182] Indeed, for most mental health service users this is the only framework that they have had available for interpreting their own experience.[183] Second, this research will also consider social approaches to disability. These theoretical contributions may offer lenses through which to reflect critically on the medical model of disability, as well as the antidiscrimination legal frameworks, at the international level, as well as in Kenya and South Africa, that seek to contribute to equality in employment for persons with psychosocial conditions. It will also look at the human rights model and the biopsychosocial model, models which were established after the medical and social model, to look at their potential contribution to anti-discrimination law.

III. MEDICAL (INDIVIDUAL/ BIO-MEDICAL) MODEL OF DISBAILITY

The medical model of disability discourse began once religious leaders were replaced as the cognitive authority by doctors and scientists[184] in the Western Judea-Christian society.[185] Indeed, from the mid-1800s onwards, moral (religious)model of disability was progressively replaced by the moral model[186] as a result of the of significant advances that were taking place in the field of medical science.[187] This was propelled by the medical field's ability to

[178] Degener op cite note 173 at 2.
[179]Ibid.
[180] Peter Beresford 'Social work and a social model of madness and distress: Developing a viable role for the future' (2005) 12(2) Social *Work & Social Sciences Review* 59 and 60; Imrie 'Demystifying disability: a review of the International Classification of Functioning, Disability' (2004) 26 (3) *Health, Sociology of Health & Illness* 287; Kazou op cit note 118 at 30.
[181] Justin A Hegelese, & Samuel Hodge 'Disability Discourse: Overview and Critiques of the Medical and Social Models,' (2016) 68:2 *Quest* 193 at 196; Faraaz Mahomed 'Stigma on the basis of psychosocial disability: a structural human rights violation' (2016) 32(3) *SAJHR* 490; KNHCR op cit note 30 at 38; Beresford, Peter 'Work and a Social Model of Madness and Distress' (2005) 12(2) *Social Work & Social Sciences Review* 59 at 63.
[182] Peter Beresford, 'Work and a Social Model of Madness and Distress' (2005) 12(2) *Social Work & Social Sciences Review* 59 at 63.
[183] Ibid.
[184] These are professional organisations and individuals who have the power or authority to establish definitions in society, in this case the conceptualisations of disability, and they are in command over the knowledge within a particular field. See Justin A Hegelese, & Samuel Hodge 'Disability Discourse: Overview and Critiques of the Medical and Social Models,' (2016) 68:2 *Quest* 193 at 193.
[185] Ibid.
[186] Retief and Letšosa op cite note 175 at 2.
[187] Ibid.

define illnesses and body parts as well as heal injuries and cure illnesses.[188] As the new cognitive authority, the medical profession were best placed to lead discourses on aspects of life that dealt with the body and mind, including disability.[189] Then, being that members of the medical field work from a biological perspective, it is no wonder that they conceptualise disability as a biological product.[190] As a result, according to the medical model disability is seen as a medical problem that resides in the individual,[191] and is a medical phenomenon that results in limited functioning that is seen as deficient.[192] It is a direct result of impairment of bodily functions and structures, including the mind, and can be caused by disease, injury, or health conditions.[193] Thus, disability can include structural or functional deficiencies caused by physical, sensory, mental or intellectual impairments.[194] Further, because disability is seen as a consequence of the impairment of the individual,[195] it is inherently abnormal and pathological.[196] Hence , disability is conceptualised as a tragedy or problem contained in an individual body or mind.[197] The result is that the impairment becomes the defining characteristic of individuals with disabilities, and this shapes the beliefs that the society has towards them.[198]

Furthermore, because the medical model focuses on the disadvantaging or negative impact of impairments rather than that of the environment in which affected persons operate,[199] this suggests that problems faced by individuals with disabilities are 'independent of wider sociocultural, physical, or political environments.'[200] Essentially, the emphasis tends to be on changing or fixing the individual to fit society.[201] This is the reason why the medical model of disability is also called the individual model, as it is the individual who has to adapt to the way

[188] Haegele & Hodge op cite note 184 at194.
[189] Ibid at 195.
[190] Ibid.
[191] Retief and Letšosa of cite note 175 at 2.
[192] Ibid.
[193] Sophie Mitra 'The Capability Approach and Disability' (2006) 16(4) *Journal of Disability Policy Studies* 236 at 237; Peter Beresford op cit note 182 at 65; Haegele & Hodge op cit note184 at 195 and 196.
[194] Haegele & Hodge op cit note 183 at 196.
[195]Ibid.
[196] Retief and Letšosa of cite note 175 at 2 and 3.
[197]Beaudry op cite note 175 at 211
[198] Haegele & Hodge op cite note 184 at 196
[199] *Adam M. Samaha* 'What Good Is the Social Model of Disability?' (2007) 74 *The University of Chicago Law Review* 1251 at 1256.
[200] Haegele & Hodge op cite note 184 at 196.
[201] Tania Burchardt, 'Capabilities and disability: the capabilities framework and the social model of disability, Disability & Society' (2004) 19(7) 735 at 736.

society is structured.[202] This model completely disregards the role played by the environment (physical or attitudinal) in the creation, maintenance or exacerbation of disability.[203] Thus, the implication being that changes to the built environment or societal organisation will not result in giving individuals with disabilities the same opportunities as those who are typically functioning.[204] The solution instead includes medical care, rehabilitation and individual adjustment to treatment.[205] Subsequently, persons with disabilities are expected to make use of the variety of medical services available to them and importantly, under direct authority of the medical profession.[206] This model elevates medical professionals to the important role of gatekeepers of resources and benefits as the solution is to be provided by them .[207] Medical professionals 'use diagnosis and labelling to: determine treatment, which individuals receive services (e.g. educational services), types of services, and benefits'.[208] This unfortunately takes away the voice of persons with disabilities and gives it to medical professionals.[209] This is both oppressive and limiting because medical personnel may not understand what individuals with disabilities value or even want, making persons with disabilities not only voiceless, but invisible.[210] Additionally, those who refuse to be fixed are considered noncompliant or unmotivated.[211]

In addition, some disabilities cannot be eliminated or ameliorated or fixed using medical advances, and persons with disabilities who find themselves in this category are considered as being in need of charity.[212] This portrayal is commonly linked to disability-related charity and fund-raising.[213] The model is normative as people are considered as persons with disabilities based on the fact that they are unable to function as "normal",[214] and consequently occupy a position of lesser citizenship,[215] and consequently experience systematic social exclusion from all arenas of life.[216] Accordingly, the medical model has

[202]Maria Faidra Valassa *What Entitlements and for Whom? Disability, Equality and the CRPD's Right to Access Employment for Persons with Disabilities* (unpublished LLM Thesis, Lund University, 2016) 14.
[203] Ibid.
[204] Haegele & Hodge op cite note 184 at 196.
[205] Marno Retief op cite note 3; Mitra op cit note 193; Valassa op cit note 202 and 14;
[206] Retief and Letšosa op cit note 3; Mitra op cite note 193.
[207] Beaudry op cit note 177; Haegele & Hodge op cit note 183 at 196.
[208] Haegele & Hodge op cit note 183 at 196.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Ibid; Mitra op cite note 193 at 237.
[215] Mitra op cite note 193 at 237.
[216] Carol Thomas 'Rescuing a social relational understanding of disability' (2004) 6(1*) SJDR* 22 at 23 and 24

proven to be oppressive as it has hindered the enjoyment of human rights by persons with psychosocial conditions.[217]

Importantly, the major concern of a mental health policy based on the medical model at the political level is: to provide health-care and rehabilitation services,[218]while broader social structural factors such as poverty, inequality, discrimination and exclusion which affect an individual's experiences of illness, are not targeted or even considered.[219] As a result, people with mental disorders have been excluded from actively participating in society in everything from housing and accommodation support to access to education, access to health care and to employment.[220] Although focusing on health-care and rehabilitation services is helpful for many, it has proven not to be enough for persons with psychosocial conditions.[221] Therefore, the relevance of the medical model in understanding and analysing the experiences of persons with psychosocial conditions, needs to be questioned and critically reviewed.[222] Indeed, 'it is difficult to find scholars who promote any such model of disability'.[223] Indeed, scholars are increasingly promoting the social model of disability as more progressive in capturing human experiences than the medical model.[224]

IV. SOCIAL APPROACHES TO DISABILITY

Prior to the late 1960s and 1970s, disability was viewed from a medical perspective, thus the medical model discussed in the above section ruled the day.[225] During that period, disabled activists and organisations controlled and run by disabled people began to publicize their social and economic exclusion and campaigning for social changes to improve their lives, and this resulted in the emergence of a social approach to understanding the nature and consequences of disability.[226] Notably, traditionally disability was studied within the sub-field of medical sociology, and particularly the sociology of chronic illness and disability. It was only until the 1980s and 1990s when Britain began approaching disability from a social perspective that the

[217] Beverley Clough ''People like that': Realising the Social Model in Mental Capacity Jurisprudence' (2014) 23(1) *Medical Law Review* 51 at 55.
[218] Mitra op cit note 191.
[219]Julie Mulvany 'Disability, impairment or illness? The relevance of the social model of disability to the study of mental disorder' (2000) 22(5) *Sociology of Health & Illness* 582 at 587.
[220] Ibid.
[221] Ibid.
[222]Ibid.
[223] Adam Samaha, "What Good Is the Social Model of Disability?" (2007)74 *University of Chicago Law Review* 1251 at 1257.
[224] Grenier cited by Haegele & Hodge op cit note 183 at 196.
[225] Kazou op cit note 118 at 27.
[226] Ibid.

new discipline 'disability studies' was developed.[227] The social approach was developed further as the disabled people's political activism grew. Its growth resulted in increased interest in the issue of disability within the academy, especially within sociology.[228] As a result, Kazou argues that the previously dominant medical understandings of disability were challenged, and focus shifted to the impact of social and environmental barriers and the discrimination, and disadvantage experienced by people with impairments. [229] Thus, with the establishment of the social model, the medical model is typically referred to as the old paradigm.[230]

Social understandings of disability have been advanced by disabled activists and disability studies scholars in several countries,[231] and thus of course there are a number of different versions.[232] As Tom Shakespeare notes, there is a 'family of social-contextual approaches to disability', including, the social model of disability, the Nordic 'relational'

[227] Ibid.
[228]Ibid.
[229] Ibid.
[230] Haegele & Hodge op cite note 184 at 196. The authors seem to be giving an overview of both the Eurocentric and Anglo-American experience.
[231] Kazou op cit note 118 at 27.
[232] Janine Owens 'Exploring the critiques of the social model of disability: the transformative possibility of Arendt's notion of power' (2015) 37(3) *Sociology of Health & Illness* 385 at 386; Tom Shakespeare 'Social models of disability and other life strategies' (2004) 6(1) *Scandinavian Journal of Disability Research* 8 at 10; Burchardt op cit not 201 at 736.

approach[233] and the North America 'minority group' approach.[234] Others include a universality[235] and the biopsychosocial model of disability,[236] and many more.[237]

Nonetheless, the British 'social model', the social model of disability, is often associated with the many social approaches of disability.[238] In fact, it is often assumed that social approaches to disability is synonymous with the 'social model of disability'.[239] Thus, the term 'social model of disability' is often used to make as a general reference to approaches that view disability from a social perspective even when the intention is not to specifically refer to the British approach.[240] Thus, some authors might use the term 'social model', when they would actually mean 'social approach'.[241] This is probably fuelled by the influence and popularity of the British approach.[242] Nonetheless, this is misleading because the various social approaches also have individual unique features .[243] This does not, however, refute the fact that each social approach includes similarities in their discourse in relation to defining and

[233] Disability is defined a continuum shifting relationship between the individual and the environment. Further, it focuses on their capacities and abilities, rather than being the defining characteristic of the individual. See also Janine Owens op cite note 39; J Tøssebro and A Kittelsaa 'Exploring the Living Conditions of Disabled People' Rannveig Traustadóttir & Borgunn Ytterhus et el (eds) *Childhood and Disability in the Nordic Countries: Being, Becoming, Belonging* (2004) 199-21; Katerina Kazou op cite note 118 at 27.

[234] It portrays persons with disabilities as a distinct grouping among human beings. Further, it focuses on the discrimination against persons with disabilities and regards civil rights legislation as the suitable response: See more Janine Owens 'Exploring the critiques of the social model of disability: the transformative possibility of Arendt's notion of power'(2015) 37(3) *Sociology of Health & Illness* 385-405 at 386; Tom Shakespeare 'Social models of disability and other life strategies' (2004) 6(1) *Scandinavian Journal of Disability Research* 8 at 10; Katerina Kazou op cite note 118 at note 27 and 28; Mary Ann Jackson 'Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighbourhood Scale?' (2018) 7(10) *www.mdpi.com/journal/laws* 1 at 5; Meryl Du Plessis 'Disability, rights discourse and the impact of South Africa's Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments' (2013) 17 *Law Democracy & Development* 202 at 206; Dimitris Anastasiou & James M. Kauffman 'The Social Model of Disability: Dichotomy between Impairment and Disability' (2013) 38 *Journal of Medicine and Philosophy* 441at 442; Mitra op cit note 193; David Pfeiffer 'A Comment on the Social Model(s)' (2002) 22(4) *Disability Studies Quarterly* 234-235.

[235] It stresses that everyone has the potential for all levels and modes of functioning of the body and mind and consequently for the disadvantageous effects of social responses to these. The grounds for drawing the outer limits of the constituency vary. See Anna Bruce *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and Its Ideological Antecedents* (2014) (unpublished PhD thesis, Lund University, 2014) 321; and Valassa *op* cit note 2020 at 17.

[236] The WHO produced this model as a compromise between a medical and a social understanding of disability. See Valassa op cite note 202 at 17.

[237] David Pfeiffer 'The Philosophical Foundations of Disability Studies' (2002) 22(2) *Disability Studies Quarterly* 3 at 4 and 5

[238] Kazou op cite note 118 at 28; David Pfeiffer 'A Comment on the Social Model(s)' (2002) 22(4) *Disability Studies Quarterly* 234-235.

[239] Kazou op cite note 118 at 38.

[240] Ibid.

[241] Ibid.

[242] Ibid; Pfeiffer ops cite note 238 at 234-235.;

[243] Kazou op cit note 118 at 28; Pfeiffer op cite note 238 at 5 -7.

discussing the concept of disabilities.[244] Undeniably, the common thread that cuts across all social approaches is the rejection of the idea that disability is simply a medical problem arising from individual impairment, and instead emphasis the role of society and the environment in creating disability.[245]

It is, however, worth noting, that the other approaches do not share the distinct characteristics of the British 'social model'.[246] The model adopts the radical idea that the cause of disability is found exclusively within society, whereas the role of impairment in creating disability is entirely denied.[247] This view is only adopted by the British 'social model', it is only the approach that makes the stark distinction between impairment and disability.[248]

a) The social model of disability

Inspired by the activism of the British disability movement in the 1960s and the 1970s, the social model developed in reaction to the limitations of the medical model of disability.[249] It was developed by disabled activists such as 'Vic Finkelstein and disability studies scholars such as Michael Oliver and Colin Barnes, based on a materialist understanding of disability.'[250] Notably, the social model of disability was an initiative led by disabled persons, in contrast to the largely non-disabled professionals, academics and charities who had up till now dominated the disability field.[251]

Significantly, one of the most important documents in the development of the social model of disability is the Union of the Physically Impaired against Segregation's (UPIAS) manifesto document, Fundamental Principles of Disability (1976).[252] Mike Oliver influenced by the ideas found in the UPIAS document,[253] in 1983 conceptualised the social model of disability.[254] The model emphasises that the role of social variables in its definition of disability.[255] In addition, unlike the medical model, which supresses the voices of persons

[244] Haegele & Hodge op cit note 184 at 197.
[245] Burchardt op cit note 201 at 736; Kazou op cit note 122 at 27.
[246] Burchardt op cit note 201 at 736.
[247] Kazou op cit note 118 at 28.
[248] Ibid.
[249] Retief & Letšosa op cit note 175 at 3.
[250] Here disability is linked to the rise of capitalism and particularly the capitalist mode of production. See more in Kazou op cit note 118 at 28.
[251] Kazou op cit note 118 at 28.
[252] Retief & Letšosa op cit note 175 at 3.
[253]Ibid; Mike Oliver 'The social model of disability: thirty years on' (2013) 28(7) *Disability & Society* 1024-1026 at 1024
[254] While the latter based driven on the by the idea of 'personal tragedy', the former is based on the theory of 'social oppression'; Kazou op cit note 118 at 30.
[255] Retief & Letšosa op cit note 175 at 3.

with disabilities,[256] it advocates that disabled people should take back their voice, and with the advice and help of others, assume control over their own lives.[257] Notably, the UPIAS arguments have subsequently been slightly been amended and extended to all disabilities and not only physical ones. [258]

The social model also operates on the basis of a clear dichotomy between impairment (biology/medicine), on the one hand, and disability on the other.[259] It is founded on the belief that impairment and disability are not synonymous,[260] and further distinguishes the two in terms of causality.[261] Thus, not only is it proposed that disability is not impairment, but also that disability is not caused by impairment.[262] Impairment is defined as the 'functional limitation or an abnormality within the individual caused by physical, mental or sensory characteristics.'[263] It is a condition of the body or mind, such as not having a limb, being blind, or experiencing depression.[264] Within this context, impairment is an attribute of an individual,[265] but importantly, it is not inherently disabling.[266] In short, impairment is basically a description of the physical body or mind.[267] Further, it is also important to note, that while impairment is universally constant, the extent of social/political consequences of impairment varies from culture to culture. [268]On the other hand, disability is the physical or social barrier to taking part in community life on an equal basis with others.[269] These barriers are caused by society, which does not take into account people who have impairments, and thus isolates and excludes them from full participation in mainstream social activities.[270] Thus, disability is a

[256] Kazou op cit note 118 at 30; See also chapter 1, heading VI.
[257] Ibid.
[258] Retief & Letšosa op cit note 175 note 4; Sara Goering 'Rethinking disability: the social model of disability and chronic disease' (2015) *8 Curr Rev Musculoskelet Med* 134 at 135.
[259] Beaudry op cit note 177 at 571.
[260] Kazou op cit note 118 at 29
[261] Ibid
[262] Ibid.
[263] Dimitris Anastasiou & James M. Kauffman 'The Social Model of Disability: Dichotomy between Impairment and Disability' (2013) 38 *Journal of Medicine and Philosophy* 441 at 442; Haegele & Hodge op cit note 183 at 129 and 197.
[264] Burchardt op cit note 201 at 736.
[265] Ibid.
[266] Haegele & Hodge op cit note 184 at 197.
[267] Sara Goering 'Rethinking disability: the social model of disability and chronic disease' (2015) *8 Curr Rev Musculoskelet Med* 134 at 135.
[268] Retief & Letšosa op cit note 175 at 4.
[269] Anastasiou & Kauffman op cit note 263 at 442; Goering op cit note 267 at 135.
[270] Ibid; Goering op cit note 267 at 135.; Burchardt op cit note 201 at 736.

social phenomenon caused by society, rather than by individual "impairments".[271] Hence, disability is imposed in addition to impairments.[272]

In contrast to the medical model, according to the social model disability is not a matter of personal tragedy and is in fact based on the theory of 'social oppression'.[273] This is highlighted in the UPIAS document.[274] The model views disability in terms of social relations and specifically refers to the relationship between two groups of people: people with impairments and the rest of society without them.[275] Basically, people with impairments are subject to social oppression by those without impairments. [276] According to the social model nothing about persons with disabilities is wrong or needs to be fixed.[277] Impairment is considered a form of diversity that is unique and that should be valued.[278] It encapsulates different ways of being, and advocates for the acceptance and accommodation of these differences by society.[279]

Consequently, because the social model sees disability as a social construct,[280] any meaningful solution should be directed at society and not the individual.[281] Hence, the appropriate response is the removal of disabling barriers to participation in society.[282] It is worth noting, apart from physical barriers, the social model of disability also focuses attention on attitudinal obstacles.[283] This is because other people's expectations and presumptions about a disabled person's quality of life, ability to work and function in other ways not only affect the development and maintenance of physical structures and institutional norms, but can create additional disabling conditions because disabled persons struggle to feel good about themselves and their prospects.[284] It is worth noting that persons with psychosocial conditions experience even higher rates of discrimination than persons with 'physical' impairments in

[271] Beaudry op cit note 177 at 211.
[272] Haegele & Hodge op cit note 183 at 197.
[273]Anastasiou & Kauffman op cit note 263 at 443; Kazou op cit not 118 at 30.
[274] Kazou op cit note 118 at 30.
[275]Ibid; Burchardt op cit 201 at 736.
[276] Kazou op cit note 118 at 29; Burchardt op cit note 201 at 736.
[277] Anastasiou & Kauffman op cit note 263 at 443.
[278] Haegele & Hodge op cit note 183 at 197.
[279] Tom Shakespeare 'Social models of disability and other life strategies' (2004) 6(1) *Scandinavian Journal of Disability Research*' 8 at 17.
[280] Retief & Letšosa op cit 172 op cit note 3.
[281] Ibid; Kazou op cit note 118 at 30.
[282] Kazou op cit note 118 at 30.
[283] Goering op cit note 267 at 135; Beresford op cit note 182 at 65.
[284] Goering op cit note 267 at 135.

employment because of attitudinal barriers from both employers and co-workers.[285] In fact, employers show greater apprehension about hiring workers with psychosocial disabilities and condition than people with other types of disabilities. [286]Thus, social change should not just include changes to the environment and in social roles, but also in societal attitudes.[287]

Nevertheless, the social model has also been heavily criticised.[288] First, some commentators contend that the social model severs the connection between impairment and disability and asserts that people with impairments are only disabled by society, and not by their impairments.[289] This causes the social model to side line discussions about personal experiences of the impact and effect of impairment completely.[290] Additionally, critics argue that impairment also contributes to disability.[291] Nonetheless, the social model proponents have taken the view that there is a clear political advantage in vindicating the idea that disabilities are a social failure, as it helps individuals not to interpret their disabled status as a natural misfortune they have to put up with, and can boldly claim their rights as a matter of entitlement rather than charity.[292] They argue that this severance is necessary, as it would also improve individuals' self-respect and confidence: they are not the problem, society is.[293] The model has also been criticised for failing to take in account diversity, and as a result presents disabled people as one unitary group.[294] This is all in the name of maintaining solidarity for political impact.[295] Thus, it can be argued that the model model intentionally fails to theorise the

[285] Paul Schnabel 'Protecting and Including Vulnerable People in Times of Economic Crisis' in A Baumann & M Muijen (eds) *Mental Health and Well-being at the Workplace – Protection and Inclusion in Challenging Times* (2010) 9; Holness op cit note 6 at 511, Kay Wheat & Elaine Brohan et al 'Mental illness and the workplace: conceal or reveal?' (2010) 103 (3) *Journal of the Royal Society of medicine* 83.

[286] Sunghee An & Richard T. Roessler et al 'Workplace Discrimination and Americans With Psychiatric Disabilities: A Comparative Study' (2011) 55(1) *Rehabilitation Counselling Bulletin* 7–19 at 8.

[287] Kazou op cit note 118 at 31.

[288] Shakespeare op cit note 279 at 15; Du Plessis op cit note op cit note 44 at 211 -212.

[289] Helen Lester & Jonathan Q. Tritter 'Listen to my madness: understanding the experiences of people with serious mental illness' (2005) 27(5) *Sociology of Health & Illness* 649 at 653; Carol Thomas 'How is disability understood? An examination of sociological approaches' (2004) 19(6) *Disability &Society* 569 at 573; Beaudry op cit note 177 at 210 at 212.

[290] Corker and Shakespeare cited Beresford op cit note 182 at 65; See similar arguments: Lester & Tritter 'op cit 289 at 651 and 653; Thomas op cit 289 at 573; Beaudry op cit note 177 at 211 and 212. Shakespeare op cit note 279 at 10 and 13; Du Plessis op cit note 44 at 209, 210 and 211, Retief & Letšosa op cit note 172 at 5; Carol Thomas, Rescuing a social relational understanding of disability op cit note 25, 26 and 27; Oliver op cit note 253 at 1025

[291] Carol Thomas, Rescuing a social relational understanding of disability op cit note 25, 26 and 27; Thomas op cit 289 at 573.

[292] Beaudry op cit note 177 at 224.

[293]Ibid.

[294] Oliver op cit note 253at 1025; Owens op cit note 232 at 389.

[295] Owens op cit note 232 at 389.

personal experiences of persons with disabilities in exchange for solidarity, all in the interest of liberation.[296]

However, as will be highlighted below when used as a lens to analyse antidiscrimination law, its recognition of societal barriers as the cause of disability does allow for the recognition of diversity. This is because antidiscrimination law by its very nature is individualised. The protection offered is not group protection, but individual protection for members of a group.[297] If an employee claims disability discrimination, for example, this does not necessarily translate into rights for all person with disabilities. Also, remedies available are tailored to specific individuals or even the process of reasonably accommodating an employee is an individualised process, as it requires identifying individual societal barriers and looking for ways to counteract its effects so that an employee can be productive in employment.

Aside from the above critiques, it has also been argued that there are theoretical difficulties with the social model.[298] Oliver's response to this criticism, is that 'critics have confused models and theories and that the social model of disability can contribute to, rather than be a substitute for, the development of an adequate social theory of disability.'[299] Interestingly enough, the limitations that have been criticised above are the very things that make the social model of disability an appropriate lens to review antidiscrimination law as will be highlighted below. Example, the 'crudeness' of the social model may, in some respects, be a strength, in that it's easier to get a very important message about societal injustices across. This may enhance its potential as a lens through which to analyse antidiscrimination laws.[300] Further the criticism of the social model cannot take away from the fact that has played a central role in promoting the individual self-worth, collective identity, and political organisation of persons with disabilities.[301] Further, it has been influential in shaping social policy concerning disabled persons, both nationally and internationally.'[302]

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[296] Ibid; also see Beaudry op cit note 177 at 224; Oliver op cit note 253 at 1025 and 1026; Mike Oliver op cit note 1025 and 1026; Owens op cit note 232 at 389; Mohammed Abouelleil Rashed 'In Defence of Madness: The Problem of Disability' (2019) 44 Journal *of Medicine and Philosophy* 150 at 155.
[297] Shivaun Quinlivan & Claire Bruton 'Disability, EU law and the CRPD: A New Dawn?' in Charles Mahony & Gerard Quinn (eds) Shivaun Quinlivan & Claire Bruton 4.
[298] See the theoretical difficulties discussed in: Shakespeare op cit note 279 at 14.; Beaudry op cit note 177 at 212; Du Plessis op cit note 43 at 209; Owens op cit note 232 at 389.
[299] Lester& Tritter op cit note 289 at 652.
[300] Chapter 2, heading V.
[301] Goering op cit note 267 at 135.
[302] Retief& Letšosa op cit note 175 at 3.

V. BIOPSYCHOSOCIAL MODEL OF DISABILITY

In 1977 American psychiatrist George Engel proposed a new model for medicine, the biopsychosocial (BPS) model.[303] A model that emerged from dissatisfaction with the biomedical model.[304] Engel argued that a broadening of the biomedical approach was needed to take account of all these different factors that contributed to both illness and patienthood.[305] As a result, the biopsychosocial model provides that biological, psychological, and social factors all play a significant role in human functioning in the context of disease or illness.[306]

Hence, although the social model of disability proposes that disability is caused by social exclusion and discrimination towards disabled people, and the medical model stresses that disability is caused by the individual impairments,[307] the BPS model of disability aims at linking both the social and the medical models by presenting a compromised approach.[308] It can thus be argued that the biopsychosocial model is more comprehensive model as it incorporates both the social and the medical model.[309] Therefore, the biopsychosocial model is based on the fact that disability is an interaction between three sets of factors; physical, such as age and gender; psychological, such as behaviour; and social, such as social and cultural environments.[310]

It is worth noting that biopsychosocial model forms the basis of the World Health Organization's (WHO) International Classification of Functioning, Disability, and Health (ICF) which was adopted in 2001, and published in 2002.[311] The ICF attempts to provide a

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[303] Paolo Gritti 'The bio-psycho-social model forty years later: a critical review' 2017 *JPS1*(1) at. 36; Ana Sabela A´ lvarez & MSc Marco Pagani et al 'The clinical application of the biopsychosocial model in mental health: a research critique' 2012 *Am J Phys Med Rehabil* 91 at 173; Francesc Borrell-Carrió & Anthony L. Suchman et al 'The Biopsychosocial Model 25 Years Later: Principles, Practice, and Scientific Inquiry, Annals of Family Medicine' 2004 2(6) 576 at 582.

[304] Derick T Wade1 & Peter W Halligan 'The biopsychosocial model of illness: a model whose time has come' 2017 *Clinical Rehabilitation* 31(8) at 995.

[305] George Engel 'The need for a new medical model: A challenge for biomedicine. Science' 1977 196(4286), 129–136, pg 133.

[306] David Pilgrim 'The Biopsychosocial Model in Health Research: Its Strengths and Limitations for Critical Realists' 2015 Journal *of Critical Realism* 14(2) 164 at 166; Barbara J. Lehman & Diana M. David et al, 'Rethinking the biopsychosocial model of health: Understanding health as a dynamic system,'2017 *Soc Personal Psychol Compass* at 1.

[307] Andreas Petasis 'Discrepancies of the Medical, Social and Biopsychosocial Models of Disability; A Comprehensive Theoretical Framework' 2019 *The International Journal of Business Management and Technology* 3(4) 42 at 47.

[308] Petasis op cit note 307 at 48.

[309] Ibid.

[310] Ibid.

[311] Du Plessis op cite note 43 at 33; WHO 'How to use the ICF: A practical manual for using the International Classification of Functioning, Disability and Health (ICF)' (2013) 5 http://www.who.int/classifi cations/drafticfpracticalmanual.pdf (accessed 17 October 2021); Derick T Wade & Peter W Halligan 'The biopsychosocial model of illness: a model whose time has come' 2017 *Clinical Rehabilitation* 31(8) 995 at 997.

more inclusive classification system for describing disability in a variety of levels and contexts (i.e., social context and personal context).[312]

Nevertheless, while the BPS model is clearly an attempt to secure a middle ground between the extremes of both the biomedical models and social models, several scholars have over the years expressed concerns regarding its application.[313]These areas of concern include: the model's problem with dichotomizing between biology, psychology, and society;[314] difficulties with the complexity of outlining linkages or prioritizing among its subsystems;[315] problems of masking an underlying biomedical approach;[316] and a pervasive individualistic focus.[317] All the above results from the fact that the BPS model lacks philosophical coherence.[318] Lvarez and Pagani argue that although the BPS model provides a more comprehensive and human approach to disability, its classic formulation of the BPS model has been criticized for its vagueness.[319]This is particularly true when it comes to conceptualising the hierarchy of its systems(biology, psychology, and society).[320] So although the BPS model pays attention to the biologic, the psychologic, and the social aspects of illness and disability, it does not provide guidance on how to set priorities.[321] According to Benning because of this lack of philosophical coherence, the model provides no safeguards against either the dominance or the under-representation of either of the three systems .[322] Consequently, prioritization depends on personal preference, and often the biomedical factors dominate .[323] So much so that it has been argued that the BPS model is mostly a medical model, that the biological factors

[312] Petasis op cit note 307 at 48 and 49.
[313] Ibid.
[314] Andrew R. Hatala 'The Status of the "Biopsychosocial" Model in Health Psychology: Towards an Integrated Approach and a Critique of Cultural Conceptions' 2012 *Open Journal of Medical Psychology* 1(1)51 at 52.
[315] Nassir S. Ghaemi 'The Rise and Fall of the Biopsychosocial Model' 2009 'The British Journal of Psychiatry' 195 3 at 3-4; N. McLaren 'The Myth of the Biopsychosocial Model' 2002 *Australian and New Zealand Journal of Psychiatry* 2002 36(5) 701 at 701-703; J. Suls, and A. Rothman 'Evolution of the Biopsychosocial Model: Prospects and Challenges for Health Psychology' 2004 Health *Psychology* 23(2) 119 at 119-120.
[316] Andrew R. Hatala 'The Status of the "Biopsychosocial" Model in Health Psychology: Towards an Integrated Approach and a Critique of Cultural Conceptions' 2012 *Open Journal of Medical Psychology* 1(1)51 at 52.
[317] Hatala op cit note 52; D. F. Marks 'Health Psychology in Context' 1996 *Journal of Health Psychology* 1 at 7-21; Tony B Benning, Limitations of the biopsychosocial model in psychiatry, Advances in Medical Education and Practice 2015:6 347 at 348.
[318] Tony B Benning 'Limitations of the biopsychosocial model in psychiatry'2015 *Advances in Medical Education and Practice* 347 at 348; F Borrell-Carrió & AL Suchman et al 'The Biopsychosocial model 25 years later: principles, practice, and scientific inquiry' 2004 *Ann Fam Med* 2 567 at 582; Paolo Gritti op cit note 303 at 39.
[319] Ana Sabela A´ lvarez & MSc Marco Pagani et al 'The clinical application of the biopsychosocial model in mental health: a research critique' 2012 *Am J Phys Med Rehabil* 91 at 178.
[320] Ibid.
[321] Lvarez & Pagani op cite note 319 at 178 and 179.
[322] Benning op cite note 318 at 348-349; Gritti op cit note 303 at 39.
[323] Lvarez & Pagani op cit 319 at 179.

are still superimposed to the psychological and social ones.[324] Hence, it still shares many of the potential pitfalls or limitations that are ascribed to the medical model that have been discussed in the previous section above.[325] Further, it has also been argued that another disadvantage of the BPS model, is that it lacks a common language for all the systems, and that the complex relations between causes and effects of factors within each subsystem, i.e. biological, psychological and social, and further, how they all interact and influence health, disease or even disability is not properly known.[326]

The above, may pose challenges for the potential of anti-discrimination protection for employees with psychosocial conditions, because if the BPS model is adopted, then it means it will still have the same pitfalls that are already in place as a result of the medical model.[327]Hence, further conceptual clarifications and developments are necessary in order for the BPS to be applied in a consistent manner that will not to exclusion of disabled persons,[328] in this case employees with persons with psychosocial condition from disability anti-discrimination protection. As will be discussed in later chapters the model that dominates disability anti-discrimination law in employment is of fundamental importance because it determines who is protected and who left out.

VI. THE HUMAN RIGHTS MODEL OF DISABILITY

The human rights model of disability, which has been argued by some scholars like Retief and Letšosa, bears a close kinship with the social model of disability. Indeed, some researchers treat the social model and the human rights model as being synonymous.[329] However, this is not the position taken by everyone. Degener in fact suggests that the two models are not only distinct, but that disability studies have moved beyond the debate of medical versus social models of disability, and are now in a new era of the human rights model of disability, as epitomised by the CRPD.[330] This claim is referred to as the 'improvement thesis' by Lawson & Beckett. [331]

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[324] Mladen Havelka & Jasminka Despot Lucanin et al 'Biopsychosocial Model – The Integrated Approach to Health and Disease' 2009 Coll. *Antropol* 33 303 at 308; Paolo Gritti 39.
[325] Mladen Havelka & Jasminka Despot Lucanin op cit note 308; See Chapter 2, Heading III.
[326] Ibid.
[327] See Chapter 2, Heading III.
[328] Du Plessis op cit not 43 at l35.
[329] Retief & Letšosa op cit note 175 at 4.
[330] Mary Ann Jackson 'Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighbourhood Scale?' (2018) 7(10) *www.mdpi.com/journal/laws* 1- at 7.
[331] Anna Lawson & Angharad E. Beckett 'The social and human rights models of disability: towards a complementarity thesis' (2020) 25(2) *The International Journal of Human Rights* 1- at 13.

Although the social model is widely acknowledged by scholars such as Kayess and French,[332] Traustadóttir,[333] and Harper[334] as playing a significant role in the drafting and shaping the CRPD,[335] and as serving as a powerful tool to demand legal reform,[336] Degener takes a contrary position. Degener argues that the CRPD it is in fact the codification of the human rights model of disability and not the social model.[337] Degener is not alone in this line of thinking. Others include Stein and Stein[338] and S. Arduin.[339]

Degener supports her 'improvement thesis' with six propositions about how the human rights model differs from the social model.[340] First, whereas the social model merely explains and helps people to understand the underlying social factors that shape the understanding of disability, the human rights model moves beyond explanation and acknowledges the human dignity of disabled persons.[341] Second, while the social model supports antidiscrimination policy civil rights reforms, the comprehensive nature of the human rights model of disability enables it to encompass both sets of human rights, civil and political as well as economic, social and cultural rights.[342] Third, whereas the social model of disability ignores the dependency, pain, deterioration of quality of life and even death as a result of impairment that may be faced by persons with disabilities, the human rights model of disability acknowledges these life circumstances and demands them to be considered when social justice theories are developed.[343] Fourth, the social model of disability neglects identity politics as a valuable component of disability policy, whereas the human rights model offers room for minority and cultural identification.[344] Fifth, that while the social model of disability is critical of prevention

[332] R. Kayess and P. French, 'Out of Darkness into Light: Introducing the United Nations Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1 at 7.
[333]Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in Oddný Mjöll Arnardóttir & Gerard Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities – European and Scandinavian Perspectives* vol 100 (ed) 1 at 3 and 16.
[334] Kayess and French op cit note 332 at 7 acknowledged this and refers to it as the 'populist' version of the social model; Paul Harpur 'Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities' (2012) 27(1) *Disability & Society* at 1.
[335] Lawson & Beckett op cit note 333 at 4.
[336] Ibid.
[337] Theresia Degener, 'A Human Rights Model of Disability' in P. Blanck and E. Flynn (ed) *Routledge Handbook on Disability Law and Human Rights* ed (2017) 49.
[338] M. A. Stein & P. J. Stein 'Beyond Disability Civil Rights' (2007) 58 *Hastings Law Journal* 1203-1240 at 1209–1210 refer to a 'disability human rights paradigm' rather than a 'human rights model of disability'
[339] Sarah Arduin, *'Article 3. General Principles', in The UN Convention on the Rights of Persons with Disabilities: A Commentary'* in ed I. Bantekas & Michael Ashley Stein et al (2018)98-99; Sarah Arduin 'Implementing Disability Rights in Education in Ireland: An Impossible Task' (2013) 36 *Dublin University Law Journal* at 93.
[340] Lawson & Beckett op cit note 333 at 13.
[341] Degener op cit note 337 at 33; Retief& Letšosa op cit note 175 at 5.
[342] Degener op cit note 337 at 35.
[343] Ibid at 38.
[344] Ibid at 41.

policy, the human rights model offers a basis for assessment when prevention policy can be claimed as human rights protection for disabled persons.[345] Finally, whereas the social model of disability can explain the majority of persons with disability live in relative poverty, the human rights model offers a roadmap for change.[346]

Lawson & Beckett not only contest this 'improvement thesis' by Degener,[347] but instead advocate for what they term the 'complementarity theses.[348] According to them, the relationship between the two models is one in which neither can be viewed as an improvement on the other because each has distinctive roles to play.[349] Notably, although both models advance human rights for disabled people, they do so in distinct roles that are complementary and symbiotic.[350]

Lawson & Beckett use the Ad Hoc Committee sessions during the drafting of the CRPD,[351] and the Committee's ongoing monitoring of its implementation, to examine the roles played by both models.[352] They argue that the social model is used in four types of context: as a general frame of reference; to provide definitions; to promote equality and inclusion; and to promote solidarity.[353] They also identify four key ways in which use is made of the 'human rights model of disability' in the concluding observations.[354] The four roles arise in the following contexts: in connection with the need for states to embed it into disability strategies and across legislation and policy;[355] in connection with awareness-raising and training;[356] in connection with concerns about systems that deprive persons with disabilities of liberty and subject them to institutional living;[357] and fourth, to ensure that policies or systems are designed and implemented with the active participation of representative organisations of disabled people.[358] Lawson and Beckett then note that prior to considering the roles, that the vast majority of references to the human rights model (or a variant of it)[359] are not accompanied

[345] Ibid at 45.
[346] Ibid at 47.
[347] Lawson & Beckett op cit note 333 at 2.
[348] Ibid note 3.
[349] Ibid.
[350] Ibid 3.
[351] Ibid note 5.
[352] Ibid note 3.
[353] Ibid note 4.
[354] Ibid note 10 and 11.
[355] Ibid note 11.
[356] Ibid.
[357] Ibid note 12.
[358] Ibid.
[359] Ibid.

with an explanation of what the Committee means by it.[360] Further, looking at others who also propagate the human rights model of disability, there seems to be a lack of clear definition of the model.[361]

Lawson & Beckett, also argue that although there is no explicit mention of the human rights model of disability in the text of the CRPD or the AHC sessions or online records,[362] the CRPD Committee's concluding observations barely mention the social model, as the human rights model plays a more active role.[363]

I agree with Lawson's & Beckett's 'complementarity thesis'[364] that neither of the two models can be viewed as an improvement on the other, because each has distinctive roles to play in the disability rights movement. Lawson's & Beckett's further, recognise the social model's role as a general frame of reference, its contribution to the development of operational definitions, and its promotion of equality and inclusion and fostering of solidarity.[365] These roles are particularly relevant in the context of antidiscrimination law.

Although I do not agree with Degener 'improvement thesis' in general, its recognition of the important role played by the social model in the struggle for civil rights and antidiscrimination legislation is instructive.[366] She also acknowledges that the 'social model of disability was created not only as an explanation for the exclusion of disabled people from society, but as a powerful tool to analyse discriminatory and oppressive structures of society'.[367] Both the 'improvement thesis' and the 'complementarity thesis' therefore recognise the important role that can be played by the social model in the analysis of antidiscrimination laws.

VII. SOCIAL APPROACHES TO PSYCHOSOCIAL DISABILITIES AND CONDITIONS

The traditional response to mental disorders in mental health and mental capacity law has predominantly been founded on the medical model of disability.[368] This is unsurprising, as the

[360] Ibid note 3.
[361] Stein and Stein op cit note 338 at 1203 although they refer to a 'disability human rights paradigm' rather than a 'human rights model of disability'; See also Arduin op cit note 313 at 98-99; S. Arduin. op cit note 339 at 93; Lawson & Beckett op cit note 333 at 11.
[362]Lawson & Beckett op cit note 333 at 10.
[363] Ibid note 4.
[364] Ibid note 3.
[365] Ibid.
[366] Degener op cit note 337 at 35.
[367] Ibid note at 34.
[368] Clough op cit note 80 at 53.

medical model has dominated the field of 'mental health'.[369] Indeed, mental health policy, provision and practice are based on notions of' 'treat' 'cure', 'care' and 'recovery'.[370] This emphasis on these notions which imply fixing is probably what has greatly contributed to the deeply ingrained societal views and practices that regards persons with psychosocial conditions as being 'less' than others, at least in a biological sense.[371]

Further, according to Clough the central characteritic of early twenty-first century is geared towards treating 'mental illness' as though 'bad' is synonymous to mad'.[372]This is fuelled by the increased incorrect association of mental health service users with 'dangerousness' or with cruel and murderous activities.[373]This of course has resulted in serious and far-reaching ramifications for persons with psychosocial conditions' enjoyment of basic rights and freedoms.[374] Beresford, argues that the medical model does not accommodate the lived experiences of mental health service users/ survivors. As a result, its persistent foothold on the mental health field has led to great dissatisfaction.[375]Yet, the model has prevailed and remains relevant,[376] and this is what pursuades Beresford to hold that the philosophical base of 'mental health' needs to be reviewed.[377]

There has been a Eurocentric interest in social perspectives from the disability movement in the field of mental distress.[378] Such efforts have not yet led to coherent social model thinking comparable with the medical model thinking for understanding mental health.[379] In many African contexts, particularly those underpinning formal law, the medical approach to psychosocial conditions still predominates as well.[380] As will be highlighted below, social theorising of psychosocial disabilities is crucial, as its absence may limit the scope and application of antidiscrimination law.

Significantly, although there are many social approaches to disability in general, as highlighted above, this research will adopt the social model of disability as a lens through which to analyse antidiscrimination laws in Kenya and South Africa. This is because the model,

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[369] Ibid.
[370] Peter Beresford 'Thinking about 'mental health': Towards a social model' (2002)11(6) *Journal of Mental Health* 581; Sara Goering op cite note 267 at 135.
[371] Clough op cit note 80 at 55.
[372] Peter Beresford op cit note 370 at 581.
[373] Peter Beresford op cit note 370 at 581.
[374] Clough op cit note 80 at 53
[375] Beresford op cit note 370 at 581; Clough op cit note 80 at 55
[376] Beresford op cit note 370 at 581
[377] Ibid.
[378] Timander & Möller op cit note 141 at 1276.
[379] Ibid
[380] Beresford op cit note 370 at 583.

as has been highlighted above, provides a philosophical basis for a transformed approach to disability among disabled people,[381] and as such has fundamental implications for persons with psychosocial conditions.

a) Social model of disability and psychosocial conditions

The social model of disability initially focused almost exclusively on physical illness[382] but, over time, attempts have been made to make it relevant to other groups, including people with learning difficulties, deaf people and those experiencing madness and distress.[383] Nevertheless, even though the model later expanded to include persons with psychosocial conditions,[384] applicability of the social model to people who experience mental distress in general has not been elaborated on sufficiently.[385] It has been argued that it is 'an area where little work has been done so far' and, for some, there remains a 'pervasive divide between the social model of disability and mad activism'.[386] This could be influenced by the fact that historically political activism and theorising of both groups happened separately.[387]

Beresford, about 18 years ago, was one of the leading names from the mental health user/ survivor movement who first asked: 'what have madness and psychiatric system survivors got to do with disability and disability studies?'[388] Of course, discussions about this issue have taken place since, [389] but there does not seem to be any clear agreement in disability discourse whether or not madness distress and psychiatric system survivors are part of it.[390]

Furthermore, those who reject the social model offer varied reasons for their choice. For some it is because mental health has tended to be peripheral within disability studies.[391] Some activists and researchers in the area of critical mental health have felt 'marginalised by disability theory.'[392] This is motivated by the fact that others are of the view that the social

[381] Ibid.
[382] Lester & Tritter op cit note 289 at 653.
[383] H Spandler & J Anderson et al 'Introduction' in H Spandler and J Anderson et al (ed) *Madness, Distress and the Politics Disablement* (ed) (2015) 2.
[384] Timander & A Möller op cit note 141 at 1281.
[385] Ibid.
[386] Nabbali cited by Spandler & Anderson op cit 356 at 3; Mad activism is issuing a challenge to psychiatry's identity as a medical specialty. See Mohammed Abouelleil Rashed 'The Identity of Psychiatry and the Challenge of Mad Activism: Rethinking the Clinical Encounter' (2020) 45 *The Journal of Medicine and Philosophy* 599.
[387] Spandler & Anderson op cit 383 at 2.
[388] Peter Beresford 'What Have Madness and Psychiatric System Survivors Got to Do with Disability and Disability Studies?' (2000) 15(1) *Disability & Society* 167. See footnote 140 for clarity on the meaning of users/ survivors.
[389] Spandler & Anderson op cit note 383 at 1.
[390] Lester & Tritter op cit note 289 at 653.
[390]Ibid.
[391] Spandler & Anderson et al op cit note 383 at 2.
[392] Ibid; Lester & Tritter op cit note 289 at 653.

model of disability 'is 'pallid' and even 'empty' when addressing the mental health system and experiences of mental distress.'[393] They argue that it fails to 'adequately conceptualise the experience, phenomenon and constitution of mental health in critical and politicized ways'.[394]

Nevertheless, Mulvany argues that it remains possible to utilise ideas from disability theorists to inject new vigour and direction into an analysis of the experience of people who experience mental illness.[395] Indeed, some mental health activists have strongly advocated for the application of disability legislation to gain human rights and social protection.[396] Correspondingly, Beresford argues that the work of the disability theorists provides new directions for an analysis of the plight of persons with psychosocial conditions.[397]

Despite the fact that disability theorists have rarely included psychiatric disability in their work,[398] activists and academics have written about the application of the social model to madness, including the potential and the problems of doing so.[399]

One of the biggest challenges of using the social model in relation to psychiatric survivors/service users, is that they may not consider themselves disabled.[400] Although some psychiatric users/survivors have started to identify as persons with psychosocial disabilities, others strongly reject the application of a disability framework to their experiences, and have expressed misgivings about being positioned as disabled.[401] Even if one identifies as distressed, mad or mentally ill, a number of factors may prevent one from taking the next step: identifying as disabled or being identified by others as such.[402] Some survivors do not consider themselves as having an impairment, hence, they believe they are not disabled.[403] They argue that their impairment is not tangible and as such is not real.[404] In fact, some do not see themselves as having any kind of personal difficulty or problem.[405] Those who believe the contrary, still

[393] Timander & Möller op cit note 141 at 1281.
[394] Ibid; Spandler & Anderson op cit note at 383 at 2.
[395] Mulvany op cit note 219 at 584 and 585.
[396] Spandler & Anderson op cit note at 356 at 2.
[397] Mulvany op cit note 219 at 582.
[398] Mulvany op cit note 219 at 584 and 585.
[399] Rashed 'In Defence of Madness: The Problem of Disability' (2019) 44 Journal *of Medicine and Philosophy* 150 at 160; Essya M. Nabbali 'A "Mad" Critique of the Social Model of Disability' (2009) 9(4) The *International Journal of Diversity in Organisations, Communities and Nations* 1.
[400] Beresford op cit note 182 at 66.
[401] Spandler & Anderson op cit note at 383 at 2.
[402] Spandler & Anderson op cit note at 383 at 24.
[403] Beresford op cit note 182 at 66; Rashed op cit note 399 at 160.
[404] Rashed op cit note 399 at 160.
[405] Beresford op cit note 182 at 66.

believe that mental illnesses are not comparable to physical or sensory impairment.[406] This is because it is it is seen as not only being socially constructed, but also as fluctuating, and a such is not as 'objective' and 'measurable' as the sensory and physical impairments.[407]This reluctance is further fuelled by the common association of disability with serious, long-term, and permanent impairment, which can result in the belief that unless one has a lifelong condition, one should not claim to be 'disabled'.[408] As a result persons with psychosocial conditions may feel that they are not deserving or worthy of support and rights found under the banner of being disabled.[409]

Some users/survivors may not consider themselves disabled because they do not want to be associated with the "pathologising" implications of the term "impairment".[410] The place of 'impairment' has proved particularly problematic for those engaged in the politics of mental health.[411] In fact, Ann Plumb one of the biggest critics of the social model's application to persons with psychosocial conditions, argues that the root of psychosocial conditions is found within relationships with society rather than an impairment.[412]It is important to note that no matter how far disability scholars may debate impairment in relation to physical disability (claiming, for example, that not only disability, but also impairment, is socially constructed), there is consensus on the existence of impairment itself.[413] However, no such consensus exists in mental health,[414] in fact, the foundation of radical sections of the psychiatric survivor movement is in denying the existence of such an impairment.[415]Yet, importantly, the state or identity of being disabled relies on the assessment of an underpinning impairment, of sufficient presence to disrupt a range of normative expectations. [416] In order to pave the way for equal access, participation and independent living support, the disability movement's demands such

[406] Jasna Russo & Debra Shulkes 'What we talk about when we talk about disability: making sense of debates in the European user/survivor movement' in H Spandler and J Anderson et al (ed) *Madness, Distress and the Politics Disablement* (ed) (2015) 36.
[407] D Reeve, 'Psycho-emotional disablism in the lives of people experiencing mental distress', in J. Anderson, B. Sapey and H. Spandler (eds) Distress or Disability? (Proceedings of a symposium held at Lancaster Disability 15-16 November 2011, Lancaster: Centre for Disability Research, Lancaster University) (2012) 24 at 26.
[408] Spandler & Anderson op cit note at 383 at 24.
[409] Ibid.
[410] Rashed op cit note 399 at 160.
[411] Spandler & Anderson op cit note at 383 at 3.
[412] Reeve op cit note 407 at 25.
[413] Spandler & Anderson op cit note at 383 at 3.
[414] Ibid.
[415]Plumb cited by Spandler & Anderson op cit note at 383 at 24.
[416] William J Penson 'Unsettling impairment: mental health and the social model of disability' in H Spandler and J Anderson et al (ed) *Madness, Distress and the Politics Disablement* (ed) (2015) 60.

an impairment.[417] in this case, for disability anti-discrimination protection in employment. Unfortunately, as it stands at the moment, that is still the cases for purposes of most antidiscrimination laws.

Next, another stumbling block for a shared discourse and activities between the disability and the mad movements, respectively,[418] is fear of increased stigma.[419] Each group faces its own distinctive stigma in society, thus, to take on the term "disability" on top of "madness", is to take on an additional stigma.[420]

The above arguments highlight the tensions between disability as a concept and the relevance or place of psychosocial conditions within disability.[421] Furthermore, although readily apparent physical impairments such as missing limbs, for example, do not fluctuate,[422] psychiatric diagnostic categories are notoriously unreliable and inconsistent and ultimately socially constructed.[423] However, the emotional and other difficulties that persons with psychosocial conditions experience are real and can disrupt what is considered to be a normal life course.[424] For example, it may be particularly hard to complete education or stay in employment in competitive settings that demand consistent performance.[425] Thus, although different, continuing mental health difficulties, fluctuating crises or extreme states of mind can have similar effects to disablement.[426] Also, it is worth noting, that the inherently inconsistent nature of psychosocial conditions is not necessarily inconsistent with the social model, since many readings of it view impairment as 'perceived' impairment, that is like disability itself, socially constructed.[427] Rashed argues that taking the position that psychiatric survivors/service users do not have an impairment[428] contributes to the idea that disability is a fixed phenomenon and not an outcome of the interaction between individual capacities and specific social/physical

[417] Spandler & Anderson op cit note at 383 at 2.
[418] A burgeoning movement(s) of activism and advocacy in mental health that provides a positive narratives of mental health phenomena, narratives that can counteract the pervasive, negative views in society and the profession of psychiatry. Mad pride is a movement and discourse that pose a direct and radical challenge to the social norms and values underpinning views on "mental illness." It rejects the language of "illness" and "disorder," reclaims the term "mad," and replaces its negative connotations with more positive understandings. It reverses the customary understanding of madness as illness in favour of the view that madness can be grounds for identity and culture; see more in Rashed op cit note 399 at 150 and 151.
[419] Rashed op cite note 399 at 160.
[420] Ibid.
[421] Beresford op cit note 182 at 66.
[422] Ibid at 66 and 67.
[423] Ibid at 67.
[424] Russo & Shulkes op cit note 406 at 35.
[425]Ibid.
[426]Ibid.
[427] Beresford op cit note a 182 at 67.
[428] Rashed op cit note 399 at 160.

contexts.[429] This line of reasoning makes it possible for persons with psychosocial conditions to be considered disabled because of an attribution of impairment by others, even if that impairment is contested by affected persons themselves.[430] This is important because, where people are treated as if they are disabled, for example where they are medically treated, often against their will, they may require protection, regardless of how they choose to see themselves.[431] Hence, the lack of a constant and tangible or measurable impairment has not stopped persons with psychosocial conditions from being placed under the banner of disability.[432] Thus, as it stands, persons with psychosocial conditions have no other recourse than to seek disability status. [433]

However, Spandler et al note that the bargaining chip that persons with psychosocial conditions require in order to benefit from disability policies and legislation, is an identifiable impairment.[434] In the absence of alternative bargaining chips it seems that they may be stuck with concepts of mental illness and/ or disability, however unpalatable they may be'.[435]

I recognise that qualifying as a person with a disability is not the only avenue through which persons with psychosocial conditions can seek legal protection. However, as will be argued below, persons with psychosocial conditions may gain from seeking disability protection.[436] Mental health activists who have strongly advocated for the application of disability legislation claim that it is necessary in order to gain human rights and social protection.[437] Those in support of seeking legal protection as persons with disabilities argue that it creates a sense of community across the survivor/service user/mad and disability movements.[438] Beresford, for example, argues that the relationship between the disability rights and mental health service users/ survivors' movements should be overt for at least three key reasons. First, survivors and persons with disabilities are already lumped together[439] within law and policy, both internationally and locally.[440] According to policy and legislation persons who are given the label of psychosis by the mental health system are identified as disabled

[429] Rashed op cit note 399 at 160.
[430] Spandler & Anderson op cit note 382 at 22.
[431] Ibid.
[432] Penson op cit not 416 at 64.
[433] Ibid.
[434] Spandler & Anderson op cit note 383 at 24.
[435] Ibid.
[436] See heading V and VI.
[437] Spandler & Anderson op cit note 383 at 2
[438] Rashed op cit note 399 at 160.
[439] Beresford op cit note 182 at 67.
[440]Ibid.

people – whether or not they self-identify as such.[441]Thus, regardless of what survivors themselves may think or even prefer,[442] they are commonly officially included as disabled.[443]Hence, it matters very little that it can be argued that policy has acted prematurely by framing madness and distress as disability without acknowledging the myriad of complexities discussed above.[444]

Second, Beresford argues that there are instances where there are significant overlaps between the two populations, example, where some survivors also have impairments as a result of treatments they have received, or impoverishment, just to name a few.[445]Third, and most important to this research, is the fact that both groups (persons with disabilities and psychiatric survivors/service users) are subject to discrimination and oppression.[446] They experience discrimination on the basis of some presumed 'imperfection' of body, mind or emotion,[447] albeit on the basis of different stereotypes.[448] Therefore, the denial of their human rights is a shared experience of disabled people and survivors with unifying potential.[449]

This power of solidarity between movements was evident in the CRPD negotiations, [450] as will be discussed in chapter 3 below.[451] Prior to the CRPD, although survivors of psychiatry argued that the special laws, labels and 'treatments' devised for them amounts to discrimination,[452] these claims were ignored and dismissed by governments, psychiatrists, courts and the public because they lacked external recognition. However, the CRPD has changed that. [453] I believe this was possible because during the drafting of the CRPD persons with disabilities, including those with psychosocial disabilities, negotiated their rights as a collective.[454] Survivors of psychiatry were able to influence the negotiation and drafting process and bring user/ survivor issues into the heart of the disability movement through the participation of groups like European Network of (ex) Users and Survivors of Psychiatry

[441]Beresford cited by Reeve, op cit note 407 at 80.
[442] Lester& Tritter not 289 at. 665.
[443] Beresford op cit note 182 at 67.
[444] Spandler & Anderson op cit note 383 at 2
[445] Peter Beresford op cit note 182 at 67.
[446] Lester & Tritter op cit note 289 at 655.
[447] Liz Sayce '*The Disability Inclusion Model: No to Shame*' in: From Psychiatric Patient to Citizen ed (2000) 129.
[448] Ibid at 130.
[449] Lester & Tritter op cit note 289 at 665.
[450] Russo and Shulkes op cit note 406 at 37 and 38.
[451] See chapter 3, heading II.
[452] Russo and Shulkes op cit note 406 at 37.
[453]Ibid.
[454] See chapter 3, heading II.

(ENUSP) and the World Network of Users and Survivors of Psychiatry (WSNUP).[455] It is this contribution of human rights defined from a user/ survivor perspective that makes this treaty such a powerful tool for advocacy.[456] If people with mental health problems are considered 'disabled'(as they are under the terms of the Convention) then they can benefit from the provisions, and this has a wide-ranging implications for persons with psychosocial conditions.[457] The treaty provides a solid and prominent international platform from which to launch human rights claims.[458] This will potentially challenge the legitimacy of many mental health laws throughout the world which permits certain human rights exceptions on the grounds of a person being of ' unsound mind.'[459] In fact, the UN Convention is often cited in support of the argument that disability policy can be of benefit to people with mental health problems.[460]

The benefits of the CRPD remain available only to those who are willing to accept disability status.[461] At domestic level, disability programmes in areas such as employment and training, housing and accommodation support, generic social support, recreation and disability services are also only available to those who qualify under the disability status.[462] As a result, they are able to access support or services; and benefit from disability policies.[463]

VIII. THE SOCIAL MODEL AS A LENS THROUGH WHICH TO ANALYSE DISABILITY ANTIDISCRIMINATION LAW

Both the social and medical model are generally adopted by States to attempt to define and combat disability discrimination.[464] This research will adopt critical perspectives of the traditional British social model of disability – the model itself, as well as critiques of it – to consider the scope, application and impact of antidiscrimination laws within the CRPD framework, as well as in Kenya and South Africa.

[455] Russo and Shulkes op cit note 406 at 37 and 38
[456]. Russo and Shulkes op cit note 406 at 37
[457] Spandler and Anderson op cit note 383at 6.
[458] Russo and Shulkes op cit note at 406 at 37 and 38
[459] Spandler and Anderson op cit note 383 at 6.
[460] Ibid.
[461] Russo and Shulkes op cit note 406 at 34.
[462] Mulvany op cit note 219 at 586.
[463] Spandler and Anderson op cit note 383 at 6; Lester & Tritter op cit note 289 at 666.
[464]Stephen Bunbury 'Unconscious bias and the medical model: How the social model may hold the key to transformative thinking about disability discrimination' (2019) 19(1) *International Journal of Discrimination and the Law* 26.

The social model's focus on discriminatory and oppressive structures within societies,[465] its engagement with frameworks for interpreting notions of disability,[466] lends itself to critical consideration of the scope and application of antidiscrimination law. In line with this Lawson & Beckett argue that critiquing the social model as though it is an explanatory theory of disablement risks overlooking and even undermining the descriptive and heuristic functions of the model,[467] which provide a way of explaining the issues associated with disability discrimination.[468] The model provides a simple mechanism by which to identify social factors that disable people with impairments, external factors to the individual which are capable of becoming the focus of campaigns for social change.[469]

Second, a social model enables discrimination law to tackle social barriers as a cause of disability. [470] This is particularly important for persons with psychosocial conditions, as research shows that the biggest barrier to persons with psychosocial disabilities accessing and maintaining employment is not the impairment or condition itself, but attitudinal barriers in employment.[471] As a result of the stigma associated with persons who have psychosocial conditions, misconceptions about them abound. They are often assumed to be dangerous, unpredictable and unintelligent. This has further been endorsed through discriminatory and exclusionary behaviours.[472]As a result, globally, many people with mental illness are excluded not just from employment, but are also denied legal rights to vote, marry or own land, and ostracised.[473]

The social model as an analytical lens for anti-discrimination law demands that the key focus of anti-discrimination laws should be the occurrence of disability discrimination itself, and not medicalised notions of who qualifies as disabled or not.[474] A social mode lens also requires that the underlying premise of antidiscrimination legislation should be that disability is a social construct rather than a 'personal tragedy', and because disability is a social and not merely an individual problem. Consequently, it demands that solutions must come from society

[465] Lawson & Beckett op cit note 331 at 1.
[466] Ibid; Bunbury op cit note 464 at 27.
[467] Ibid.
[468] Bunbury op cit note 464 at 41.
[469] Lawson & Beckett op cit note 331 at 17.
[470] Ibid.
[471] Theresia Degener 'The Definition of Disability in German and Foreign Discrimination Law' (2006) 26 (2) Disability Studies Quarterly, available at www.dsq-sds.org, accessed 21 March 2021.
[472] Teresa Hall & Ritsuko Kakuma et al 'Social inclusion and exclusion of people with mental illness in Timor-Leste: a qualitative investigation with multiple stakeholders' (2019) 19(702) *BMC Public Health* 2.
[473] Hall & Kakuma op cit note 472 at 2.
[474] Katie Wells 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' (2003) 32(4) *Industrial Law Journal* 260.

as a whole and not only from the individual.[475] Furthermore, it does not construe the definition of disability so narrowly that disability protection can only be invoked in favour of those with a certain degree of impairment or those who are "truly disabled".[476] This is because it recognises that such fixation is founded on the very same stereotypes about disabled persons that discrimination law seeks to prevent and combat.[477]

Another consequence of adhering to the social model is that it implies the prohibition of discrimination not only on the basis of actual impairments only, but also on the basis of characteristics which are presumed of or imputed on persons experiencing discrimination.[478] It, thus recognises assumed or perceived disability and discrimination.[479] It also recognises discrimination by association.[480] An example is where an employee is treated unfavourable by her employer in the workplace because they have a husband or child with a psychosocial disability. This is in line with research that indicates that family members perceive themselves as disabled if they have a family member that is disabled.[481] In other words, if they are associated with a disabled individual, they can be subject to disability discrimination.[482] Importantly, the recognition of perceived disabilities and discrimination by association serves as evidence of the influence of the social model approach in anti-discrimination law.[483]

Further, it facilitates the extension of protection beyond those with a "present" impairment, to employees with past, and future ones.[484] This is the acknowledgment that dee rooted social stereotypes of an impairment can influence how a person with that impairment is treated by others.[485] It is the awareness that any stigma associated with an impairment can stay even after the physical or psychiatric effects of that impairment no longer exist.[486] Indeed, if

[475] Elizabeth Dickson 'Understanding Disability: An Analysis of the Influence of the Social Model of Disability in the Drafting of the Anti-Discrimination Act 1991 (Qld) and in its Interpretation and Application' (2003) 8(1) Australia *& New Zealand Journal of Law & Education* 47-70 at 47.
[476] Degener op cit note 471.
[477] Gregor Mauc̆ec 'Tackling disability-based discrimination in international and European law International' (2013) 13(1) *Journal of Discrimination and the Law* 49.
[478] Dickson op cit note 475; Bunbury op cit note 464 at 37.
[479] Bunbury op cit note 464 at 37; Mauc̆ec op cit note 477 at 41 and 49.
[480] Ibid.
[481] Bunbury op cit note 464 at 37
[482] Ibid.
[483] Ibid.
[484] Yuling Hao & Peng Li 'Employment Legal Framework for Persons with Disabilities in China: Effectiveness and Reasons' (2020) 17(14) International *Journal of Environmental Research and Public Health* 6; Degener op cit note 444.
[485] Dickson op cit note 475 at 49.
[486] Ibid.

anti-discrimination law is based on a social model of disability, it is completely irrelevant whether discrimination is based on a real or perceived characteristic.[487]

Additionally, when anti-discrimination law adopts a social lens it not only affects how disability is defined, but also how discrimination is applied and its scope. If we take into consideration that the primary mission of provisions on the prohibition of discrimination is to protect individuals against discrimination,[488] the implication is that the definition and requirements of discrimination should be structured in a manner where the goal becomes the discriminatory act of the perpetrator in this case the employer. Hence, the elements or requirements of its definition like the intention or burden of proof or maybe the necessity to prove a comparative discriminatory do not become the focus of the law and is even done away with in some instances where it will detract from the discriminatory conduct in question.

Also, the recognition of the duty of employers to reasonably accommodate an employee is the realisation that the elimination of discrimination may require positive action by others to accommodate the needs of the person with the impairment.[489] This is a reflection of the social model.[490] It suggests that the managing impairment is not the exclusive responsibility of the person with that impairment, but also of society at large.

The social model lens would affect how anti-discrimination law is applied and even enforced. In the case of reasonable accommodation, for example, it would require the determination of adequate reasonable accommodation be done by assessing how work environments can be changed so that persons with disabilities can participate and not vice versa.

In addition, a social model lens also influences the type of remedies provided under antidiscrimination law. As has already been highlighted, the social model acknowledges that 'limitations' faced by persons with disabilities flow from their treatment and not merely from their impairment.[491] Discrimination and, by implication, disablement, exist as institutional and not merely individual phenomena.[492] Thus, it is expected that this institutional nature of discrimination should also be factored into the application of remedies. Thus, the focus of

[487] Colin Barnes A working social model? Disability, work and disability politics in the 21st century' 2000 20(4) Critical Social Policy 441 at 442; Mauc̆ec op cit note 444 at 44.
[488] Mauc̆ec op cit note op cit note 477 at 44.
[489] Dickson op cit note op cit note 475 at 49.
[490] Dickson op cite note 475 at 49 and 50
[491] Dickson op cite note 475 at 50.
[492] Dickson op cite note 475 at 47.

remedies should not only be recourse for the individual in terms of monetary compensation or reinstatement alone, but should go beyond and also include societal or institutional reform where possible and appropriate.[493]

Although the social model has been criticised for failing to take in account diversity, and as a result presents disabled people as one unitary group,[494] in order to identify protected classes for anti-discrimination purposes, the law is necessarily blunt. That does not mean that all differences are irrelevant at all the stages of seeking anti-discrimination protection. This is because, although there may be instances where differences or diversity is required to be subservient to the collective interests of disabled persons, for disability anti-discrimination law purposes, specifically, this is at the stage of determining disability status. It is the predominance of the medical model of disability that causes difficulties at this stage, as will be discussed below.[495]

Once that hurdle is crossed and it becomes time to identify the form of discrimination as a legal response to anti-discrimination protection, the inquiry is individualised. Anti-discrimination law often provides individual remedies or solutions to specific events or challenges.[496] The application of the social model may therefore be able to include varied circumstances faced by persons with disabilities.

Lastly, a social model implies a holistic approach that takes into account all types of discrimination that create barriers to equality. Direct and indirect discrimination, harassment, and the denial of reasonable accommodation can all be viewed through a social model of disability. Dickson argues that an example of the influence of the social model of disability is found in the recognition of indirect discrimination. I am inclined to agree because the very nature of indirect discrimination is that it follows from policies and practices which target mainstream society.[497] Similar arguments can be made in relation to reasonable accommodation and even harassment.[498]

IV. CONCLUSION

This chapter considered the various models of discrimination that may impact anti-discrimination law, and proceeded to analyse and critique the traditional British social model,

[493] Dickson op cite note 475 at 47.
[494] Oliver op cit note 253 at 1025; Owens op cit note 232 at 389.
[495] See chapter 4, heading IV and chapter 5 heading IV.
[496] Quinlivan & Bruton op cit note 297.
[497] Dickson op cite note 448 at 50.
[498] Bunbury op cit note 444 at 37; Gregor Mauc̆ec op cit note 450 at 41 and 49.

which has influenced international and many domestic systems of anti-discrimination law. These theoretical debates will inform the engagement with, and the review of, disability anti-discrimination laws, particularly as they apply to persons with psychosocial disabilities.[499] In the next chapter, our focus shifts to the CRPD and its provisions that seek to address discrimination against persons with psychosocial disabilities in the employment sphere.

[499] Sayce op cit note 420 at 2.

CHAPTER THREE: REVIEW OF THE CRPD AND ITS ANTI-DISCRIMINATION PROTECTION OF EMPLOYEES WITH PSYCHOSOCIAL DISABILITIES

I. INTRODUCTION

This chapter will firstly, delve into what compliance with article 27(1)(a) of the United Nations Convention of the Rights of Persons with Disabilities (CRPD) means for States Parties, employers and employees. In order to make this determination, it will firstly discuss the meaning of compliance as used in international law. Secondly, it will analyse the meaning and scope of the employment anti-discrimination provision in the CRPD and why it applies not only to employees with disabilities in general, but to employees with psychosocial disabilities specifically. The chapter will then break down the four forms of discrimination protected under the CRPD, namely: direct discrimination, indirect discrimination, harassment, and the denial of reasonable accommodation. Lastly, it will consider the rights of employees with psychosocial conditions in employment and the concomitant duties that are imposed on state parties and employers.

II. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD): AN INTRODUCTION

International law has grown both in significance and volume in recent decades, and treaties have played a key role in this growth.[500] Significantly, although all treaties are obligation-creating legal instruments, not all are equally binding.[501] States Parties are only bound by international treaties if they consent through ratification. [502] Both Kenya and South Africa have ratified the CRPD.[503] South Africa has further ratified the Optional Protocol to the CRPD,[504] unlike Kenya, the implications of which will be discussed below.[505]

[500] A treaty is a formal agreement between sovereign states, usually in writing. Such formal agreements are central to the conduct of international relations; also see Beth Ann Simmons 'Treaty Compliance and Violation'(2010) 13 (1) *Annual Review of Political Science* 273 at 274. The word treaty will be used interchangeably with the word Convention.

[501] Ibid.

[502] Ibid.

[503] Convention on the Rights of Persons with Disabilities, 13 December 2006, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed 26 March 2021.

[504] Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=_en, accessed on 26 March 2021.

[505] See Chapter 5, heading 11.

The UN, over the years, has adopted a number of conventions with the goal of protecting different groups, including persons with disabilities from societal structures that are discriminatory in order to ensure access to human rights.[506] Since its establishment in 1945 through the end of the last century, the UN has promulgated seven fundamental human rights Conventions.[507] They include : the conventions are the International Covenant on Civil and Political Rights (ICCPR),[508] the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[509] and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT),[510] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), [511]the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[512] the Convention on the Rights of the Child (CRC),[513] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).[514] All the Conventions are universal in scope and although are also not specifically directed toward persons with disabilities, they implicitly include persons with disabilities within their purview.[515]

Notably, although the aforementioned Conventions protect persons with disabilities by implication, they have generally had inadequate success at ensuring persons with disabilities

[506] The Norwegian Equality and Anti-Discrimination Ombud 'The Ombud´s report to the UN Committee on the Rights of Persons with Disabilities – a supplement to Norway's first periodic report' 2015 at 10.
[507] Michael Ashley Stein & Janet E. Lord 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities' in Oddný Mjöll Arnardóttir & Gerard Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives, Series: International Studies in Human Rights* Vol 100(2009) 19; United Nations 'History of United Nations' https://www.un.org/en/about-us/history-of-the-un, accessed on 26 April 2021.
[508] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html, accessed 21 October 2021.
[509] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html, accessed 21 October 2021.
[510] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at https://www.refworld.org/docid/3ae6b3a94.html, accessed 21 October 2021.
[511] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html, accessed 21 October 2021.
[512] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: https://www.refworld.org/docid/3ae6b3970.html, accessed 21 October 2021.
[513] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: https://www.refworld.org/docid/3ae6b38f0.html, accessed 21 October 2021.
[514] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, available at: https://www.refworld.org/docid/3ae6b3980.html, accessed 21 October 2021.
[515] Stein & Lord op cit note 507 at 19 and 20

can exercise their rights.[516] This is because to qualify for protection under any of these instruments, a disabled person must either fall under a universal provision that by inference covers them as a person, or possess a different protected characteristic that is not based on disability alone.[517] The challenge with this approach is that existing human rights obligations are not tailor made to address the specific barriers faced by persons with disabilities in the realisation of their human rights.[518]

Despite this, it must be acknowledged that prior to the CRPD some effort was in fact made to place disability issues on the international agenda , but these efforts did not result in legally binding measures.[519] Initial initiatives included the adoption of the Declaration on the Rights of Mentally Retarded Persons,[520] the Declaration on the Rights of Disabled Persons during the 1970s,[521]the proclamation of the International Year of the Disabled in 1981,[522] and the International Decade of Disabled Persons from 1982–1991,[523] and the adoption of the World Programme of Action Concerning Disabled Persons in 1982,[524] the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which was adopted in 1993.[525] Nevertheless, none of the initiatives or rules led to a legally binding instrument,[526] and as a result were not enforceable.[527] Nonetheless, despite not being legally binding and being founded on paternalistic medical and charity models of disability, these initiatives helped to raise awareness about the human rights of persons with disabilities.[528] Everything changed

[516] Paul Harpur 'Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities' (2012) 27(1) *Disability & Society* 1 at 4; Stein & Lord op cit note 507 at 20.
[517] Stein & Lord op cit note 507 at 19.
[518] Ibid.
[519] Ibid at 120.
[520] This terminology is based in an approach that regards disability as deficit, see. Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), U.N. GAOR, Supp. No. 29 at 93, U.N. Doc. A/8429 (1971).
[521] Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. GAOR, Supp. No. 34 at 88, U.N. Doc. A/10034 (1975); Stein & Lord op cit note 507 at 21.
[522] International Year of Disabled Persons, G.A. Res. 36/77, U.N. GAOR, 36th Sess., Supp. No. 77 at 176, U.N. Doc. A/RES/36/77 (1981);Stein & Lord op cit note 507 at 21.
[523] Implementation of the World Programme of Action Concerning Disabled Persons, G.A. Res. 37/53, U.N. GAOR, 37th Sess., Supp. No. 53 at 186–87, para. 11, U.N. Doc. A/RES/37/53 (1982); Stein & Lord op cit note 507 at 21.
[524]. World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51 at 185, U.N. Doc. A/RES/37/52 (1982).
[525]Standard Rules on the Equalization of Opportunities for Persons With Disabilities, G.A. Res. 48/96, at 202, U.N. GAOR, 48th Sess, Supp. No. 49 at 68, U.N. Doc. A/RES/48/96 (1993); Stein & Lord op cit note 507 at 22; Sabrina Ferraina 'Analysis of the Legal Meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Settings' 14 March 2012 at 5.
[526]. Stein & Lord op cit note 507 at 22.
[527] Sabrina Ferraina 'Analysis of the Legal Meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Settings' 14 March 2012 at 491.
[528] This is partly illustrated by the use of the term mentally retarded in the Declaration on the Rights of Mentally Retarded Persons and the Declaration of 1971.

in 2001 when the UN General Assembly established an Ad Hoc Committee to report on the possibility of the United Nations adopting a disability-specific, human rights convention, the beginning of a much-needed change. [529]

This committee began its work in 2002,[530] and more than 130 States participated in the process, side by side with hundreds of disabilities rights agencies, UN agencies, and other interested organisations.[531] After five years of negotiations,[532] the CRPD was presented to the General Assembly on 5 December 2006, and was adopted unanimously on 13 December 2006.[533] The CRPD was then opened for signature on 30 March 2007, [534] and came into force on 3 May 2008.[535] Additionally, its Optional Protocol, was also adopted and entered into force on the same date.[536]

The CRPD is the most rapidly negotiated human rights treaty to date and, since its adoption, it has received impressive support globally.[537] According to Harper during negotiations disability advocates and their organisations had the opportunity actively participate in the drafting of the CRPD treaty text. This was facilitated by the dynamic rules of procedure that were adopted during the drafting process.[538]Significantly, mental health user and survivor organisations like World Network of Users and Survivors of Psychiatry (WNUSP), Mind Freedom/Support Coalition International (MF/SCI) and other organisations participated actively in the CRPD negotiations.[539] In fact, these organisations negotiated together with organisations representing other persons with disabilities under the International Disability Caucus (IDC). They united to negotiate and speak with one voice.[540] As a result, of being part of the IDC, users and survivors of psychiatry organisations like WSNUP were not only able to show solidarity with other disability groups and negotiate for mutual interests,

[529] Paul Harpur op cit note 516 at 4, Stein & Janet E. Lord op cit note 507 at 22.
[530] Janet E. Lord 'The U.N. Disability Convention: Creating Opportunities for Participation' (2010) 19 *Bus Law Today* 23.
[531] Lord op cit note 23.
[532] Harpur op cit note 516 at 4.
[533] Ibid.
[534] Lord op cit note 23.
[535] Ibid; Harpur op cit note 516 at 4;
[536] Lord op cit note 530 at 23.
[537] Jarlath Clifford 'The UN Disability Convention and its Impact on European' (2011) 6 *Equality Law The Equal Rights Review* 11 at 13.
[538] Lord op cit note 530 at 23.
[539] WSNUP (World Network of Users and Survivors of Psychiatry) 'Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities' February 2008 at 4. Refer to footnote 140 for meaning of users/ survivors.
[540] Ibid.

but also interests that are specific to persons with psychosocial disabilities.[541] They were able to influence the negotiation and drafting process and bring user/ survivor issues into the heart of the disability movement and advocated for and addressed human rights violations especially targeted against users and survivors of psychiatry.[542] This included the areas of legal capacity, liberty and right to live in the community and freedom from forced psychiatric interventions.[543] It is this contribution of human rights defined from a user/ survivor perspective that makes this treaty such a powerful tool for advocacy.[544]

The CRPD holds great importance for user/ survivor because historically, the development of government laws and policies have excluded persons with psychosocial disabilities, thereby limiting the ability of their needs to be addressed.[545] For example, traditional mental health laws have often have often allowed for forced psychiatric treatment and detention, and not the human rights of persons with psychosocial conditions.[546] The users/ survivors drafted the CRPD with the aim that it would bring an end to such practices that deny equal personhood and dignity.[547] The CRPD therefore provides an avenue through which the violence and degradation carried out in the name of care and treatment of survivors of psychiatry, can be challenged as human rights abuses.[548] The provisions which specifically speak to the needs of users/ survivors, and that were negotiated for by WSNUP and similar organisations include art 12 (equal recognition before the law), 14 (liberty and security) and 17 (protecting the integrity of person). [549] However, it is important to note that the CRPD does not create new or even special rights, 'but rather spells out the application of existing human rights principles specifically for persons with disabilities.'[550] At its core, the CRPD aims to facilitate the full participation of persons with disabilities in the community.[551] Furthermore, it creates a system of monitoring and implementation at national and international levels.[552]

[541] Ibid.
[542] Russo & Shulkes op cit note 406 at 37 and 38; WSNUP op cit note 539 at 6.
[543]WSNUP op cit note 539 at 6.
[544] Russo & Shulkes op cit note 406 at 37.
[545] Steven J. Hoffman & Lathika Sritharan et al 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada' (2016) 16(1) *BMC International Health and Human Rights* 1 at 5. See footnote 140 for meaning of users/survivors.
[546] Ibid.
[547] Russo & Shulkes op cit note 545 at 37.
[548] Ibid.
[549] Hoffman & Sritharan op cit note 545 at 5.
[550] Lord op cit note 530 at 24.
[551] Ferraina op cit note 527 at 5.
[552] Lord op cit note 530 at 24.

III. OBLIGATIONS OF STATES PARTIES UNDER ARTICLE 27(1) (a)

The right to work and employment raises issues related to non-discrimination and accessibility. Disability-based discrimination has been 'prominent and persistent' in the field of work an employment.[553] An ILO intervention that attempted to bring about much needed change was the 1983 Convention 159 concerning Vocational Rehabilitation and Employment of Disabled Persons.[554] However, it is only with the CRPD that a coherent set of rights of persons with disabilities in the workplace is espoused.[555] The CRPD, in art 27, sets out the right to work and employment of persons with disabilities, and institutes one of the most detailed provisions of the convention, importantly, emphasising that the right to work is instrumental for the enjoyment of all other human rights and freedoms.[556] Article 27 does not only define what the right to work and employment constitutes for persons with disabilities; it sets out a non-exhaustive list of appropriate steps for States Parties to take.[557] The overall goal of the article is not just about persons with disabilities gaining access to employment, but about them maintaining it.[558]

The right to work encompasses two elements: first, the right to be afforded the opportunity, on an equal basis with others, 'to gain a living by work freely chosen or accepted in a labour market'; and, second, the right to carry on such employment in a 'work environment that is open, inclusive and accessible to persons with disabilities.'[559] It does not guarantee that everyone with a disability who is of working age will have employment, instead it demands for access to work and employment opportunities on an equal basis with others. [560] As well as that such work and employment is carried out in a conducive environment and under favourable conditions.[561]

Article 27(1) lists the steps that state parties should take in order to facilitate 'open, inclusive and accessible' labour markets and work environments. Article 27(1)(a), which is the focus of this research, prohibits discrimination on the basis of disability concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of

[553] Dianah Msipa 'The Right to Work and Employment in Southern Africa: A Commentary on How Selected Employment Laws Fare Against Article 27 of the CRPD' (2016) 4 *ADRY* 283 at 284.
[554] Fasciglione Marco 'Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism' in Valentina Della Fina & Rachele Cera (ed) *Protecting the Rights of People with Autism in the Fields of Education and Employment: International, European and National Perspectives (ed) (2015)* 146.
[555] Marco op cit note 554 at 146.
[556] Faidra Maria Valassa, *Entitlements and for Whom? Disability, Equality and the CRPD's Right to Access Employment for Persons with Disabilities* (unpublished LLM Thesis, Lund University, 2016) 34.
[557] Marco op cit note 146; Holness 'op cit note 6 at 517.
[558] Valassa op cit note 556 at 35.
[559] Msipa op cit note 553 at 285.
[560] Ibid at 284 and 285.
[561] Article 27(1); Msipa op cit note 518 at 285.

employment, career advancement and safe and healthy working conditions. It thus protects persons with psychosocial disabilities from discrimination in all the different stages of employment.

Article 27(1)(a) must be read with the general anti-discrimination provisions (art 3 and art 5), as well as art 4, which addresses general obligations on states parties.[562] Both Kenya and South Africa as states parties have positive obligations to enact specific and comprehensive anti-discrimination legislation in employment.[563] If their existing laws institute the discrimination against persons with disabilities in the workplace, it calls for its abolishment.[564]Additionally, to enact disability-inclusive anti-discrimination laws in the workplace where relevant laws do not exist.[565] In terms of art 5(2), read with art 27(1) (a), domestic anti-discrimination laws should prohibit all forms of discrimination on the basis of disability, including four main forms of discrimination, which can occur individually or simultaneously:[566]direct discrimination, indirect discrimination, denial of reasonable accommodation and harassment.[567] Additionally, that protection against discrimination should be on all possible grounds of discrimination and their intersections must be taken into account.[568] It is therefore clear that multiple and intersectional discrimination is recognised. Further, art 5(2) read with art 4(1)(e), extends the duty to prohibit disability based on discrimination to the private sector.[569] States parties are obligated to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise'.[570]

The CRPD Committee (the Committee)[571] has further, highlighted that anti-discrimination laws can only be effective if they are based on a definition of disability that is not only broad but corresponds with the purpose of such laws, which is to eliminate all forms of disability-based discrimination.[572] According to the Committee persons seeking legal

[562] *Liliane Gröninger et al. vs. Germany* CRPD/C/D/2/2010 para 6:3 and 7.
[563] UN Committee on the Rights of Persons with Disabilities 'General comment No. 6 Equality and Non-Discrimination *(Art 5 of the Convention)* (2018) CRPD/C/GC/6 para 22.
[564] 4(1)(b).
[565] Comment 6 para 73(b).
[566] Ibid para 18.
[567] Ibid
[568] Ibid para 21; art 5(2) of the CRPD.
[569] Ibid para 13.
[570] Article 4(1)(e).
[571] See footnote 114 where the CRPD Committee's role are explained.
[572] General Comment no. 6 at para 73(b).

recourse should not be burdened with having to prove that they are "disabled enough" to benefit from ant-discrimination protection.[573]

Once states parties have adopted appropriate legislative, administrative and other measures for the implementation of non-discrimination rights in employment, [574] the next step is to ensure that these rights are actionable in domestic courts, and further, provide access to justice for all persons who have experienced discrimination[575] on an equal basis with others.[576] As well as sufficient and accessible provision of legal aid to facilitate access to justice for victims of discrimination.[577]

In addition, when it comes to rules relating to evidence and proof, States Parties are obligated to ensure that stereotypes about the capacity of persons with disabilities do not result in victims of discrimination being inhibited from obtaining redress.[578] The Committee emphasises that the motive or intention of the discriminating party is not relevant to the determination of whether discrimination has occurred.[579] Also, the Committee advocates for procedural rules to shift the burden of proof in civil procedures from the claimant to the respondent in cases where there are facts from which it may be 'presumed that there has been discrimination'.[580] This does not mean that complainants in discrimination cases are exempt from providing evidence of their claims.[581] What is required from a complainant is to 'establish facts from which it may be presumed that there has been direct or indirect discrimination',[582] and only after this does the burden of proof move to the respondent, who may rebut this presumption by proving 'that there has been no breach of the principle of equal treatment.'[583] This arguably applies in all cases of discrimination protected under the CRPD, including everything from direct and indirect discrimination, to harassment, and to discrimination by association.[584] Nevertheless, it does not clarify what facts will be sufficient to create a

[573] Ibid.
[574] 4(1)(a).
[575] General Comment no. 6 para 3.
[576] General Comment no. 6 para 73 (h) and (l).
[577]Ibid para 31.
[578] General Comment no. 6 at para 73(i).
[579] Ibid para 18.
[580] Ibid para 73(i).
[581] Julie Ringelheim 'The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland' (2019) 2 *European Equality Law Review* at 51.
[582] Ibid.
[583] Ibid.
[584] Lisa Waddington and Andrea Broderick (European network of legal experts in gender equality and non-discrimination) 'Combatting disability discrimination and realising equality: A comparison of the UN CRPD and EU equality and non-discrimination law' October 2018 at 82 and 83.

presumption of discrimination, and therefore shift the onus on to the respondent. It is left up to States Parties to fill in the gap. The only guidance given by the Committee is that the shift in burden of proof should ensure that victims of discrimination are not re-victimized or act as a barrier to obtaining redress.[585] Further, states parties are also obligated to protect individuals from adverse treatment or consequences that may visited up on a complainant in reaction to pursuance of their antidiscrimination right.[586]

Disability-inclusive anti-discrimination laws should also be accompanied by the provision of appropriate and effective legal remedies.[587] The remedies provided should not only promote effective compliance of anti-discrimination law, but also the enjoyment of the rights to equality and non-discrimination.[588]State parties should also provide effective, proportionate and dissuasive sanctions for when a claimant makes a successful discrimination claim.[589] Further, where the discrimination is systemic nature, it is not enough to provide compensation to the victim as it may not effect real change,[590] and as such the Committee suggests that states parties should also implement 'forward looking, non-pecuniary remedies'. According to the Committee this means 'further effective protection against discrimination carried out by private parties and organizations is provided by the State party.'[591]

Then, under art 31 read together with art 5, states parties are obligate to collect, current accurate and disaggregated data in order to analyse the effectiveness of measures promoting equality.[592] This will help in identifying inequalities, discriminatory practices and patterns of disadvantage.[593]

Significantly, because equality and non-discrimination are principles[594] and rights[595] that play both an interpretative role for all the other principles and rights enshrined in the CRPD, and are a cornerstone of the international protection guaranteed by the convention, both are cross-cutting obligations of immediate realization. Therefore, they are not subject to

[585] General Comment no. 6 at para 73(i).
[586] Ibid.
[587] General comment no. 6 para 22.
[588] Waddington and Broderick op cit note 584 at 83.
[589] General Comment No.6 para 31.
[590] Ibid para 22.
[591] Ibid.
[592] Ibid para 34.
[593] Ibid.
[594] Article 3.
[595] Article 4.

progressive realization.[596] State parties therefore have a duty to ensure immediate realisation of employment anti-discrimination rights of persons with psychosocial disabilities.

IV. THE DEFINITION OF DISABILITY IN THE CRPD

Only those employees with psychosocial conditions who qualify as persons with disabilities according to the definition provided by the CRPD are protected under the treaty. Therefore, only employees who qualify as having psychosocial disabilities are protected from discrimination in employment in art 27(1)(a).

An explicit definition of disability is notably absent from the CRPD.[597] Nonetheless, the treaty does provide much needed guidance regarding the concept of disability in art 1, and in paragraph 5 of the preamble. According to Tromel, it was evident from the beginning of the CRPD negotiation process that the determination of an internationally agreed definition of disability would be an almost impossible task.[598] Indeed, during negotiations, there were different camps.[599] One camp argued for a not so precise definition, in order to facilitate the flexibility, adaptation to change and the inclusiveness of the concept.[600] Those against a definition argued that a definition of disability would become outdated and would risk leaving groups outside CRPD's scope.[601] Another camp argued that it was necessary to include a strict definition in order to prevent states from evading real commitments.[602] In their view, the absence of a definition would prevent uniform implementation of the CRPD.[603] What was evident was that proponents of a definition held the view that such definition should reflect the social model and not the medical model.[604]

Eventually the final text of the CRPD adopted an open-ended conceptualisation of disability.[605] Article 1 states:

> '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.'

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[596] General Comment no. 6 para 12.
[597] Waddington and Broderick op cit note 584h at 5
[598] Stefan Tromel 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' (2009) 1 *1 Eur. Y.B. Disability L* 115 at 121.
[599]Waddington and Broderick op cit note 584 at 37; Tromel op cit note 598 at 121 -122.
[600] Silvia Favalli & Delia Ferri 'Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints' (2016) 22(3) *European Public Law* 1 at 7.
[601] Ibid.
[602] Ibid
[603] Ibid.
[604] Ibid.
[605] Ibid.

The CRPD, in its preamble, emphasises that disability is an evolving concept and that it results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[606] The CRPD acknowledges the interactional nature of the concept of disability. This is highlighted by the fact that the CRPD recognises that societal barriers play a key role in the process of disablement, as well as how individual impairments affects ones participation in society.[607]This marks a shift away from the historically dominant medical model of disability towards a more social understanding of disability.[608] The CRPD does not, however, adopt one specific social model of disability.[609] This choice was likely deliberate, as one of the 'inherent limitations' of a strict version of the social model it may not be unable to accommodate disadvantages that may result directly from an impairment, and not from socially-constructed barriers.[610]

The understanding of disability espoused by the CRPD is one that is based on the interactional relationship between people with impairments and the wider environment as it recognises that 'disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with impairments'.[611] This approach avoids the criticisms levelled against the traditional social model of disability by recognising the relevance of impairment, while still emphasising the social dimensions of disability. It is thus more capable of accurately framing discussions that are relevant not just to persons with disabilities generally, but to persons with psychosocial disabilities specifically.[612]

a) Mental Impairment

The CRPD's definition of persons with disabilities includes persons with mental impairments.[613] Nonetheless, the term 'psychosocial disability' and psychosocial conditions will instead be used in this thesis to refer to employees with mental impairments instead of persons with mental disabilities or conditions.[614]

[606] Preamble at para 5.
[607] Waddington and Broderick op cit note 584 at 37.
[608]Jarlath Clifford 'The UN Disability Convention and its impact on European equality law' (2011) 6 *The Equal Rights Review* 11 at 12; Waddington and Broderick op cit note 562 at 36.
[609]See heading III of chapter 2.
[610] Waddington and Broderick op cit note 584 at 37.
[611]Ibid.
[612] Clifford op cit note 608 at 12.
[613] Art 1.
[614] See heading I of chapter 1 where this is discussed.

The definition of persons with disabilities found under the CRPD does not include conditions or illness as part of its definition, and the implication is therefore that persons with psychosocial conditions (mental illness, conditions, and disorders) will have to first qualify as having a mental impairment. Consequently, any 'conditions' or 'illnesses' may have to, in addition to fulfilling the other criteria in art 1, qualify as 'impairments. This raises questions about the definition of 'impairment' and whether there are 'conditions' and 'illnesses' that do not amount to 'impairments.[615]

According to the CRPD in order to qualify as a person with a disability one should first have a physical, mental, intellectual or sensory impairment.[616] Generally, what constitutes an impairment is often determined from a physical perspective.[617] However, this may not fit nicely with psychosocial conditions because they are often invisible compared to more visible physical or sensory disabilities.[618] Additionally, Bruce argues that while physical conditions like being deaf or being paralysed is viewed as falling automatically within the category of 'impairments', 'a person with chronic conditions more commonly thought of as 'illnesses' or as 'medical' will have to qualify as a person with a disability in the sense of art 1 through the display of symptoms that qualify as 'impairments', rather than by 'label' or 'diagnosis' of such 'conditions' or 'illnesses' per se'.[619]

It is also not clear whether a qualified mental health practitioner has to identify impairment, or even which classification system or instrument will be used to determine if a person has a mental impairment. Instruments available for the classification and diagnosis of mental impairments include the American Psychiatric Association's DSM V[620] and the WHO's International Classification of Diseases (ICD), which has had 11 editions so far.[621] Furthermore, the diagnosis of mental health problems remains a contested field.[622] There are ongoing debates within psychiatry and psychology on the exact diagnosis of mental illness.[623]

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[615] Anna Bruce *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (PhD thesis, Lund University, 2014)305.
[616] Article 1 of the CRPD
[617] Du Plessis op cit note 43 at 35-37.
[618] Mark Bell and Lisa Waddington (European network of legal experts in gender equality and non-discrimination) 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' December 2016 at 36.
[619] Bruce op cit note 615 at 306.
[620] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (2013).
[621] World Health Organization *International Classification of Diseases* 11 ed (2019). While ICD-11 was adopted in 2019, it will only come into effect on 1 January 2022.
[622] Mark Bell 'Mental Health, Law, and Creating Inclusive Workplaces' (2016) 69 *Current Legal Problems* 1 at 20.
[623] Bell and Waddington op cit note 618 at 36.

This means that medical documentation of an individual's condition may be more contentious than in comparison to some physical impairments.[624] Third, it is important to note that in some circumstances it is possible to have a psychosocial condition that in interaction with barriers, is disabling, but it may fail to meet the diagnostic requirements of the DSM V or ICD-11.[625] As a result, individuals with a psychosocial conditions may face a number of challenges in establishing that they fall within the scope of this definition. [626]

All these difficulties could have been avoided had the drafters opted to use 'condition' and/or 'illness' in the definition of disability or, alternatively, if the relationship between 'illnesses' or 'conditions' on the one hand, and 'impairments' on the other hand, had been clarified. If the term 'conditions' had been used, the medical connection perceived as inherent in the term 'impairments' would have been avoided.[627] Bruce argues that the term 'condition' broader in meaning than 'impairment' with perceived connection with medicine, and has potential to extend coverage to conditions associated more with 'illnesses'.[628] Hence, such a definition would have been more inclusive and acceptable to both persons with psychosocial conditions who identify with medical terminology and diagnosis, and for those who reject medical terminology and identify with disability as a social and political category only.[629]

The above challenges are probably what motivated the suggestion that the definition of disability should include illness and conditions together with impairment during the CRPD negotiations. Indeed, when the definition of disability was tabled by the chair of the Ad Hoc Committee in the seventh session during the drafting of the CRPD it included "impairments, conditions or illnesses".[630] The IDC, in the eight session, still proposed the addition of the term "conditions" to the definition of disability. The IDC argued that because some group with disabilities did not agree with the term "impairment" and instead preferred the term "condition".[631] Nevertheless, the final text only included "impairments" in the definition.[632] CRPD recommendations seems to suggest that both illnesses and conditions can constitute a

[624] Ibid.
[625] See chapter 1 heading I where this is explained.
[626] Bell & Waddington op cit note 618 at 8.
[627] Bruce op cit note 615 at 307.
[628] Ibid.
[629] Ibid.
[630] Ad Hoc Committee, Possible definition of "Disability": Discussion Text Suggested by the Chair, available at https://www.un.org/development/desa/disabilities/seventh-session-ad-hoc-committee-30.html, accessed on 26 April 2021.
[631] Bruce op cit note 306; Revisions and amendments at the Eighth Session of the Ad Hoc Committee, NGO Comments on the draft text, IDC proposed text on Definitions, available at https://www.un.org/esa/socdev/enable/rights/ahc8contngos.htm, accessed on 26 May 2021.
[632] Bruce op cit note 580 at 305 and 306.

disability without necessarily having to qualify as an impairment first.[633] This was evident in the case of *S.C. v. Brazil*,[634] in which the Committee determined that an illness could qualify as a disability under the CRPD. The author had a motorcycle accident which resulted in a left knee injury.[635] The CRPD Committee held that people with illnesses are not automatically excluded from the scope of the UN Convention, and that 'a health impairment which is initially conceived of as illness can develop into an impairment in the context of disability because of its duration or its chronic development'.[636] According to Waddington et al this ruling by the Committee provides wide scope for the recognition of several different types of medically-diagnosed illnesses under the concept of 'disability'.[637]

In another case, *X v Tanzania*[638] the Committee held that a condition such as albinism qualifies as a disability. However, this is because the condition also has the hallmarks of 'impairment'. It held that albinism, which is a relatively rare, non-contagious, genetically inherited condition fell within the definition of disability as enshrined in art 1 of the CRPD.[639]

Therefore, the conclusion that can be made from both cases is that if an employee can show that they have a long-term illness or condition which may qualify as an 'impairment', and which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others, they can qualify as someone with a disability.

b) Long Term

The requirement that an impairment needs to be " long term" is another criterion used to draw the line between those who are covered by the CRPD and those who are not.[640] However, the use of the term raises a number of questions.[641] At first glance, it seems that art 1 does limit the application of the CRPD to persons who have 'long-term' impairments, and this would automatically exclude those persons with short term impairments.[642] This would certainly

[633] John Fanning *The Medicalisation and the Mental Health Act* (2018) 185.
[634] CRPD/C/12/D/10/2013.
[635] Para 2.2
[636] Para 6.3
[637] Waddington & Andrea op cit note 584 at 56.
[638] X V Tanzania CRPD/C/18/D/22/2014.
[639] Supra note para 7.6.
[640] Bruce op cit note 615 at 303.
[641] Ibid at 310.
[642] Rosemary Kayess and Phillip French 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1at 23.; Bruce op cit note 580 at 310 and 311.

exclude those persons with short term impairments arising from traumatic injuries and disease, and persons with episodic conditions,[643] which are common feature of psychosocial conditions.

However, the CRPD does not define what "long term" means. Kayes et al argue that the issue of duration was contentious during the negotiations of the CRPD. States such as Japan expressed fears that the inclusion of 'temporary' impairments as disabilities was "too wide in scope". Others parties, including the IDC, were of the opinion that the use of "long-term" would allow states to limit the coverage of the CRPD.[644] Clearly, long-term won the day.

Bruce et al argue that, 'long-term by common connotation, sets a threshold which is lower than for example 'permanent' and will thus cover impairments which are present but have only lasted or are only likely to last for a limited time. The extent of this time, while being somewhere between 'short-term' and 'permanent', cannot be pinpointed from the wording of art 1 or its context or purpose, nor from the records of the negotiations.'[645]

The approach to intermittent or even fluctuating conditions, which is the most common characteristic of psychosocial conditions, is not clear.[646] Bell argues that the CRPD does not cover short-term mental health problems of limited severity, as they do not constitute a disability for the purposes of non-discrimination law.[647] She insinuates that a short-term impairment is synonymous with reduced severity, a fact that I disagree with because a long-term disability can in some circumstances be less severe than a short-term condition.[648] Further, the CRPD is silent about the question of severity and for good reason. During negotiations references to 'severe' and similar propositions were opposed as 'negative labelling' i.e., as it implicates impairment as negative and stigmatises those with high levels of impairment. It is also steeped in a medical model rather than a social model of disability.[649] It creates a hierarchy amongst disabilities, which was 'problematic against the background that 'people with less severe disabilities are often left out of programmes from which they could benefit.'[650] In the end 'severe' did not make it to the final version of the CRPD.[651] However, the exact parameters

[643] Kayess and French op cit note 642 at 22.
[644] Bruce op cit note 615 at 310; United Nations Enable 'Sessions of the Ad Hoc Committee' available at https://www.un.org/esa/socdev/enable/rights/adhoccom.htm, accessed on 26 April 2021.
[645] Ibid at 311.
[646] Ibid at 310.
[647] Bell and Waddington op cit note 618 at 31 and 32.
[648] Bruce op cit note 615 at 308
[649] Ibid United Nations Enable 'Sessions of the Ad Hoc Committee' available at https://www.un.org/esa/socdev/enable/rights/adhoccom.htm, accessed on 26 April 2021.
[650] Ibid at 308 and 309; United Nations Enable 'Sessions of the Ad Hoc Committee' available at https://www.un.org/esa/socdev/enable/rights/adhoccom.htm, accessed on 26 April 2021.
[651] Article 1 of the CRPD.

of what it means for an impairment to be 'long term' remains unclear. This flexibility could work in favour of complainants, but could also be applied to their detriment.

The meaning of 'long term' is of particular importance for persons with psychosocial conditions, because such conditions are often fluctuating in nature, with periods of relatively good mental health interspersed with periods of significant impairment and illness.[652] Moreover, the long-term effects and severity of psychological impairments, particularly in the early stages of the illness, can be difficult to predict.[653] These features of psychological conditions mean that individuals risk falling outside a legal definition of disability whose focus is on disability being ' long term'.[654] Therefore, if the CRPD is interpreted restrictively with regard to 'long term' requirement, the implication is that it will make it difficult for employees with psychosocial conditions to establish that their condition is sufficiently long term to qualify as a disability.[655]

Various aspects of the CRPD and the Committee's jurisprudence indicate that persons with psychosocial conditions could still enjoy protection because 'long term' is not defined in the convention. Apart from the fact that the CRPD adopts a social approach in its understanding of disability, the open ended nature of art 1 implies that the definition provided by the CRPD is flexible and not exhaustive.[656] Furthermore, according to Committee[657] discrimination based on disability can be against persons who have a disability at present, past, future, or who may be presumed to have a disability, as well as those who are associated with a person with a disability.[658] The latter is referred to as discrimination by association.[659]

Consequently, the CRPD recognises that there are persons who, although they do not have an actual mental impairment, may still be discriminated against because of prejudice and stigma.[660] Hence, the CRPD includes within its umbrella of protection persons with psychosocial conditions who, although they do not qualify as having a functional impairment, have conditions that carry stigma which substantially limit their entry and advancement in

[652] Ibid; Bell and Waddington op cit note 618 at 36.
[653] Bell and Waddington op cit note 618 at 36;
[654] Ibid.
[655] Bell and Waddington op cit note 618 at 8.
[656] Clifford op cit note 573 at 12; Waddington and Broderick op cit note 584 at 55 and 56.
[657] General Comment 6 at para 20.
[658] Ibid; presumed disability will be used interchangeably with perceived disability.
[659] Ibid.
[660] Viviers op cite note 59 at 52.

employment. [661] This also means that the CRPD protects from discrimination persons with psychosocial conditions who although they manage their impairment through treatment and medication, still experience discrimination.[662]

This approach by the Committee, in my opinion, recognises that the key objective of the protected class of disability in ant-discrimination law is not to identify and reject undeserving claims.[663] This type of approach propagates the discriminatory view that marginalised groups, such as persons with disability, are out to beat the system in order to access undeserved benefits.[664] Its purpose is to protect persons with psychosocial disabilities from stigma and prejudice. This recognition by the Committee is a big win for persons with psychosocial conditions, who have historically faced stigmatisation and been excluded from employment, not necessarily on the grounds of the severity of their impairments, but simply on the basis that they have, or are perceived to have, impairments.[665]

The CRPD, in this regard, recognises the social realities of disability,[666] and as a result offers a more nuanced, purposive approach to addressing disability discrimination.[667] It establishes disability concept that is not only firstly flexible and inclusive,[668] but one that seeks to challenge stigma, aversive attitudes, and stereotypes about persons with disabilities.[669] It takes into account that disability may have nothing to do with actual functional limitation, but rather with prejudice and stereotyping.[670]

V. DISCRIMINATION ON THE BASIS OF DISABILITY

Discrimination on the basis of disability under the convention is described as: [671]

> '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

[661] Charles Ngwena & Loot Pretorius 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24(10) *Indus. L.J. (JUTA)* 1816-1839 at 1824; Bruce op cite note 580 at 303.
[662] Maureen Mswela 'Does Albinism Fit Within the Legal Definition of Disability in the Employment Context? A Comparative Analysis of the Judicial Interpretation of Disability under the SA and the US Non-Discrimination Laws' (2018) 21 *PER / PELJ* 1 at 9.
[663] Du Plessis op cit note 43 at 109.
[664] Ibid.
[665] Mswela op cit note 662 at 10.
[666] Ngwena, Charles and Pretorius, Loot 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24 (10) *Indus. L.J. (JUTA)* 1816 at 1824
[667] Viviers op cit note 58 at 52
[668] Ibid at 50
[669] Mswela op cit note 662 at 9.
[670] Ngwena, Charles and Pretorius, Loot 'Conceiving Disability, and Applying the Constitutional Test for Fairness and Justifiability: A Commentary on IMATU v City of Cape Town' (2007) 28(4) *Indus. L.J. (JUTA)*747 at 763.
[671] Article 2 of the CRPD

> all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'

This definition of discrimination, read with art 5, is broad, as it covers varied forms of discrimination in the employment sphere. Notably, the phrase "on an equal basis with others" is a novel component.[672] It basically means that persons with disabilities will not be granted more or fewer rights or benefits than the general population.[673] In order to facilitate this, the CRPD obligates states parties to take concrete specific measures to achieve de facto equality[674] for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms. [675] The Committee equates de facto equality to substantive equality and de jure equality to formal equality. [676] Consequently, the CRPD identifies four main forms of discrimination, which can occur individually or simultaneously.[677]Its definition of discrimination goes beyond what contained in previous human rights treaties. It not only includes direct and indirect discrimination, plus harassment, it goes on to provide that the denial of reasonable accommodation is a distinct form of discrimination.[678] Even though neither direct nor indirect discrimination, nor harassment, are overtly mentioned in the wording of the convention itself, the Committee provides that all three forms, as well as the denial of reasonable accommodation constitutes discrimination.[679]

a) Multiple and intersectional discrimination

The CRPD prohibits discrimination based on multiple or intersecting characteristics.[680] Although the CRPD in art 6 only recognises multiple discrimination, the CRPD Committee reads the prohibition of intersectional discrimination into the convention's provisions.[681] This corresponds with the preamble of the CRPD, which recognises the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination

[672] General Comment no. 6 at para 17.
[673] Ibid.
[674] Janet E. Lord and Rebecca Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: the un convention on the rights of persons with disabilities' in Marcia H. Rioux & Lee Ann Basser et al (eds) Critical Perspectives on Human Rights and Disability Law(2011) at 275 and 276; General Comment No. 6 para 17.
[675] Ibid.
[676]According to formal equality is achieved if a law or policy treats equal groups in a neutral manner. Substantive equality is, by contrast, less concerned with equal treatment and more focused on equal access and equal benefit. In some circumstances, this may require treating persons with disabilities differently, where treating them the same would fail to recognize critical needs, ignore barriers to full inclusion and undermine realization of human rights. See General Comment No. 6 para 18; Waddington & Broderick op cit not 652 at 63.
[677] Ibid.
[678] Article 2, Waddington & Broderick op cit note 584 at 40.
[679] General Comment No.6 at para 18.
[680] Ibid para 16 and19.
[681] Waddington & Broderick op cit note 584 at 42.

on the basis of the different protected grounds including everything from race, to colour, to indigenous or social origin .[682]

Intersectional discrimination 'occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status.'[683] Here, the grounds interact with each other at the same time in such a way that they are inseparable and this leads to unique types of disadvantage and discrimination.[684] On the other hand, multiple discrimination is a situation where a person can experience discrimination on two or several grounds, and hence their experience of discrimination is aggravated.[685] For example, the CRPD recognises that women and girls with disabilities are subject to multiple discrimination.[686]

Multiple or intersecting discrimination can manifest in the form of direct or indirect discrimination, harassment or the denial of reasonable accommodation.[687] It therefore has more to do with the grounds of discrimination than with the form the discrimination takes.

b) Direct Discrimination

Direct discrimination occurs when an individual is treated less favourably than other persons in a similar situation on the basis of a prohibited ground, such as disability.[688] An employee with a psychosocial disability, for example, may be treated differently based on their condition or impairment, irrespective of whether their profile matches the requirements of a particular job.[689] As a consequence they may be disadvantaged or limited from accessing the benefits and opportunities available to other members of society.[690] The Committee has further, emphasised that the motive or intention of the discriminating party is not relevant to a determination of whether discrimination has occurred or not.[691]

[682] CRPD preamble; General Comment No. 6 at para 19.
[683] Ibid.
[684] Ibid.
[685]Ibid.
[686] Article 6(1).
[687] General Comment 6 at para 19.
[688] General comment 6 para 18; Annegret Kämpf *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health in Australia* (unpublished Ph D thesis, 2012, Otago University)102.
[689] Maria Faidra Valassa What Entitlements and for Whom? Disability, Equality and the CRPD's Right to Access Employment for Persons with Disabilities (unpublished LLM Thesis, Lund University, 2016) 44.
[690] Manuela Tomei 'Discrimination and Equality at Work: A Review of the Concepts' (2003) 142(4) *International Labour Review* 401 at 402.
[691] General Comment 6 at para 18(a).

Tribunals and courts may approach claims of direct discrimination in one of two ways, and this determines whether a comparator will be used.[692] The first approach is the utilisation of the test of 'unfavourable treatment', which does not require the use of a comparator (real or hypothetical). [693] The complainant is required to show that they have been treated unfavourably because of a prohibited ground.[694] If the complainant shows that they have been treated unfavourably, at least in part, by reason of the relevant protected ground, then the individual will have been directly discriminated against, and no comparator is required. [695].

The second approach is to adopt the use of a comparator, which has proven to be the more complicated in discrimination jurisprudence. [696] The complainant has to show that because they possess a protected attribute, in this case a disability, they were treated less favourably than someone who was not disabled, and who was otherwise in a substantially similar situation as them.[697]

Traditionally, statutory provisions prohibiting direct discrimination have employed the notion of 'less favourable treatment'. This seems to be the position taken by the CRPD if one considers the definition of discrimination, and the conceptualisation of direct discrimination provided in General Comment 6. The concept of more or less favourable treatment is basically about making comparisons.[698] Its use in the determination of discrimination, has been subject to significant criticism.[699] Campbell argues that in many cases, it is difficult to identify an appropriate comparator. This is because one not only needs to identify a comparator who does not have the protected attribute, a disability in this case, as the complainant who has a disability, but one who is in substantially the same circumstances as themselves. All whilst avoiding offensive or otherwise undesirable results.[700] Furthermore, even if the use of a hypothetical

[692] Simon Forshaw & Marcus Pilgerstorfer 'Direct and Indirect Discrimination: Is There Something in between?' (2008) 37(4) *Industrial Law Journal* 347 at 348.
[693] Colin Campbell & Dale Smith 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' (2015) 43 *Fed. L. Rev.* 91 at 93.
[694] Forshaw & Pilgerstorfer op cit note 692 at 348.
[695] Ibid.
[696]Ibid.
[697] Colin Campbell op cit note 693 at 91 and 92; Magdalena Jankowska-Gilberg & Dagmara Rajska (European Union Agency for Fundamental Rights) 'Handbook on European non-discrimination law' 2018 at 23.
[698] Heinz-Dietrich Steinmeyer in co-operation with Working Group on legislation to counter discrimination against persons with disabilities (P-RR-LADI) 'Legislation to Counter Discrimination against Persons with Disabilities' 2000 at 58.
[699] Maleiha Malik 'Modernising Discrimination law: Proposals for a Single Equality Act for Great Britain' (2007) 9 *International Journal of Discrimination and the Law* 73 at 79.
[700] Campbell op cit note 693 at 92.

comparator is allowed, it may still be a challenge to determine how the alleged discriminator would have treated that comparator.[701]

Campbell further argues that the use of a comparator reinforces the privileged status of the group of which the comparator is a member. This is perpetuated by treating the comparator group as the norm in the comparison process when determining if the treatment accorded to members of the disadvantaged group was discriminatory. [702] The use of a comparator 'could therefore 'result in the perpetuation of the exact harms - of hierarchy and stigma - that discrimination law and policy seek to address.'[703] Malik argues that because of the individual nature of comparison, the use of comparator not only fails to take sufficient account of the social, but also to capture the manner in which discrimination is a structural problem.[704] Lastly, not every case of discrimination is agreeable to the use of the comparator test.[705] Goldberg argues that the use of a comparator to discern discrimination may not adequality fit with to today's evolved workplace. This is because it is difficult to identify an appropriate comparator in the current highly mobile workplace. [706] This is also true for intersectional claims based on more than one ground of discrimination.[707]

Insistence on comparators, further, implies that discrimination laws and norms do not impose obligations with meaningful abstract value.[708] If a complainant is unable to identify an appropriate comparator, then it means that direct discrimination did not take place and the case will be unable to proceed. Hence, the use of a comparator could result in not only reducing the possibility of success for complainants because sufficiently close comparators rarely exist, but also missing important forms of discrimination.[709] Further, the use of a comparator seems to perpetuate the message that an employer can get away with discriminatory action as long as the treatment is committed in an even-handed fashion.[710] Thus, it can be argued that the use of a comparator limits the protection offered by anti-discrimination law.[711] Basically, the deficiencies caused by using comparators as a tool to determine discrimination, have come to

[701] Ibid.
[702] Ibid.
[703] Malik op cit note 699 at 79.
[704] Ibid.
[705] Shreya Atrey, Comparison in intersectional discrimination, (2018) 38 *Legal Studies* 379 at 379 and 380.
[706] Suzanne B. Goldberg 'Discrimination by Comparison' (2011) 120 *The Yale Law Journal* 728 at 731 and 732.
[707] Atrey op cit note 705 at 380.
[708] Goldberg op cit note 706 at733.
[709] Ibid at 735.
[710] Goldberg op cit note 706 at 732 and 733.
[711] Ibid at 733 and 734.

outweigh its strengths.[712] The difficulty of identifying a comparator has led to it abandoned altogether in certain categories, for example pregnancy.[713] In my view, the same ought to happen in the context of disability.

c) Indirect Discrimination

Indirect discrimination has its roots in US law in the famous case of *Griggs v Duke Power Co.*[714] The case introduced the idea of indirect discrimination or disparate impact into the emerging law of discrimination.[715] Many jurisdictions have adopted this idea of indirect discrimination[716] as part of anti-discrimination law.[717] The CRPD Committee defines indirect discrimination to mean that 'laws, policies or practices appear neutral at face value but have a disproportionate negative impact on a person with a disability.'[718] It is more concerned with the effect of the differential treatment,[719] and not even differential treatment necessarily.[720]

The first requirement for a claim for indirect discrimination is an apparently neutral rule, policy criterion or practice[721] that is applied to everybody[722] and neither explicitly targets nor is intended to disadvantage members of the group to which a complainant belongs.[723] The second requirement is that the apparently neutral provision, criterion or practice places members of a 'protected group' at a particular disadvantage.[724] Thirdly, the relevant disadvantage should be disproportionate.[725]

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[712] Goldberg op cit note 706 at 735.
[713] Malik op cit note 699 at 79; Anđelija Tasić, 'Comparator as the Element of Discrimination - is the Theoretical Concept Recognized in Serbian Case Law?' (2019) 1(6) *Proceedings of the International Scientific Conference "Social Changes in the Global World&quot* 77 at 82.
[714] *Griggs v Duke Power Co 401 US 424 (1971)* at 431. In the US Supreme Court for the first time recognised that Title VII of the Civil Rights Act of 1964 'prohibits not only overt discrimination but also practices that are fair in form, but discriminatory in operation' *Griggs v Duke Power Co 401 US 424 (1971)* at 431; Simon Forshaw & Marcus Pilgerstorfer 'Direct and Indirect Discrimination: Is There Something in between?' 2008 37(4) *Industrial Law Journal* 347 at 349
[715] Simon Forshaw & Marcus Pilgerstorfer 'Direct and Indirect Discrimination: Is There Something in between?' 2008 37(4) *Industrial Law Journal* 347 at 349.
[716] Hugh Collins & Tarunabh Khatun 'Foundations of Indirect Discrimination Law: Controversies and Critical Questions' in Hugh Collins et al (eds) *Foundations of Indirect Discrimination* (2018) at 2.
[717] Collins and Khatun op cit note 716 at 2 and 4.
[718] General Comment no. 6 at para 18(b). Committee
[719] Annegret Kämpf *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health in Australia* (Unpublished Ph D thesis, 2012, Otago University) 102.
[720] Erik Fribergh and Morten Kjaerum (European Union Agency for Fundamental Rights European Court of Human Rights - Council of Europe) 'Handbook on European non-discrimination law' 2011 at 29.
[721] Ibid.
[722] Ibid.
[723]Kasper Lippert-Rasmussen 'Indirect Discrimination Is Not Necessarily Unjust' (2014) 2(2) *Journal of Practical Ethics* 33 at 37 and 38.
[724] Fribergh and Kjaerum op cit note 720 at 30.
[725] Lippert-Rasmussen op cit note 723.

Indirect discrimination, highlights an important distinction between formal and substantive equality.[726] It recognises that one rule applying to all people, without due consideration for the specific circumstances or context of the disadvantaged, may,[727] in some instances, perpetuate or even deepen existing inequalities instead of reducing them.[728] Discrimination may therefore result not only from treating people in similar situations differently, but also from offering the same treatment to people who are in different situations.[729] This implies that, in some cases, facilitating equality may call for treating people differently.

The primary purpose of indirect discrimination is not to uncover hidden intentional discrimination, but rather to ensure that superficially neutral restrictions do not act as barriers to different groups in society.[730] It can also be used as a tool to challenge underlying and subconscious stereotypes and prejudices based on the idea of the inferiority or the superiority of particular groups of people and stereotyped role.[731] Thus in employment, it can be used to challenge the validity of institutional structures that consolidate prior unfair distributions of advantages and disadvantages between various groups in society.[732] For example, most workplaces and employment practices were designed in the past when few women or disabled persons were in the workforce,[733] but unfortunately continue to apply, and this is where indirect discrimination can be used to legitimately expose these policies to scrutiny.[734]

Sometimes the law of indirect discrimination serves to expose and to eliminate disguised intentional discrimination.[735] It can therefore be one of the most powerful legal measures available to disadvantaged groups in society to assert their claims to justice. [736] Let us consider the following example: A policy states that employees who have not taken sick leave in the previous 12 months will qualify for annual bonus. This may not appear problematic at first glance, but it may be indirectly discriminatory against persons with psychosocial

[726] Thomas Cox 'Indirect Discrimination: The Requirement of Reasonableness' (1992) 6 *Corp. & Bus. L.J* 313.
[727]Tomei op cit note 690 at 403.
[728]Ibid.
[729] Fribergh and Kjaerum op cit note 720 at 29.
[730] Selene Mize 'Indirect Discrimination Reconsidered' (2007) 1 *N.Z. L. Rev.* 27 at 36.
[731] Ibid; Christa Tobler (European network of legal experts in the non-discrimination field) 'Limits and potential of the concept of indirect discrimination' September 2008 at 24.
[732] Collins & Khaitan op cit note 681 at 11 and 29.
[733] Mize op cit note 730 at 36.
[734]Ibid.
[735] Collins and Khaitan op cit note 681 at 29.
[736] Ibid at 30

conditions. This is because research shows that common mental disorders[737] often lead to recurring of sickness absence[738] and persons living with such conditions are therefore prone to take sick leave.

d) Harassment

Laws forbidding harassment first appeared in the United States.[739] Harassment is a unique concept in law as it refers to a wide variety of behaviour which can be sanctioned both by civil and criminal law.[740] Even under civil law, which is the focus of this research, it takes a variety of forms. In its first appearance it was a way of protecting racial minorities in the United States,[741] but currently its most common form is sexual harassment.[742] Nonetheless, harassment has evolved into more than racial or sexual harassment.[743] This is clearly reflected in the CRPD, which recognises harassment as a distinct form of discrimination.[744]

The Committee provides that harassment as form of discriminations occurs: [745]

> 'when unwanted conduct related to disability or other prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[746] It can happen through actions or words that have the effect of perpetuating the difference and oppression of persons with disabilities.'

Also included in the list as harassment are: bullying and its online form, cyberbullying and cyberhate,[747] and disability-based violence in all its appearances, such as rape, abuse and exploitation, hate-crime and beating.[748]

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[737] Common mental disorders include depression, generalised anxiety disorder, panic disorder, phobias, social anxiety disorder, obsessive-compulsive disorder and post-traumatic stress disorder. See National Collaborating Centre for Mental Health (UK) 'Common Mental Health Disorders: Identification and Pathways to Care. Leicester (UK): British Psychological Society' 2011 at 13; Haitze de Vries & Alba et al 'Determinants of Sickness Absence and Return to Work Among Employees with Common Mental Disorders: A Scoping Review' (2018) 28 *J Occup Rehabil* 393; Pinka Chatterji &Margarita Alegria et el 'Psychiatric Disorders and Labour Market Outcomes: Evidence from the National Latino and Asian American Study' (2005) 16 *Health Economics (Health Econ.)* 1069 at 1071.

[738] Haitze de Vries & Alba et al 'Determinants of Sickness Absence and Return to Work Among Employees with Common Mental Disorders: A Scoping Review' (2018) 28 *J Occup Rehabil* 393

[739] Gabrielle S Friedman and James Q Whitman 'The European Transformation of Harassment Law: Discrimination Versus Dignity' (2003) 9(2) *Columbia Journal of European Law (Colum J Eur L)* at 241.

[740] András László Pap 'Harassment: A Silver Bullet to Tackle Institutional Discrimination, But No Panacea for all Forms of Dignity and Equality Harms' 5(2) 2019 *East European Journal of Society and Politics 11 at* 14.

[741] Notably, the American conception of "harassment" was as a form of discrimination, a way of tormenting members of minority and other disadvantaged groups seeking upward social mobility through work. See Friedman and Whitman op cit note 739 at 241 and 243.

[742] Ibid at 241 and 246.

[743] Ibid; Pap op cit note 740 at 14.

[744] Pap op cit note 740 at 14.

[745] General Comment No. 6 at para 18.

[746] Ibid.

[747] Ibid.

[748]Ibid.

Significantly, the definition is broad and takes cognisant of the fact that harassment today has evolved to digital forms. Additionally, because of its broad definition,

> 'it could include: spoken or written abuse offensive emails, tweets or comments on websites and social media, images and graffiti, physical gestures, facial expressions, banter that is offensive to you'.[749]

The above definition by the Committee does not clarify whether harassment is a one-time occurrence or a pattern of procedures, thus the implication is that it can be both a one-time occurrence or a pattern of procedures, or a series of continuous, recurring activities.[750] Further, the intention of the perpetrator is not highlighted as a necessary element. The CRPD thus recognises that employees may be harassed because of having a psychosocial disability, and provides necessary protection. For example, if an employer knows that his employee has a psychosocial disability, and then goes out of their way to single out the employee and to comment on how they are incompetent and should be locked up away from society because of their psychosocial disability, this is likely to be harassment. It can also occur where an employee makes it known to an employee that they will never be promoted because they have a psychosocial disability. Additionally, from the definition, the act or words do not have to be repetitive in order to amount to harassment.

e) Unjustifiable Denial of Reasonable Accommodation

It may be useful to make the distinction between reasonable accommodation and direct discrimination, accessibility and special measures from the outset. Both indirect discrimination and reasonable accommodation are similar in that 'they both reach beyond the demands of formal equality to address the disadvantage which results from apparently neutral requirements and practices, and both require recognition of material difference and a corresponding adaption of practice.'[751] However, the similarities end there. While indirect discrimination is concerned with the impact on a group of persons in general, reasonable accommodation has to be tailored to suit the needs of a particular disabled person.[752]

It is also important to differentiate reasonable accommodation and accessibility. While reasonable accommodation is an individual right with individual implications, accessibility is a group right.[753] In addition, while accessibility is an ex ante duty, the duty to provide

[749] General Comment No. 6 at para 18(d); Friedman and Whitman op cit note 704 at 247.
[750] General Comment No. 6 at para 18(d).
[751] Anna Lawson *Disability and Equality Law in Britain* (2008) at 186.
[752] Du Plessis note 43 at 100.
[753] Delia Ferri & Anna Lawson (European network of legal experts in gender equality and non-discrimination) 'Reasonable accommodation for disabled people in employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway' 2016 at 7.

reasonable accommodation is an ex nunc duty.[754] That means that accessibility is anticipatory in nature; 'it must be built into systems and processes without regard to the need of a particular person with a disability, for example, to have access to a building, a service or a product, on an equal basis with others.'[755] In contrast reasonable accommodation as an ex nunc duty, is only provided from the moment that a person with a disability wants to exercise his or her rights.[756] Also, although accessibility duties are required to be implemented gradually, but unconditionally; reasonable accommodation duties, as highlighted above, are immediately realisable, but conditional. Conditional in that they are subject to the limitation of 'undue' or 'disproportionate' burden.[757]

Due to the gradual realisation of accessibility in the built environment, public transportation and information and communication services, reasonable accommodation may be used as a means to provide access to an individual in the meantime, as it is an immediate duty.[758] Furthermore, in some instances, accessibility may be used as a means to remove a barrier, thereby negating the need for individual accommodations.[759] Nevertheless, it is worth noting that the distinction between accessibility and reasonable accommodation is not always easily made.[760]

Finally, reasonable accommodation should not be confused with specific measures,[761] which include affirmative action measures.[762] Even though both concepts are similar in that they aim at achieving de facto equality[763] of persons with disabilities,[764] reasonable accommodation is a non-discrimination duty, whereas specific measures implies a preferential treatment of persons with disabilities over others to address historic and systemic exclusion from the benefits of exercising rights.[765] It involves adopting or 'maintaining certain advantages in favour of an underrepresented or marginalised group.'[766] They can be temporary

[754] Ibid at 24; General comment No. 6 para 24.
[755] General comment no. 6 at para 24.
[756] Ibid.
[757] Ibid at par 42; Article 2 of CRPD.
[758] Para 42.
[759] Ferri & Lawson op cit note 753 at 49.
[760] Ferri & Lawson op cit note 753 at 95 and 96
[761] Article 5(4) of the CRPD
[762] General comment No. 6 on equality and non-discrimination at para 28.
[763] Ibid.
[764] Ibid.
[765] General comment No. 6 para 25. Non-discrimination is used interchangeably with anti-discrimination.
[766] Ibid at 28; See the meaning and scope of special measures in the UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32 The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination (2009) CERD/C/GC/32 para para 12.

in nature, or permanent, depending on context and circumstances, including by virtue of a particular impairment or the structural barriers in society.[767] Examples of positive discrimination include quotas, reduced entry requirements or qualifications, reservations of professions, supported employment, [768] affirmative action measures,[769] support programmes for students with disabilities in tertiary education,[770] targeted recruitment, quota systems, advancement and empowerment measures, as well as respite care and technological aids.[771]

Similarly, although reasonable accommodation and the provision of support may overlap in some circumstance, they are not synonymous.[772] Provision of support include, for example, personal assistants, under the right to live independently and be included in the community,[773] support to exercise legal capacity[774] or 'procedural accommodations' in the context of access to justice.[775] Further, while reasonable accommodation is limited by the concept of disproportionality, procedural accommodations are not.

The CRPD is the first human rights treaty to provide that the unjustified failure to provide reasonable accommodation is a distinct form of discrimination.[776] In other words, the unjustified denial of reasonable accommodation is a separate form of discrimination that does not fall under the heading of direct or indirect discrimination.[777] The CRPD defines reasonable accommodation as:

> 'Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'[778]

This definition makes it clear that accommodations involve the removal of specific disadvantages in order to ensure equality for disabled individuals.[779] It was 'developed to address the issue of impairment and to acknowledge the need of persons with disabilities to be treated in a different way than persons without disabilities in order to make rights 'real' for the former group.'[780]

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[767] General Comment No. 6 para 28.
[768] Lawson op cit note 753 at 209-212; General Comment No. para 28.
[769] CERD General Recommendation no. 32 at para 12.
[770] General comment no. 6 para 25(c).
[771] General Comment no.6 at para 28.
[772] General comment no. 6 at para 25.
[773] Ibid.
[774] Ibid.
[775] Ibid.
[776] Article 2 of the CRPD.
[777] Waddington & a Broderick op cit note 584 at 64.
[778] Article 2 of the CRPD.
[779] Ferri & Lawson op cit note 753 at 48.
[780] Sabrina Ferraina op cit note 527 at 15; Ferri & Lawson op cit note 753 at 48.

The concern of reasonable accommodation is not to confer advantage but to remove disadvantage.[781]

Lawson argues that reasonable accommodation has a unusual bridging role.[782] This is because its purpose is to ensure that all rights (both economic, social or cultural rights, and civil and political right) are meaningfully accessible to persons with disabilities.[783] Although discrimination is traditionally a civil and political right, because the CRPD defines denial of reasonable accommodation as a form of discrimination, it now imposes a positive obligation on both States Parties and private entities.[784] Reasonable accommodation hence carries both financial and non-financial costs.[785] As a result, it can be argued that although the CRPD provides that the principle of immediate realisation will apply to civil and political, and progressive realisation for economic, social and cultural rights, because denial of reasonable accommodation amounts to discrimination, it creates an obligation of immediate effect despite having financial obligations.[786] Scholars such as Waddington et al [787] argue that because the duty to reasonably accommodate forms part of the non-discrimination norm, it is an obligation that has immediate effect.[788] This is also the position taken by the Committee which makes it clear that reasonable accommodation is an immediate duty.[789]

In contrast, Lord et al suggest that the concepts of 'reasonableness' and 'undue burden' serve to introduce some notion of progressive realisation into the realm of non-discrimination.[790] I agree with Lawson and Waddington et al that reasonable accommodation is an immediate obligation, even though the parameters of the obligation may be circumscribed by concepts such as reasonableness and 'disproportionate or undue burden'.

Article 5(3) CRPD requires states parties to take all appropriate steps to ensure that reasonable accommodation is provided.[791] State parties must ensure that their

[781] Ferri &Lawson op cit note 753 at 49.
[782] Lawson op cit note 751 at 40.
[783] Ibid at 65.
[784] Lawson op cit note 751 at 66; Other civil and political rights that impose positive obligation include art 19 and 20 of the CRPD.
[785] Lawson op cit note 751 at 64.
[786]Equality and non-discrimination are principles and rights. The Convention refers to them in article 3 as principles and in article 5 as rights. They are also an interpretative tool for all the other principles and rights enshrined in the Convention. Promoting equality and tackling discrimination are cross-cutting obligations that require immediate realization. General Comment No. 6 para 12.
[787] Waddington & Broderick op cit note 584 at 40.
[788] Ibid; Lawson op cit 751 at 64.
[789] General Comment no. 6 para 42.
[790] Lord & Brown op cit note 674 at 280.
[791] Article 4(b) and c; Marco op cit note 554 at 150; Ferri & Lawson op cit note 753 at 8; Waddington & Broderick op cit note 584 at 40.

antidiscrimination legislation provides for the denial of reasonable accommodation as a form of discrimination.[792] Accordingly, states parties are obligated to identify barriers and consider how those obstacles might be removed in order for employees with psychosocial disabilities to thrive in the workplace .[793] Furthermore, such legislation must obligate both public and private sector employers to provide reasonable accommodation to individual employees with disabilities.[794]

The process of an employer reasonably accommodating an employee with a psychosocial disability should begin with dialogue, as both parties should consult in order to help identify and remove barriers.[795] Further, the duty to provide reasonable accommodation is not limited to disclosure and preceding request for accommodation by an employee,[796] but applies also where a potential duty bearer, the employer, should have realised that the person in question had a disability that might require accommodations.[797] Notably, the changes required by reasonable accommodation carry both financial and non-financial costs.[798]

The employer should ensure that the accommodation is not only feasible (legally or in practice),[799] but that it is also relevant and effective in facilitating the realisation of the right in question.[800] Persons with a disabilities moreover should not bear the costs.[801] Notably, the term 'reasonable' has been debated, as some states parties have interpreted the term 'reasonable' to refer to an accommodation which does not result in excessive costs or challenges for the employer, while others relate the term to the quality of the accommodation, meaning that the accommodation must be effective in facilitating an individual with a disability to carry out the relevant employment duties.[802]

The Committee, has emphasised that 'reasonable accommodation' is a single term, and that 'reasonable' is not an exception clause to the duty.[803] Hence, reasonableness should not be used to assess the costs of accommodation or the availability of resources as this occurs at

[792] Article 2 and 5(3); Marco op cit note 554 at 150; Clifford op cit note 608 at 14.
[793] Lawson op cit note 751 at 66 and 67; Ferri & Lawson op cit note 718 at 48 and 49.
[794] Marco op cit note 554 at 15.
[795] General Comment No. 6 at para 26(a).
[796] General Comment No. 6 at para 24.
[797] Ibid.
[798] Lawson op cit note 751 at 64; General Comment No. 6 at para 26(a).
[799] General Comment No. 6 at para 26(b).
[800] Ibid at (c).
[801] Ibid at (d) and (f).
[802] Marco op cit note 554 at 25.
[803] General Comment no. 6 at para 25.

a later stage, when the "disproportionate or undue burden" assessment is undertaken.[804] The 'reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability'.[805] An accommodation is reasonable, therefore, if it achieves the individual purpose (or purposes) for the person with a disability for which it is being made. [806] An accommodation may, however, be reasonable, while still posing a 'disproportionate or undue burden' on a duty bearer.

Notably, "disproportionate or undue burden" should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. According to the Committee both terms should be considered synonyms as they demand for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party.[807] Notably, Kayes et al raise concern about the phrase 'undue burden'. They argue that it may construe persons with disabilities as "burdens" on the community.[808] In line with this, a general misconception by employers is that reasonable accommodation is too costly or difficult to provide.[809] Lawson, in contrast, argues that because art 2 places a heavy emphasis on concepts of reasonableness and proportionality,[810] the CRPD puts more weight on the impact of making the relevant modification in the workplace, and not necessarily on absolute figures as the central issue.[811]

The Committee provides that the determination of whether a reasonable accommodation is disproportionate or imposes an undue burden, requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned.[812] Potential factors to be considered include financial costs, the size of the accommodating party, the potential effect of the of the accommodation on the accommodating party , third-party benefits, negative impacts on other persons and reasonable health and safety requirements.[813] Thus, it is not only financial factors that should be considered, but also social

[804] Ibid.
[805] Ibid.
[806] Ibid. See *H.M V Sweden CRPD*/C/7/D/3/2011. In this case the Committee in determining whether denial of reasonable accommodation amounts to discrimination, adopted a two-prong test. The first step is to identify whether the accommodation is effective in meeting the needs of the individual with the disability and second to determine whether the accommodation imposed a disproportionate burden on the responsible entity.
[807] General comment 6 para 25(b).
[808] Lawson op cit note 751 at 64.
[809] General Comment No. 6 at para 25.
[810] Lawson op cit note 751 at 64.
[811] Ibid.
[812] General Comment No. 6 at para 26(d).
[813] Ibid at 26(d) and 26(e).

factors.[814] This is because 'many proposed steps will carry net benefits rather than burdens for duty-bearers – in addition to the benefit of securing the custom or employment of the particular individual, benefits might flow from measures such as the introduction of a system or structure that will improve accessibility and thereby increase the organisation's future employees that may require similar infrastructure.'[815]

Notably, when it comes to changes that require financial cost, the reasonableness of bearing a particular cost will depend on the circumstances of the duty-bearer in question (in this case the employer).[816] According to the Committee, this requires the consideration of the of the circumstances of the State party as a whole and the private sector entity, overall assets rather than just the resources of a unit or department within an organisational structure in order to make a determination .[817] This is because what amounts to a disproportionate hardship for a small business may not be so for large and well-resourced organisations.[818] Hence, a case-by-case approach should be adopted in determining 'disproportionate or undue burden'.

Importantly, the determination of 'disproportionate or undue burden' also includes consultations between the employer in this case and person with a disability.[819] This is because the burden of proof rests with the duty bearer who claims that his or her burden would be disproportionate or undue.[820] In *HM v Sweden*[821] it was found that the state parties had not produced evidence to indicated that reasonably accommodating the author would impose a "disproportionate or undue burden". The Committee found that because Sweden's Planning and Building Act allowed for departure from the development plan, it could thus reasonably accommodate the author, and thus her request would not impose a "disproportionate or undue burden" on the State party.[822]

Importantly, though, the committee stated that states parties enjoy a margin of discretion in the formulation of reasonable accommodation duties especially in their decisions of when a burden should be regarded as a 'disproportionate or undue burden'.[823] This position

[814] Ferri & Lawson op cit note 753 at 50.
[815] Ibid.
[816] Lawson op cit note 751 at 64.
[817] General Comment no. 6 at para 26(d) and 26(e).
[818] Anna Lawson op cit note 716 at 64; Ferri & Lawson op cit note 718 at 50.
[819] General Comment no. 6 para 26.
[820] Ibid at para 26(d) and 26(g).
[821] *H.M. V Sweden* CRPD/C/7/D/3/2011.
[822] Para 8.5.
[823] Ferri & Lawson op cit note 753.

was reiterated in the case of *Jungelin v Sweden.*[824] The majority of the Committee in this case affirmed that when it comes to assessing the reasonableness and proportionality of accommodation measures, States Parties 'enjoy a certain margin of appreciation.'[825] State authorities have an intimate knowledge of their country and are thus better placed to interpret what a right means in a certain context when weighing competing public and individual interests.[826]

The Committee did not hold that states parties enjoy unlimited margin, but that the Committee would respect the decision if the domestic courts used an objective criterion in reaching its decision.[827] It did, however, emphasise that it was generally for the courts of states parties to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[828] Notably, this decision(the decision by the Committee's majority) has been criticised for not being sufficiently radical in promoting equality and considering the effects of their decision.[829] Indeed, five Committee members issued a joint dissenting opinion and one Committee member partially concurred with the joint dissenting opinion.

The joint dissenting opinion found that despite states parties enjoying a certain margin of freedom when assessing undue burden in the determination of reasonable accommodation, the Committee should have still reviewed the criteria that was used by the state party in this particular case. [830] The dissenting view highlighted the fact that the domestic court should have considered the potential impact of the alternative measures on the future employment of other persons with visual impairments as an additional positive criterion. Thus, the benefit to future employees must also be taken into account. Thus, in the determination of 'disproportionate or undue burden', apart from only looking at the impact on the individual seeking the reasonable accommodation, the effects of denying such accommodation to others who may be similarly affected in the future, should also be considered.[831]

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[824] *Marie-Louise Jungelin V Sweden* CRPD/C/12/D/5/2011.
[825] Supra note para 10.4.
[826] Innocentia Mgijima-Konopi, Regional Developments the Jurisprudence of the Committee on the Rights of Persons with Disabilities and its Implications for Africa, (2016) 4 *ADRY* 269 at 279.
[827] Konopi op cit note 791 at 279.
[828] Supra note 825 para 10.4.
[829] Willene Holness (2016) The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace (2016) 32(3) *South African Journal on Human Rights* 510 at 523.
[830]Supra note 825 para 10.4.
[831] Holness op cit note 829 at 524.

Holness argues that the dissenting members' opinion should be commended for considering a more robust substantive equality approach to reasonable accommodation, which considered the impact of systemic discrimination in the given employment situation, and thus moved closer to a transformative approach to equality.[832] I agree that the inclusion of social impact and not only financial cost is a more holistic approach to equality.

The Committee has also noted that apart from the limitation of "disproportionate or undue burden" the denial of reasonable accommodation can be justified based on objective criteria.[833] According to the committee: it must be communicated in a timely fashion to the person with a disability concerned,[834] and the justification test should be determined based on the length of the relationship between the duty bearer and the rights holder.[835] The implication is that unlike indirect discrimination, an employer can justify denying an employee with a disability reasonable accommodation.

Notably, the most prominent application of the reasonable accommodation requirement remains in the field of work and employment. It is, nevertheless, argued that when developing reasonable accommodation laws and policies, there is a tendency to focus on people with physical or sensory impairments, and persons with psychosocial conditions are often overlooked.[836] Lawson argues that this is because it requires less imagination to identify the obstacles which standard design or procedure might create for people with physical or sensory impairments. For example, 'if a person cannot see and therefore use a computer designed for sighted persons, an employer may provide a braille computer keyboard. The barriers which people with psychosocial impairments might encounter are far less obvious and not easily identifiable.'[837]

Despite this, the power of reasonable accommodation is that it is a versatile and is just as applicable to persons with psychosocial disabilities.[838] Examples of reasonable accommodation for persons with psychosocial disabilities include: flexible working hours, [839]

[832] Ibid.
[833] General Comment No. 6 at para 27.
[834] Ibid.
[835] Ibid.
[836] Lawson op cit note 716 at 68.
[837] Ibid.
[838] Ibid.
[839]Ibid at 71; SA Federation of Mental Health Reasonable Accommodation in Employment https://www.safmh.org.za/documents/Reasonable%20Accommodation%20EMP.pdf

permission to work home temporarily;[840] job transfer within the organisation;[841] provision for disability leave; allocating duties to another person during periods of incapacity; modifying procedures for pre-employment testing or assessment;[842] reorganisation or altering of workstations or acquiring new tools;[843] quiet workspace or provision of equipment like noise-cancelling headphones in order to limit distractions due to sound sensitivity;[844] conveying tasks via email or in writing – to provide reference where memory is affected;[845] and provision of frequent breaks due to concentration difficulties.[846] Looking at the examples above it is evident that apart from the employer, employee, and expert, the human resource officer will also be required to play a vital role in identifying relevant reasonable accommodation.

VI. JUSTIFICATION

According to a longstanding and widely used pragmatic definition of discrimination by human rights treaties such as CERD and CEDAW,[847] differential treatment in a comparable situation does not constitute discrimination if the purpose or effect of the differential treatment is to achieve a legitimate aim and if the differential treatment can be justified objectively and reasonably.[848] The CRPD does not seem to adopt such an approach.[849]

The draft of General Comment No. 6 received views in support of and views against the pragmatic approach.[850] Proponents such as Neuman was of the view that discrimination on the basis of disability does not mean that differential treatment on the basis of disability is always a violation of the Convention per se, without any consideration of the explanation that is put forward to justify the differential treatment.[851] However, AGE Platform Europe while looking at the interconnection between age and disability, argued that the problem with

[840] Lawson op cit note 751 at 71.
[841] Ibid at 73.
[842] Ibid at 70.
[843] Ferraina op cit note 491 at 16.
[844] SA Federation of Mental Health Reasonable Accommodation in Employment, available at https://www.safmh.org.za/documents/Reasonable%20Accommodation%20EMP.pdf; Lawson op cit note 716 at 71.
[845] Ibid.
[846] Ibid.
[847] See heading II where the abbreviations are given meaning.
[848] Sándor Gurbai 'Beyond the Pragmatic Definition? The Right to Non-discrimination of Persons with Disabilities in the Context of Coercive Interventions' (2020) 22(1) *Health and Human Rights Journal* 279 at 281.
[849] Art 2 of the CRPD.
[850] Ibid.
[851] Gerald L. Neuman 'Submission regarding draft general comment on article 5, Equality and non-discrimination' 18 June 2017 at 1, available at https://www.ohchr.org/EN/HRBodies/CRPD/Pages/WSEqualityArt5.aspx, accessed 21 March 2021.

justification is that it gives a pass to action which although clearly being discriminatory, is tolerated but often also established by norms.[852]

The final version of General Comment No. 6 is entirely silent on justification[853] when it comes to both direct and indirect discrimination.[854] Nonetheless, the Committee seems to imply that only the denial of reasonable accommodation can be justified, as it specifically allows for the justification of the denial of reasonable accommodation.[855]

The committee further magnifies the confusion with its decisions. In some instances, it has invoked pragmatic definition of discrimination[856] while in other cases it has chosen not to invoke it.[857] For example, in the indirect discrimination case of *Iuliia Domina and Max Bendtsen v. Denmark* it acknowledged justification, while it did not in Y *v. United Republic of Tanzania*, *V.F.C. v. Spain* (direct discrimination) and *J.H. v. Australia* (indirect discrimination).[858]

Gurbai, argues that since the Committee adopted General Comment No. 6, there seems to be 'trend away from reliance on the pragmatic definition in direct discrimination cases, and hesitation to rely on the pragmatic definition in indirect discrimination cases.'[859] Consequently, what this means is that any unfavourable treatment on this basis would automatically amount to disability-based direct discrimination.[860] For example, if a person is

[852] AGE Platform Europe 'Submission Draft the outline of General Comment on Article 5. Equality & Non-Discrimination' 23 June 2017 at 1.
[853] The word justification will be used interchangeable with defence because defences are used to justify discrimination. See *IMATU v City of Cape Town* [2005] 10 BLLR 1084 (LC) (18 July 2005) para 99 and 101; Sándor Gurbai op cit note 848 and 289.
[854] General Comment No. 6 para 18.
[855] General Comment No. 6 para 27.
[856] The committee relied on the pragmatic definition of discrimination in three cases about allegations of indirect discrimination: *H.M. v. Sweden* CRPD/C/7/D/3/2011, *Marlon James Noble v. Australia* CRPD/C/16/D/7/2012 and *Iuliia Domina and Max Bendtsen v. Denmark* CRPD/C/20/D/39/2017; See Gurbai op cit note 848 at 286.
[857] The treaty body did not address the pragmatic definition of discrimination in four cases where it dealt with the issue of indirect discrimination. For example, the cases of *Michael Lockrey v. Australia* CRPD/C/15/D/13/2013, *Gemma Beasley v. Australia* CRPD/C/15/D/11/2013, and J.*H. v. Australia* CRPD/C/20/35/2016 involved deaf persons. In these cases, the committee did not use the pragmatic definition of discrimination even as it recalled its jurisprudence on indirect discrimination, See Gurbai op cit note 848 at 286; The committee did not use the pragmatic definition of discrimination in the three cases in which it addressed explicitly the concept of direct discrimination. In the case of *V.F.C. v. Spain* CRPD/C/21/D/34/2015, *para* 6.3 and 8.10; *X v. United Republic of Tanzania* and *Y v. United Republic of Tanzania* CRPD/C/20/DR/23/2014, para 8.4; Bujdosó et al. v. Hungary CRPD /C/10/D/4/2011 para 9.4 and 9.6. In these cases, the CRPD Committee found direct discrimination without entering into the consideration of whether there was any legitimate aim for the less favourable treatment based on disability. See more Gurbai op cit note 848 at 287 and 288.
[858] *Iuliia Domina and Max Bendtsen v. Denmark* CRPD/C/20/D/39/2017 para 8.3; *United Republic of Tanzania* and *Y v. United Republic of Tanzania* CRPD/C/20/DR/23/2014, para 8.4; *V.F.C. v. Spain* CRPD/C/21/D/34/2015, *para* 6.3 and 8.10; J.*H. v. Australia* CRPD/C/20/35/2016 para 7.3-7.4.
[859] Ibid at 290.
[860] Ibid at 288.

subjected to unfavourable treatment and denied employment or a promotion by an employer based on the grounds of an actual or perceived psychosocial impairment, this would automatically amount to disability-based discrimination, and no justification defence would be allowed.

To sum up, from all the above it is not clear what the CRPD's position is in the Convention itself, or even from Committee recommendations in individual complaints. They all seem to provide conflicting positions. Hence, precise information on the CRPD's position is required. The implication of this will be discussed further in the chapters that follow.

VII. CONCLUSION

The CRPD in art 27(1)(a) provides for a wide variety of legal responses that are at the disposal of an employees who may find themselves discriminated against on the ground that they an actual or perceived psychosocial disability. It not only provides a broad, flexible and inclusive definition of disability that recognises person with psychosocial conditions as persons with disabilities and as persons who are protected under the treaty as persons with disabilities, but it also provides a wide scope of discrimination that covers everything from discrimination on one ground, to discrimination on multiple grounds, and further recognises discrimination by association. It also protects an employee against four forms of discrimination, including the unjustifiable denial of reasonable accommodation, and is the first international human rights treaty to do so.

Although the CRPD provides what seems like comprehensive protection, there are areas that limit its application and others that need further clarification, including the meaning of 'impairment' and what it means for it to be 'long term' in the context of psychosocial disabilities, the standard of proof complainants has to meet in order for a presumption of discrimination to be triggered, as well as whether its anti-discrimination provisions allow for justification or defences. These issues will be discussed further in chapter 6.

CHAPTER 4: THE ANTI-DISCRIMINATION LEGAL FRAMEWORK IN KENYA

I. INTRODUCTION

In this chapter I will discuss the legal framework in Kenya that protects employees with psychosocial conditions from discrimination in employment. To begin with, the chapter will delve into the place of the CRPD under Kenyan law, as this is necessary in order to understand when and how the CRPD applies under Kenya's law, and the resulting legal implications. Besides that, it will critically analyse the Constitution and specific anti-discrimination legislation that provide legal responses to an employee with psychosocial disabilities who is or may be discriminated against in employment. The analysis considers, inter alia, the definition of disability, the different forms of discrimination covered under Kenya's anti-discrimination law and their scope. Finally, it evaluates whether the available legislation provides adequate protection to persons with psychosocial disabilities from discrimination in employment.

I. THE CRPD WITHIN THE KENYAN LEGAL FRAMEWORK

The relationship between international law and national law centres on the question of when, if ever, international law becomes binding law within a state.[861] It is captured concisely by the distinction between monistic and dualistic systems.[862]

The 1963 Constitution of Kenya from the beginning did not specify the applicable treaty practice. However, Kenya being a Commonwealth country, predominantly followed a dualist approach where international law does not form part of the domestic law of a country unless and until the enactment of domestic legislature.[863] The 2010 Constitution (henceforth the Constitution),[864] however, gives international law a more prominent role in the domestic legal system.[865] Article 2(5) of the Constitution provides that 'the general rules of international law

[861] Juha Tuovinen 'What to Do with International Law: Three Flaws in Glenister' (2014) 5 *(Const. Ct. Rev.)* 435 at 438.

[862] Tuovinen op cit note 861 at 438; Andre Stemmet 'The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law' (1999) 33(1) *The International Lawyer* at 47.

[863] Tuovinen op cit note 861 at 438; Elizabeth Kamundia 'The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts in Kenya' in Lisa Waddington and Anna Lawson(ed) T*he UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*(2013) 286-313 at 287; Tom Kabau and Chege Njoroge 'The application of international law in Kenya under the 2010 Constitution: critical issues in the harmonisation of the legal system' (2011) 44(3) *The Comparative and International Law Journal of Southern Africa* 293 at 295.Nicholas Wasonga Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *African Human Rights Law journal*, 414 at 415.

[864] The Kenyan Constitution, 2010.

[865] Kamundia op cit note 863 at 287; kabau & Njoroge op cit note 863 at 295; Orago op cit note 863 at 415.

shall form part of the law of Kenya', and art 2(6) provides that 'any treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.

Articles 2(5) and 2(6) seem to incorporate general rules of international law and ratified treaties[866] into Kenyan laws automatically, without the necessity of a domesticating statute, thus indicating a shift from the former dualist approach to a monist approach.[867] However, art 21(4) and art 94(5) of the Constitution can be interpreted to support contentions that Kenya is still a dualist state.[868] Article 21(4) provides that 'the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms'. Article 94(5) sates that 'no person or body, other than Parliament, has the power to make provisions having the force of law in Kenya except under authority conferred by this Constitution or by legislation.'[869]

The aforementioned provisions have given rise to debate regarding the status of international law in the Kenyan legal system.[870] While legal scholars are in agreement on the rules of international law as automatically forming part of the law of Kenya as provided for in art 2(5),[871] there is no such uniformity of agreement when it comes to treaties[872] as provided in article 2(6).[873] There is no shortage of disagreement.[874] It falls beyond the scope of this thesis to engage fully in this debate here.

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[866] Kenya ratified the CRPD on 5 May 2008. Additionally, Kenya submitted its State Report to the CRPD Committee on the implementation of the Convention. The next report is due in 2022. Global Disability Rights Now 'Formal Operation of the CRPD in Kenya' available at <*http://www.globaldisabilityrightsnow.org/law/kenyacrpd*>, accessed 26 April 2021; Reporting status for Kenya, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN, 28 July 2014.

[867] Gilbert Oduor Onyango *A socio-legal critique of the legal framework for the promotion of rights of persons with disabilities in Kenya* (unpublished LLM thesis, International Institute of Social Studies, 2012)3.; Nicholas Wasonga Orago op cit note 863 at 419; Kabau and Njoroge op cit note 863 at 293; Kamundia op cit note 863 at 288; *Karen Njeri Kandie v Alssane Ba* [2015] eKLR Civil Appeal 20 of 2013.

[868] Kamundia op cit note 828 at 288.

[869] The Constitution of Kenya, 2010.

[870] Kamundia op cit note 863 at 286.

[871] Ibid note at 292.

[872] The word treaty will be used interchangeably with Convention.

[873] Kamundia op cit note 828 at 292.

[874] Kabau and e Njoroge op cit note 863 at 298 and 299; Nicholas Wasonga Orago op cit note 863 at 432; Makumi Mwagiru 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' (2011) 3(1) *Journal of Language, Technology & Entrepreneurship in Africa* 144- 155 at 153; Kamundia op cit note 863 at 292; E. Oluoch Asher 'Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya' (2013) 3(11) *International Journal of Humanities and Social Science* 266 at 271.

The Treaty Making and Ratification Act[875] provides that a treaty cannot be ratified without the approval of Cabinet and Parliament.[876] Therefore, although a treaty does not need to be legislated into domestic law by Parliament in order for it to form part of Kenyan law, a treaty will not become Kenyan law directly unless its ratification is first approved by parliament.

This Act applies only to treaties passed before its commencement on 14 December 2012, and as such does not apply to treaties like the CRPD, which was ratified by Kenya on 19 May 2008.[877] Its application in Kenya therefore does not require the approval by parliament. This was confirmed in the case of *Karen Njeri Kandie v Alssane Ba*.[878] A recent Supreme Court decision, however, took a different approach: [879]

> "[A]rticles 2(5) and (6) of the Constitution has nothing or little of significance to do with the monist-dualist categorization. ……At any rate, given the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are non-self-executing, which means that, they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action."

I disagree with this position because the distinction, although not relevant for treaties or conventions ratified by Kenya after the commencement of the Treaty Making and Ratification Act came into force on 14 December 2012, it is still key for all other treaties, including the CRPD, which were ratified before the Act came into force.

Even if one accepts that the CRPD can be invoked directly in a court of law when relevant rights have been violated,[880] the issue is complicated because of the hierarchy between domestic and international law. The monist doctrine has two possible approaches with regard to the supremacy of either domestic or international law.[881] The first approach is that international law enjoys supremacy over domestic law, while the second approach is based on the view that domestic law has primacy over international law.[882] Kenya seems to adopt neither.

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[875] No. 45 of 2012 Revised Edition 2018 [2012. assented to on 13th December, 2012, and was commenced on 14th December, 2012.
[876] Section 8, 12, 3(1).
[877] United Nations Treaty Collection 'Convention on the Rights of People with Disability' available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed on 26 February 2021.
[878] [2015] eKLR, Civil Appeal 20 of 2013.
[879] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, petition 3 of 2018 at para 133.
[880] Onyango op cit note *867* at 3.
[881] kabau and Njoroge op cit note 863 at 295
[882] Ibid.

Although it is clear that the Constitution is the supreme law of the land,[883] there is a lack of clarity when it comes to the hierarchy between international law and domestic legislation. Neither the 2010 Constitution,[884] nor the Judicature Act,[885]provides any answers.[886] Nonetheless, case law seems to provide some insight. However, as will be highlighted courts have taken different positions on whether international law supersedes domestic legislation or vice versa.[887]

In *In Re the Matter of Zipporah Wambui Mathara*,[888] the High Court[889] upheld the supremacy of international law over domestic legislation.[890] In contrast, the High Court in *Beatrice Wanjiku & Another v Attorney General*,[891] held that international law is not superior to domestic legislation.[892] The court in *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani*,[893] agreed with the reasoning in *Beatrice Wanjiku*.[894] It held that although treaty law provisions do not carry the same weight as constitutional provisions, they ranked in *pari passu*[895] with domestic statute law'.[896] In addition, 'where provisions in two statutes appear to contradict each other, it is a general principle of statutory interpretation that as far as possible, the statutes should be read and interpreted harmoniously.'[897] A similar position was taken *Njeri Kandie v Alssane*.[898] Here the Court of Appeal held that although

[883] This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government, and any law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. See art 2.
[884] Article 2.
[885] Chapter 8, Revised Edition 2012 [2010} in s 3.
[886] Tom Kabau and J Osogo Ambani 'The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?' (2013) 1(1) *Africa Nazarene University Law Journal* 36 at 44 and 45.
[887] Orago op cit note 867 at 418.
[888] *In Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, Bankruptcy cause 19 of 2010.
[889] It is a superior court together with Supreme Court and the Court of Appeal. Its Jurisdiction includes: unlimited original jurisdiction in criminal and civil matters; to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear any question respecting the interpretation of this Constitution and on any other jurisdiction, original or appellate, conferred on it by legislation. Article 161(1) and 165(3) of the Constitution.
[890] Supra note 853 at para 9 and 10.
[891] *Beatrice Wanjiku & another v Attorney General* [2012] eKLR, Petition 190 of 2011 at para 33 and 34.
[892]Supra not at 856; *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division* [2018] eKLR, petition 303 of 2015 at para 21.
[893] *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division* [2018] Eklr.
[894] Supra note 891 at para 36.
[895] Side by side; at the same rate or on an equal footing.
[896] Supra note 891 at para 34.
[897] Ibid.
[898] [2015] eKLR.

international treaties and conventions were part of Kenyan law they are at par with other laws enacted by Parliament.[899]

In *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*[900] the Supreme Court held that

> 'Article 2(5) and (6) requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement.'[901]

Further, where a court is faced with a dispute and there is a gap in the domestic law, such gap must be filled by international law because 'it forms part of the law of Kenya'.[902]

The CRPD does form part of Kenyan law, and is in an equal footing with domestic legislation. Even so, the CRPD only applies where there is no conflict with existing law or for purposes of removing ambiguity or uncertainty in domestic laws. Also, the CRPD applies directly where there is a lacuna in the law, which may be filled by reference to it.

II. KENYA'S EMPLOYMENT ANTI-DISCRIMINATION LEGAL FRAMEWORK

The Kenyan anti-discrimination legal framework provides both constitutional and statutory safeguards that protect employees with psychosocial conditions against discrimination in employment. Admittedly, under the Kenyan legal framework, an employee with a psychosocial condition who is discriminated against can bring a discrimination claim under the Constitution,[903] Persons with Disabilities Act (PWD) Act, [904] Employment Act,[905] the CRPD as has been highlighted above, and also other relevant international treaties. It has been argued that the most significant and transformative development in Kenya in respect of equality was the adoption of the Constitution on 27 August 2010.[906] It replaced both the 1969 Constitution and the former colonial Constitution of 1963, has brought major improvements to the legal and policy framework with regards to discrimination; it has a strong focus on equality, a much-improved right to non-discrimination with special provisions for the protection of rights for

[899] Supra note 898.
[900] [2021] eKLR, Petition 3 of 2018.
[901] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR, Petition 3 of 2018 at para 132.
[902] *Ibid*.
[903] The Kenya Constitution, 2010.
[904] Act no. 14 of 2003.
[905] Chapter 226 Revised Edition 2012 [2007].
[906] The Equal Rights Trust in Partnership with Kenyan Human Rights Commission 'In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya' ERT Country Report Series: 1 London' February 2012 at. 170.

particular vulnerable groups that includes persons with disabilities.[907] This strong commitment to the principles of equality and non-discrimination is evidenced throughout the Constitution.[908]It is worth noting that both the PWD Act and the Employment Act were enacted prior to the promulgation of the 2010 Constitution,[909] and before the CRPD came into force, and as such are both currently under review.[910]

The Employment Act, which was passed in 2007, declares and defines the fundamental rights of employees in order to provide basic conditions of employment.[911] However, persons with psychosocial disabilities who are not protected by the Employment Act[912] may have recourse in terms of the PWD Act and the Constitution.

The PWD Act, which was enacted in 2003,[913] was the first Kenyan law that specifically protected persons with disabilities from discrimination.[914] The aim of the Act is to provide for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Development Fund for Persons with Disabilities in order to provide monetary assistance to organisations and persons with disabilities.[915] Hence, this Act provides protection for employees with psychosocial conditions who qualify as disabled specifically.

From case law what it is evident that discrimination claims may be brought in terms of one or more relevant laws. In *Antony Kipkorir Sang v Attorney General*,[916] for example, a case involving disability discrimination in employment, the claim was brought under section 27(4), 28, 29, 41(1) and 2(b) and 54(1) of the Constitution,[917] section 15 of the PWD Act as well as art 1 of the CRPD.*[918]* In *Duncan Otieno Waga v Attorney General*,[919] an employment

[907] Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions, the 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions' (2015)1 *Speculum Juris* 1 at 6; The Equal Rights Trust in Partnership with KHRC op cit note 83 at 170.
[908] The preamble, art 10(2)b; art 20(4) b; art 54.
[909] PWD Act in 2003, and Employment Act in 2007.
[910] Persons with Disabilities (Amendment) Bill, 2019; The Employment Act (amendment) Bill, 2019; E Kamundia, 'Country Report: Kenya' (2014) 2 A*DRY Volume* 185-205 at 190.
[911] Employment Act Cap. 226, No. 11 of 2007.
[912] They may may not qualify as 'employees' as provided for in s 2 of the Employment Act, or are excluded because they work for the armed forces or police, the National Youth Service; or is in a family undertaking where an employer and the employer's dependants are the only employees or Export Processing Zone. See, further, ss 3(2) and 3(5) of the Employment Act.
[913] Revised Edition 2012 [2003] Chapter 133.
[914] The Equal Rights Trust in Partnership with KHRC op cit note 871 at 132.
[915] PWA Act.
[916] *Kipkorir Sang –Versus- Attorney General* [2014] eKLR**,** Cause 2408 of 2012.
[917] Supra note 916 at para 4.
[918] Supra note 917 at para 5.
[919] [2014] eKLR**,** Cause 2408 of 2012 para b, d, and a.

discrimination claim based on disability was brought under the PWD Act (ss 15 and 22) and the Universal Declaration of Human Rights (UDHR) in art 1. In *Paul Pkiach Anupa v Attorney General*[920] an employment discrimination case was brought under art 27(4), 41(1) and (2)(*b*) and 54(1) of the Constitution, s 15 of the PWD Act and s 5(3)(*a*) of the Employment Act.[921]

III. JURISDICTION IN EMPLOYMENT DISCRIMINATION CLAIMS

The Employment and Labour Relations Court (ELRC), which was established in pursuance of art 162(2)(a) of the Constitution, has exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee.[922] The court also has jurisdiction on matters concerning enforcement of rights and fundamental freedoms in employment. In *Brahim Tadicha Sora v Isaac B. Nadera (SSP*),[923] it was held that the ELRC has the same status as the High Court, which is the Constitutional Court, and hence, it was competent to interpret the Constitution and decide matters relating to breach of fundamental rights and freedoms in disputes falling within the provisions of section 12 of the Employment and Labour Relations Court Act.[924]

This, is similar to South Africa where the Labour Court has the same status as the High Court.[925] In South Africa, however, a party aggrieved with the decision of the Labour Court can appeal to the Labour Appeal Court, while in Kenya appeals from the Employment and Labour Relations Court lie with the Court of Appeal against any judgement, award, order or decree issued by the Court.[926] Further, an appeal from the Court of Appeal lies with the Supreme Court of Kenya. [927] Although the ELRC has appellate jurisdiction, it specifically hears and determines appeals from decisions of the Registrar of Trade Unions; and local tribunals or commissions as may be prescribed under any written law.[928]

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[920] [2012] eKLR, High Court, Petition 93 of 2011.
[921] Supra note 920 at para 16.
[922] Industrial Court Act Chapter 234B Revised Edition 2013 [2012] s 1 2(1)(a); Employment Act s 87.
[923] [2019] eKLR, Miscellaneous Civil Application 430 of 2018, para 20.
[924] No. 20 of 2011 Revised Edition 2016 [2011], *Brahim Tadicha Sora v Isaac B. Nadera (SSP)* [2019] eKLR, Miscellaneous Civil Application 430 of 2018 at para 20-24; *United States International University v Attorney General* (2012) eKLR, petition No 170 of 2012 at para 32 and 33; *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR Civil, Appeal 50 of 2014 at para 45.
[925] Article 162(2)(a).
[926] EEA s 167,168 and 183; Amendment of Section 168 of Constitution Amended by section 12 of Constitution Sixth Amendment Act of 2001 s 4(3) (a); Employment Act s 17(1), Notably, an appeal from a judgement, award, decision, decree or order of the Court shall lie only on matters of law, s 17(2).
[927] Article 163(3) b.
[928] Section 12(5).

IV. WHO CAN BRING A DISCRIMINATION CLAIM?

According to the ELRC[929] a claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.[930] Hence an employee with a psychosocial condition can bring a discrimination claim before the courts. Also, according to the Employment Act an aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.[931]

However, the PWD Act seems to take a contractionary position. It provides that a complaint by a person with a disability that his employer has discriminated against him or her in a way which is contrary to the PWD Act may be presented to the ELRC through the appropriate trade union.[932] Basically, in the PWD Act there are no provisions for individual victims of discrimination to bring civil proceedings against an alleged discriminator under the Act.[933] Nonetheless, practice on the ground suggests that individuals are allowed to bring claims of discrimination in employment based on the PWD Act.[934] In fact, Justice S. Majanja in the *Paul Pkiach Anupa v Attorney General*,[935] in reference to the *Persons with Disabilities Act* states:

> "Although the Act does not expressly state that a personal cause of action may be founded upon its provisions such an action is not prohibited. Since the Act was intended to give effect to the rights of persons with disabilities, I think the court may enforce its provisions by giving such relief that is consistent with its provisions. Apart from the Act, Article 23 entitles the Court to grant such relief as is appropriate to ensure that the right infringed is vindicated."[936]

An employee can also institute court proceedings claiming that their rights under art 27 of the Constitution, which prohibits discrimination, were infringed.[937]An employee can seek redress in terms of art 22 of the Constitution.[938] The right is extended to other interested parties including: a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its

[929] Chapter 234B Revised Edition 2014 [2012].
[930] Section 1 2(2); 87(1)
[931] Section 87(1).
[932] PWD Act s 15(3).
[933]The Equal Rights Trust in Partnership with KHRC op cit note 871 at 230.
[934] Ibid at 231.
[935] [2012] eKLR, High Court, Petition 93 of 2011, the High Court of Kenya.
[936]Supra note 935 at para 70.
[937] Article 22(1).
[938] The Equal Rights Trust in Partnership with KHRC op cit note 871 at 178.

members.[939]These extension provisions recognise the disadvantages that victims of discrimination may face in terms of resources and access to evidence when bringing a case, and the systemic nature of discrimination.[940] This right is, however, not absolute and is limited.[941]

V. PROTECTED GROUNDS UNDER WHICH AN EMPLOYEE WITH A PSYCHOSOCIAL CONDITIONS CAN BRING A CLAIM OF DISCRIMINATION

The Constitution, in art 27(4), prohibits both direct and indirect discrimination on a list of 16 protected grounds. It provides that:

> 'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'[942]

The list of protected grounds is elaborate, and it will be argued below that employees with psychosocial conditions in Kenya can seek anti-discrimination constitutional protection under the grounds of disability, and if they fail to qualify as having a disability, under health status or an unspecified ground. Also, worth noting is that the Constitution prohibits discrimination by both public and private employers.[943] The PWD Act also provides that no person shall deny a person with a disability access to opportunities for suitable employment.[944] The Employment Act prohibits discrimination in employment on a variety of grounds that include: race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.[945] Unlike the Constitution, it includes a further protected ground that is relevant to persons with psychosocial disabilities: mental status.[946]

Therefore, from all the above according to the Kenyan anti-discrimination legal framework, an employee with psychosocial conditions can bring a discrimination claim on a number of grounds: disability or health status under the Constitution;[947] disability under the

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[939] Article 22(2).
[940] The Equal Rights Trust in Partnership with KHRC op cit note 871 at 170.
[941] Article 24 which limits rights and fundamental freedoms under the Kenyan Constitution is identical to s 36 of the South African Constitution in some aspects, but not completely. In fact, the main difference is that s 36 of the South African Constitution does not include as a consideration on whether to limit the Bill of Rights shall: the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.
[942] Article 27(4).
[943] Article 27(4) and (5); *Dr. Samson Gwer & 5 others v Kenya Medical Research Institute (KEMRI) & 3others* [2014] eKLR, Petition 21 of 2013 at para 67.
[944] 12(1).
[945] Employment Act sec 5(3)(a).
[946] Ibid.
[947] Article 27(4).

PWD Act; [948] and/or disability or mental status under the Employment Act.[949] Further, the provisions that list the protected grounds in the Constitution,[950] and the Employment Act[951] imply that the lists of grounds are open, so an employee with a psychosocial condition could also bring a discrimination claim under an unspecified ground. The legal consequences of an employee with a psychosocial condition claiming discrimination under each of the protected grounds will be discussed below.

a) Disability

The Constitution,[952] the PWD Act,[953] and the Employment Act[954] all prohibit discrimination based on disability, and thereafter all provide definitions of what amounts to disability. This is in contrast to the CRPD which instead of defining disability, took a more cautious approach when it came to defining disability and instead opted to define 'persons with disabilities' in order to provide a more flexible non-exhaustive provision, which allows for an open-ended interpretation of disability.[955] Furthermore, as has been highlighted in previous chapters,[956] the intention of the drafters of the CRPD was for persons with psychosocial conditions to receive anti-discrimination protection specifically under the ground of disability,[957] and therefore if the definition adopted by Kenyan anti-discrimination law is so restrictive that it prevents employees with psychosocial conditions from qualifying as persons with disabilities, and as a result are forced to claim protection under other grounds, this not only denies them specific protection provided for persons with disabilities, but is not in compliance with art 27(1)(a) of the CRPD.

The Constitution defines disability to include:

> 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.'[958]

Looking at the above definition, the first thing that stands out is the fact that it adopts a medical approach, as its focus is on the individual as the cause of disability and not necessarily how

[948] Section 15(1).
[949] Section 5(3)(a).
[950] Article 27(4).
[951] Employment Act Section 5(3)(a).
[952] Article 260.
[953] Section 2.
[954] Section 2.
[955] Lee Ann Basser and Melinda Jones 'The Disability Discrimination Act 1992 (CTH): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26(2) *Melbourne University Law Review* 254 at 260-262;
[956] Chapter 3, heading 11.
[957] Ibid.
[958] Article 260.

society is structured. Also, the requirement that the impairment, condition or illness, which is real or perceived, must have "a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities" is underpinned by the medical approach to disability.

Nonetheless, this definition also contains elements of a social approach for a number of reasons. Firstly, the inclusion of 'condition' and 'illness' into the definition of disability on top of impairment is particularly relevant for persons with psychosocial conditions, as it makes qualifying as a person with a disability less contentious. A definition of disability that does not include "conditions" or "illnesses" would require that persons with psychosocial conditions in addition to fulfilling the other definitional criteria provided in art 260 of the Constitution, also must qualify as having an impairment and this would knock out a good number from qualifying as persons with disability. The inclusion of 'condition' or 'illness' in the definition of disability removes the need to determine whether a psychosocial condition such as depression qualifies as an impairment, and the need to determine whether there are mental conditions and illnesses which do not amount to impairments.[959]

This addition of 'condition' or 'illness' broadens the definition of disability to include persons with disabilities who identify with medical terminology and diagnosis, and also those who reject medical terminology and identify with disability as a social and political category only.[960] The recognition of perceived disabilities is also of particular relevance for persons with psychosocial conditions, as it captures the effects of the prejudice and stigma often experienced by them.[961] It recognises that persons with psychosocial conditions are often not disabled because of their condition, illness or impairment, but because of prejudice and stigma. This is especially relevant in a country like Kenya where there is a lot of shame, deep-rooted stigma, and general lack of understanding about psychosocial conditions in general.[962] Consequently, persons with mental disorders are assumed to be incompetent and unable to live productive lives.[963] Further, this also provides protection for someone who has been wrongly perceived or misdiagnosed as having an impairment.[964]

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[959] Anna Bruce *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (Unpublished PhD thesis, Lund University, 2014) 305.
[960] Ann Bruce op cit not 959 at 307.
[961] Rosalind Lake *Discrimination Against People with Mental Health Problems in the Workplace: A Comparative Analysis* (Unpublished PhD thesis, Rhodes University, December 2005) 49; Chapter 3, Heading
[962] (KNCHR) Kenya National Commission on Human Rights 'Silenced Minds: The Systematic Neglect of the Mental Health System in Kenya: A Human Rights Audit of the Mental Health System in Kenya' November 2011 at 39.
[963] Ibid.
[964] Lake op cit note 961 at 49.

The Employment Act[965] defines disability as: 'a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on a person's social and economic participation.'[966] The PWD Act similarly defines disability as '…. a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.'[967] These definitions in the Employment Act and the PWD Act are not only narrower than the definition provided for in the Constitution above, but are also arguably ableist. In my view, they conceive of disability in a manner that implies that it is persons with disabilities' personal deficits that prevent them from participating fully in society. These assumptions are rooted in negative cultural attitudes about disability and perpetuates the myth that disability is always linked to ill health, incapacity, and dependence, [968] and not how society is structured to prevent persons with impairments from flourishing.[969] Also, notably, the definitions do not include parameters for the required duration of impairment. Nonetheless, this is not necessarily a negative as it makes the definition more inclusive especially for psychosocial conditions which fluctuate, disappear or become dormant for a certain period of time and then return.[970]

Lastly, the definitions in the PWD Act and the Employment Act also fail to recognise the effects of the prejudice and stigma in the creation of disability.[971] Employees who may be wrongly perceived or presumed to be a person with a disability; or even has been misdiagnosed as having an impairment are therefore not explicitly protected.[972] Notably, the current Disability Bill does not bring about much needed change with regard to the definition of disability. The Bill defines disability as: 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.'[973] This new definition is different from the one in the current

[965] The Employment Act sec 2.
[966] Section 2.
[967] Ibid.
[968] Thomas Hehir 'Confronting Ableism *' (2007)* 64(5) *Educational Leadership* 8-14 at 5; Keith Storey 'Combating Ableism in Schools' (2007) 52(1) *Preventing School Failure: Alternative Education for Children and Youth* 56-58 at 56 ; Margaret A. McLean 'Getting to Know You: The Prospect of Challenging Ableism Through Adult Learning' (2011) 132 *New Directions for Adult and Continuing Education* 13-22 at 13.
[969] Ibid.
[970] Viviers op cit note 58 at 58.
[971] Chapter 2, heading VI; Chapter 1, heading I; Lake op cit note 926 at 49.
[972] Lake op cit note 961 at 49.
[973] Persons with Disabilities (Amendment) Bill (Senate Bill No. 29 of 2020) s 2.

Act, however it still adopts a medical model of disability. However, between its current state and when the Bill is eventually passed by parliament, the definition could change. As it stands though, the definition is too restrictive and could possibly exclude employees with psychosocial conditions from qualifying as persons with disabilities.

In conclusion, the two definitions of disability found in the Employment Act and the PWD Act are both narrow and restrictive.[974] They do not facilitate the purpose of disability anti-discrimination law.[975] In my opinion these definitions may act as barriers to protection for employees with psychosocial conditions. The definition of disability in the Constitution is more inclusive of employees who have psychosocial conditions as it recognises perceived disabilities, as well as conditions or illnesses that may not qualify as impairments.[976]

Article 2 of the Constitution declares that it is the supreme law, and that any law inconsistent with it is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.[977] Therefore, if the definition of disability in both the PWD Act [978]and Employment Act,[979] are inconsistent with the definition found in the Constitution, they both can be challenged and rendered void. However, so far, the definitions found in the Employment Act and the PWD Act have not been challenged.

i) Registration of Disability

In Kenya, the courts will only recognise an individual as a person with a disability if they are registered under the National Council for Persons with Disabilities (NCPWD).[980] This has been upheld in a number of cases including: *Suleman Angolo v Executive Officer Teachers Service Commission*[981] *and* Stephen *Kariuki Kama v Kenya Ports Authority*,[982] *Juliet Mwongeli Muema v Smollan Kenya Limited,* [983] *Fredrick Gitau Kimani v Attorney General.*[984]

In *Esau Rodgers Mumia v Central Bank of Kenya*[985], the court ruled that one only becomes certified as a person with a disability for purposes of accessing the rights and

[974] See chapter 4, heading VI above.
[975] Ibid.
[976] Ibid.
[977] The Constitution art 2(4).
[978] Section 2.
[979] Section 2.
[980] PWD Act s 7(1) c.
[981] [2015] *eKLR*, Constitutional Petition 12 of 2014 at para *11.*
[982] [2016] *eKLR*, Constitutional Petition 21 of 2016 at para 47.
[983] [2019] eKLR, Cause 104 of 2017.
[984] [2012] eKLR, petition 157 of 2011.
[985] [2017] eKLR, Cause 940 of 2014.

privileges under the PWD Act after they are registered by the NCPWD in terms of s 7(1)(c) of the PWD Act.[986] For an employee to access the benefits of disability set out in law, their disability must be certified through registration by the NCPWD, relying on duly completed medical reports.[987] Therefore, employees with psychosocial conditions cannot claim anti-discrimination protection as persons with disabilities under Kenyan law unless they are first registered as a person with a disability by the NCPWD.

The NCPWD is a state corporation established by the PWD Act,[988] and was set up in November 2004.[989] The registration of persons with disabilities is stated as being to enhance and facilitate the ability of the NCPWD to perform its functions which include: co-operating 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, co-ordinating services provided for the welfare and rehabilitation of persons with disabilities, to implement programmes for vocational guidance and counselling, [990]and for tax exemption purposes. [991] Registration is also used for social welfare purposes, specifically to distribute the National Development Fund set aside annually for persons with disabilities.[992]

According to the NCPWD website, one must qualify as a person with a disability first before registration, but no information is provided as to which specific definition should be used to determine if a person is disabled or not.[993] The NCPWD website simply provides: '… individuals who qualify as per the definition of a person with disability are required to get registered at the district level.'[994] However, the most logical conclusion would be that the definition of disability used by the NCPWD is the definition found in the PWD Act,[995] which is the same law that also creates the NCPWD.[996]

The definition of disability as provided under the PWD Act, though narrow and restrictive as has been highlighted above, is the most important definition when it comes to

[986] Supra note 985 at para 18.
[987] Supra note 985 at para 21.
[988] Section 3.
[989] National Council for Persons with Disability available at http://ncpwd.go.ke/index.php/about-ncpwd, accessed on 26 April 2021.
[990] PWD Act s Section 7(1) b(i)(viii).
[991] Section 35(2).
[992] PWD Act s 32.
[993]National Council for Persons with Disability, available at https://ncpwd.wordpress.com/services/registration-2/, accessed on 26 April 2021.
[994] Ibid.
[995] Section 2; Chapter 4, Heading IV(a)
[996] National Council for Persons with Disability, available at https://ncpwd.wordpress.com/services/registration-2/; PWD Act s 7(1) c.

disability anti-discrimination law in Kenya.[997] It is used to determine who will access all rights found under the Act.[998] Furthermore, because the courts will not recognise a person with a disability unless they are registered as per the PWD Act,[999] it means that the definition of disability used under the PWD Act is what is used to determine if a person will also be eligible for other disability rights found in other laws beyond the Act. An employee cannot therefore claim anti-discrimination rights under the Employment Act, the Constitution, even the CRPD, unless they are first registered as a person with a disability, as per the PWD Act.

ii) The Registration Process

According to the NCPWD website, in order for a person to get registered as a person with a disability, what is needed is: a coloured passport sized photo, a copy of a medical report from the government gazetted hospitals, and a filled individual registration form.[1000] The form is available on the council's website, and the form identifies mental impairment as a category for disability.[1001] However, no information is provided about the definition used to determine if a person has a mental impairment or not. Indeed, not much information is provided about the process of registration itself, how long it takes, what type of medical report is required and by whom, and which qualifications the assessor should have. The only information available is that a medical report is required. Moreover, the disability application asks whether the disability was by birth, accident or illness and at what age it manifested. Further, it provides causes of disability where an applicant must tick and these include: birth, accident or illness. There is no available definition of what constitutes a mental impairment under the Kenyan legal framework, nor a stipulation on what diagnostic instrument will be used to determine if a person has a mental impairment and thus qualify as a person with a psychosocial disability.

The Mental Health Act[1002] also does not provide much needed direction. It does not define what a mental impairment is and instead defines 'person suffering from a mental disorder' as:

[997] PWD Act s 7(1)(c)(i).
[998] PWD Act s 2.
[999] See chapter 4VI(a)(i) heading for relevant case law.
[1000] National Council for Persons with Disability, available at https://ncpwd.wordpress.com/services/registration-2/ accessed on 26 April 2021.
[1001] National Council for Persons with Disability, available at https://ncpwd.wordpress.com/services/registration-2/ accessed on 26 April 2021; Disability Registration form available at http://ncpwd.go.ke/index.php/about-ncpwd; http://ncpwd.go.ke/index.php/downloads/application-forms, accessed on 26 April 2021.
[1002] Mental Health, Cap. 248, Act No. 10 of 1989, L.N. 143/1991, Act No. 11 of 1993.

> ‘a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.’[1003]

Notably, the Act does not proceed to further clarify what ‘a person who has been found to be so suffering under this Act’ entails. This definition is circular and unfortunately not very helpful, as it does not explain how a person can be found to have a disorder. Moreover, the definition seems to imply that all mental health care conditions induce “suffering”, which is not only inaccurate, but discriminatory. It is important to note, though, that the definition is not for anti-discrimination purposes specifically, but for the care of persons who are suffering from mental disorder or mental sub normality. The Mental Health Act provides for the custody of their persons and the management of their estates; for the management and control of mental hospitals; and for connected purposes. The Act is currently under review.[1004]

Lastly, the disability registration form gets into murky waters where it asks about the severity of the disability, whether it is moderate or severe. Notwithstanding, there is no information about how severity of an impairment will be determined. Markedly, the CRPD avoided this question of severity of disability.[1005] This is because during negotiations references to ‘severe’ and similar proposition were opposed as ‘negative labelling’.[1006] The use of the word implicates impairment as negative and in turn stigmatises those with high levels of impairment, and is the manifestation of a medical approach as opposed to a social one.[1007] Further, such an approach facilitates the creation of a ‘hierarchy of disability’, and the result is that people with less severe disabilities are often left out of beneficial programmes.[1008]

Notably, the person with a disability is required to apply. However, the form does not disclose what will happen if an individual ticks moderate, only that the registration process of children and adults is an ongoing process.[1009] Thus, the assumption is that all those who apply are certified as being disabled. There is also no information about whether the NCPWD council can reject an application, and if they do what recourse can be taken by an applicant. Nonetheless, a person who seeks registration as a person with a disability and is rejected, may

[1003] Mental Health Act.
[1004] Mental Health (amendment) Bill, 2020.
[1005] Chapter 3, Heading IV(b).
[1006] Bruce op cit note 959 at 308.
[1007] Ibid.
[1008] Ibid at 309.
[1009] https://ncpwd.wordpress.com/services/registration-2/.

find recourse in art 47 of the Constitution, which emphasises the need for fair administrative action and binds the government and its various agencies, in his case the NCPWD. Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Furthermore, if a person's right or fundamental freedom has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.[1010] Hence, a party aggrieved by the administrative actions of the NWCPD, can claim recourse under art 47. This was highlighted in *Antony Kipkorir Sang v Attorney General*[1011] *and Duncan Otieno Waga v Attorney General.*[1012]

Further, the NCPWD website does not provide any official current or accurate data on the number of persons with psychosocial disabilities who have been registered since the NCPWD was set up in 2004.[1013]

b) Health status

The Constitution, in art 27(4), prohibits discrimination on 16 protected grounds, and apart from disability, it can be argued that persons with psychosocial conditions who do not qualify as persons with disabilities can bring a claim under the ground of health status. However, there is no definition of the term 'health status' in the Constitution or relevant legislation, and further Kenyan courts have not had to deal with the legal meaning of most of the 16 grounds protected grounds. However, guidance on the meaning of health status can be found in a variety of other sources.

[1010] Article 47(1) and (2).
[1011] [2014] eKLR**,** Cause 2408 of 2012, Industrial Court of Kenya at para 55 and 56.
[1012] [2014] eKLR Cause 89 of 2013, Industrial Court.
[1013] NCPWD (National Council for Persons with Disabilities) 'Cash Transfer Payments for Persons with Severe Disabilities under Inua Jamii Programme for January-February 2020 and March-April', available at http://ncpwd.go.ke/images/CT_payments_April_2020_1.pdf.; 'Cash Transfer Press release June' 26-6-2020, available at http://ncpwd.go.ke/index.php/media-centre/news-events/99-cash-transfer-payments-for-persons-with-severe-disabilities, accessed on 26 March 2021; 'Cash transfer for PWDs' available at http://ncpwd.go.ke/index.php/cash-transfer-for-pwds, accessed 26 March 2021; Financial Statements FY 2016-2017, http://ncpwd.go.ke/images/docs/Financials/Financials-2016-2017.pdf, http://ncpwd.go.ke/index.php/downloads/financial-statements; Financial Statements FY 2017-2018, http://ncpwd.go.ke/images/docs/Financials/Financial%20Statements%20FY2017-2018.pdf, http://ncpwd.go.ke/index.php/downloads/financial-statements; http://ncpwd.go.ke/index.php/downloads/ndfpwd-funding-summary/fy-2018-2019; Financial year 2018-2019 Funding Summary for the financial year 2018-2019, http://ncpwd.go.ke/index.php/downloads/ndfpwd-funding-summarym ;http://ncpwd.go.ke/images/funding/ASSISTIVE-DEVICES-PROVISION-3-TO-BE-REVISED.pdf;http://ncpwd.go.ke/images/funding/EDUCATION-ASSISTANCE.pdf http://ncpwd.go.ke/images/funding/ASSISTIVE-DEVICES-PROVISION-3-TO-BE-REVISED.pdf;http://ncpwd.go.ke/images/funding/EDUCATION-ASSISTANCE.pdf

First, the definition provided by the UN Committee on Economic, Social and Cultural Rights (Committee on CESCR), similar to the Kenyan Constitution, lists health status as a prohibited ground of discrimination.[1014] It provides that health status refers to a person's physical or mental health.[1015] Also, according to the UN Committee on ESCR it is not only discrimination based on a person's actual health status that is prohibited, but also one based on a person's perceived health status. Further, the UN Committee on ESCR goes on to provide that health status includes everything from mental illness, to diseases such as leprosy, to obstetric fistula, to HIV status.[1016] This definition by the UN Committee on ESCR seems to be inclusive of both actual and perceived psychosocial conditions.

Roberts describes discrimination on the basis of health status as healthism.[1017] In addition, Roberts and Weeks,[1018] in their book provide that health status includes both static health conditions that are seemingly beyond the individual's control (including legally protected disabilities) and voluntary health related conduct that is at the whim and will of the individual.[1019] Moreover, discrimination based on health status includes everything from conditions like cancer, to HIV status, [1020]to mental illness, but it also includes persons discriminated against because of tobacco or nicotine use, and because of being obese.[1021]

Maher goes on to list other grounds as falling under health status that include: alcohol consumption, seatbelt and helmet use, recreational sports (skiing, race car driving, skydiving, mountain climbing, bungee jumping), sun-tanning, occupational hazards.[1022] Consequently, the definition of health status has been criticised as being too wide, as literally anything falls into the definition provided.[1023]In fact, Roberts and Weeks readily concede to this criticism,

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[1014]. UN Committee on Economic, Social and Cultural Rights General comment no. 20 (2009) *Non-discrimination in Economic, Social and Cultural Rights' (art. 2, para. Of the Convention)* (2009) E/C.12/GC/20 para 33.
[1015] Ibid.
[1016] Ibid
[1017] Jessica L. Roberts & Elizabeth Weeks Leonard 'What *Is (and Isn't) Healthism'* (2016) 50 (*Georgia Law Review* GA. L. REV) 833-907 at 835 and 838
[1018] Jessica L. Roberts& Elizabeth Weeks Leonard *What Is Healthism? In Healthism: Health-Status Discrimination and the Law* (2018) ch 1.
[1019] Roberts & Leonard op cit note 1017 at 842.
[1020] Ibid.
[1021]Ibid.
[1022] Ibid.
[1023] Brendan S. Maher 'Some Thoughts on Healthism and Employee Benefits in the Age of Trump' (2017) 18(2) *Marquette Benefits & Social Welfare Law Review* 295 at 302.

and attempt to define the terms and boundaries,[1024] which are beyond the purpose of this research.

Apart from the over inclusive nature of 'health status', the definition ensures that persons with psychosocial conditions in general will be covered and are able to seek discrimination protection on the ground of health status. It also means that psychosocial conditions which are as a result of addictions will also not be denied anti-discrimination protection simply because they chose to consume alcohol or other drugs.[1025]

From the two definitions of health status, it is clear that in order to qualify for anti-discrimination protection under this ground, an employee with a psychosocial condition does not require an impairment. Secondly, it recognises perceived health conditions and conditions that are a result of voluntary health related conduct that is at the whim and will of the individual. Nevertheless, it is important to note that health status as a potential anti-discrimination category and healthism as a theory of unjustifiable discrimination are still new and evolving concepts.[1026]

c) Mental Status

According to the Employment Act an employer may not discriminate against an employee based on their mental status.[1027] What amounts to 'mental status' is not provided for under the Act and as a result has been left for the courts to determine. Kenyan courts have not yet had to determine the legal meaning, as no case concerning discrimination based on mental status has been presented before the courts. 'The Dictionary of Modern Medicine provides some guidance and defines mental status as a comprehensive description or statement of a patient's intellectual capacity, emotional state, and general mental health based on examiner's observation and directed interview; includes assessment of mood, behaviour, orientation, judgement, memory,

[1024] In line with this argument, they proceed to offer four governing principles to guide the analysis that include: health welfare, health liberty, health equality, and health justice Furthermore, providing that if health status differentiation violates all the four values that it amounts to discrimination. See Jessica L. Roberts & Elizabeth Weeks op cit note 1018 at 24 - 44; Whatever the conceptual challenges of defining unambiguously and comprehensively the elements of undesirable healthism, Roberts and Weeks' book shows how pervasive health discrimination is generally, how frequently health discrimination leads to normative wrongs, and how much of the latter conduct nonetheless escapes legal sanction. See Maher op cit note 1023 at 302.

[1025] Roberts and Leonard op cit note 1017 at 838.

[1026] Ibid.

[1027] Employment Act sec 5(3)(a).

problem solving ability, includes assessment of mood, behaviour, orientation, judgement, memory, problem solving ability, and contact with reality.'[1028]

It can be concluded from the above that in order to qualify under the prohibited ground of mental status an employee does not necessarily have to be diagnosed with a mental impairment. Hence, an argument could be made that it can provide anti-discrimination protection for employees who may have a psychosocial condition, and may not necessarily qualify as being disabled, and those with psychosocial conditions who do not see themselves as having an impairment.[1029]

d) Unspecified Ground

Employees with psychosocial conditions who may not qualify under the prohibited ground of disability, health status or mental status can still challenge discrimination on an unspecified ground under the Constitution, and the Employment Act.[1030] The use of the word 'includes' in both provisions makes it clear that the definition of disability is indicative rather than exhaustive.[1031] This is in recognition of the fact that disability is an evolving concept and thus the interpretation of what constitutes disability should be flexible and leave room for creative interpretation.[1032] It creates the possibility of legal challenge by those who may be discriminated against, but on grounds which are not explicitly listed in art 27(4).

Therefore, persons with psychosocial conditions who may not qualify as having a disability according to the definition provided above may still seek protection under art 27(4). The section does not establish a test for the inclusion of new grounds, as has been adopted in South African anti-discrimination legislation.[1033] However, this may not necessarily be damaging, as can be seen in the debates around the meaning of 'analogous grounds' and 'arbitrary grounds' in the amended version of the South African Employment Equity Act.[1034] It remains to be seen how the Kenyan judiciary will interpret the provision.[1035]

[1028] McGraw-Hill Concise Dictionary of Modern Medicine, available at https://medical-dictionary.thefreedictionary.com/mental+status#:~:text=A%20comprehensive%20description%20or%20statement,ability%2C%20and%20contact%20with%20reality, accessed on 26 March 2021.
[1029] Lake op cit note 32.
[1030] See chapter 4, heading III.
[1031] Ibid.
[1032] Mental Disability Advocacy Centre, 'The Right to Legal Capacity in Kenya' March 2014 at 15.
[1033] Jim Fitzgerald 'The Road to Equality? The Right to Equality in Kenya's New Constitution' (2010) 5 The *Equal Rights Review* 55-59.
[1034] See Chapter 5, heading IV(b).
[1035] Fitzgerald op cit note 1035 at 58-59.

VI. THE SCOPE AND DEFINITION OF DISCRIMINATION

The Employment Act defines the scope of discrimination law in employment to cover recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.[1036] The Act further extends the scope when it provides that the employer is obligated to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.[1037] This includes: recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.[1038]

The Employment Act specifically prohibits disability based discriminations in all areas of employment, including advertisements;[1039] recruitment;[1040] the creation, classification or abolition of posts;[1041]the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits;[1042] the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment;[1043] the provision of facilities related to or connected with employment;[1044] or any other matter related to employment.[1045] It is thus evident that the scope of employment anti-discrimination law is wide, as it covers the different stages of employment. Additionally, the Constitution,[1046] PWD Act[1047] and Employment Act[1048] prohibit discrimination by both public and private employers in all areas of employment.

The Employment Act also provides protection for persons with psychosocial conditions from both unfair termination and wrongful summary dismissal.[1049] A termination and dismissal

[1036] Section 5(b).
[1037] Employment Act s 5(2).
[1038] Employment Act s 5(8)(c).
[1039] 15(1) (a).
[1040] 15(1) (b)
[1041] 15 (1) (c).
[1042] 15 (1) (d).
[1043] 15(1)(e).
[1044] 15(1)(f).
[1045] 15(1) (g).
[1046] Article 27(4) and (5)
[1047] Section 15(1).
[1048] Employment Act Section 5(3)(a).
[1049]Although, both termination and summary dismissal involve bringing an employment contract to an end, while termination requires notice before doing so, summary dismissal occurs without notice or with less notice than that to which the employee is entitled. See more Employment Act Section 35 and 44.

of an employee is automatically unfair if it is based on disability.[1050] Therefore, if a person is summarily dismissed or terminated because of having a psychosocial disability, that automatically amounts to wrongful dismissal.[1051]

a) Multiple and Intersectional Discrimination and Discrimination by Association

The Kenyan anti-discrimination legal framework provides for discrimination based on one ground and does not cover intersectional or multiple discrimination. The Constitution, in art 27(4), for example, prohibits discrimination on 'any ground', not on 'one or more grounds. There is also no legal provision or case law in support of the recognition of discrimination by association. Thus, an employee who is an associate of a person with a psychosocial condition or disability and who is discriminated against based on this association has no recourse. However, Kenya being a monist state allows for an employee who is registered as a person with a disability to claim this form of discrimination directly under the CRPD, but within the limitations discussed above.

b) Direct Discrimination: The Use of a Comparator

Once an employee with a psychosocial condition determines which protected ground they will rely upon in their claim, the next stage is to determine whether discrimination took place. Nonetheless, the definition of discrimination is not provided for in the Constitution.[1052] The Employment Act also does not define discrimination, but it provides that failure to pay employees equal remuneration for work of equal value amounts to discrimination.[1053]

The PWD Act does provide some more direction as it defines the term 'discriminate' as: '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.'[1054] This definition seems to adopt the "unfavourable treatment" approach and not the "less favourable treatment" approach, which requires a

[1050] Section 45(4)(a), 46(g). Termination/ Dismissal is unfair if based on an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability. This list is different from the list provided in Section 5(3) a on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. *VMK v Catholic University of Eastern Africa* [2013] eKLR, Cause No. 1161 Of 2010; *Antony Kipkorir Sang –Versus- Attorney General, Duncan Otieno Waga v Attorney General*

[1051] Employment Act s 45(4)(a) & 46(g).

[1052] Article 27.

[1053] Employment Act s 5(5).

[1054] Section 2.

comparator. [1055] As highlighted in the previous chapter, this approach does away with the need to use a comparator, which avoids many challenges which may impact negatively on a discrimination claim made by an employee with a psychosocial condition or disability.[1056]

Case law, however, shows that courts have adopted the "less favourable treatment" approach when it comes to determining whether discrimination took place. In *Barclays Bank of Kenya Ltd vs Gladys Muthoni,*[1057] and *Law Society of Kenya v Attorney General,*[1058] both the Court of Appeal and the Supreme Court, respectively, defined discrimination to require 'less favourable treatment', which requires a comparator.[1059]

The Labour Courts seem to take a different approach from the above, an approach which seems to send mixed messages. Significantly, apart from the class action case of *Kenya Society for the Mentally Handicapped (KSMH) against the Kenyan government,*[1060] which was dismissed, there has not been another case before the Kenyan courts that deals with discrimination against persons with psychosocial disabilities or conditions in employment. Nonetheless, some insight is provided by case law in the following paragraphs. However, the case law highlighted deals with discrimination in employment based on other types of disabilities and other protected grounds.

In *VMK v Catholic University of Eastern Africa,*[1061] the claimant's HIV status under section 5(3) of the Employment Act was at issue. In this case in the determination of whether the claimant was discriminated against because of her HIV status, the court compared the differential treatment she faced compared to two male colleagues who held the same position as her. The court found that the claimant had vividly brought out evidence of discrimination in respect of recruitment in that whilst her two male counterparts in the position of telephone operator and receptionist were recruited on permanent and pensionable terms, she was singled out and recruited as a casual employee.[1062] Further , that unlike her colleagues, she was placed continuously and deliberately on short contracts solely on the basis of her HIV status in order

[1055] Colin Campbell & Dale Smith 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' *(2015) 43(1) Fed. L. Rev* 91 at 93; See chapter 3, heading V(b).
[1056] See chapter 3, heading V(b).
[1057] *Barclays Bank of Kenya Ltd v Gladys Muthoni* [2018] eKLR Civil Appeal 296 & 301 of 2016 (Consolidated) The Court of Appeal at para 47.
[1058] *Law Society of Kenya v Attorney General* [2019] eKLR no. 4 of 2019 at para 79.
[1059] *Barclays Bank of Kenya Ltd v Gladys Muthoni* at para 47; Law Society of Kenya V Attorney General & Another at para 79;
[1060] *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General* [2012] eKLR, petition 155A of 2011 at para 1.
[1061] [2013] eKLR, Cause no. 1161 of 2010.
[1062] Para 41 (i).

to allow for easy termination.[1063] In the end the court found that the decision not to employ the claimant on permanent terms, and the final decision to terminate her employment were discriminatory and solely based on the claimant's HIV status.[1064]

Then, in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni*[1065] although the court alluded to the use of a comparator, it did not go into much detail about its use in the determination of whether discrimination on the basis of nationality took place in the declaration of redundancy. The court found that there was evidence that the respondents were subjected to different treatment while at work compared to other nationalities.[1066] In addition, in *Ol Pejeta Ranching Limited v David Wanjau Muhoro,*[1067] which deals with racial discrimination based on unequal pay, the court adopted the use of a comparator.[1068] The trial court found that the claimant was racially discriminated against, as he had been paid less than the two white comparators in similar managerial positions as him.[1069]

Nevertheless, in cases concerning disability discrimination in employment specifically, the courts seem to adopt the 'unfavourable treatment' approach, as no comparator is used. This is in line with the PWD Act definition of 'discriminate'.[1070] Whether this applies in all discrimination cases in general, or only disability discrimination claims, is not clear. Nonetheless, the likely conclusion is that the courts adopt "unfavourable treatment" when it comes to discrimination based on disability and the "less favourable treatment" when discrimination is based on other protected grounds.

c) Indirect Discrimination

An employee with a psychosocial disability or condition who is discriminated against in employment has the option of claiming direct or indirect discrimination. The Constitution[1071]

[1063] Para 41 (vii).
[1064] Para 70.
[1065] *Gladys Muthoni Mwangi & 20 Others v Barclays Bank of Kenya Limited* [2016] eKLR Petition 25 of 2016 at para 94 -97; *Barclays Bank of Kenya Ltd & another v Gladys Muthoni [*2018] eKLR Civil Appeal 296 & 301 of 2016 (Consolidated) The Court of Appeal.
[1066] Gladys Muthoni Mwangi v Barclays Bank at para 94 -97.
[1067] [2017] eKLR, Civil Appeal 42 of 2015.
[1068] *Barclays Bank of Kenya Ltd & another v Gladys Muthoni* [2018] eKLR Civil Appeal 296 & 301 of 2016 (Consolidated) The Court of Appeal.
[1069] Supra note.
[1070] *Paul Pkiach Anupa & Another v Attorney General [2012] eKLR*, High Court, Petition 93 of 2011; *Antony Kipkorir Sang –Versus- Attorney Genera*l [2014] eKLR**,** Cause 2408 of 2012, Industrial Court of Kenya; *Juliet Mwongeli Muema v Smollan Kenya Limited* [2019] eKLR, Cause 104 of 2017; *Duncan Otieno Waga v Attorney General* [2014] eKLR Cause 89 of 2013, Industrial Court.
[1071] Article 27(4).

and the PWD Act[1072] prohibit both direct and indirect discrimination.[1073] In contrast though, the Employment Act does not differentiate between the two forms of discrimination.[1074] The implication of this could be that either the Act does not recognises indirect discrimination or it adopts the school of thought that the distinction between direct and indirect discrimination is no very useful and should fall under one umbrella.[1075] Whatever the reason, this research looks at compliance with the CRPD, which specifically provides that both direct and indirect discrimination should be prohibited, hence this distinction is necessary to determine compliance with art 27(1)(a) of the CRPD.

Admittedly, there is no definition of what amounts to indirect discrimination under anti-discrimination law. The concept of indirect discrimination is still novel and not quite developed in Kenyan jurisprudence yet. This is evident in the fact that there is barely any case law where indirect discrimination has been claimed. The only case so far is *Dr. Samson Gwer v Kenya Medical Research Institute (KEMRI).*[1076] Here again, although the case does not deal with disability discrimination, but racial discrimination, it offers insight into how Kenyan courts may deal with indirect discrimination. In this case the petitioners, six research scientists claimed racial discrimination in the workplace. They specifically pleaded inequality on the basis of their race contrary to art 27(4) of the Constitution.[1077]

The respondents provided statistical evidence to support their racial discrimination claims,[1078] and the trial court held that the petitioners had proven on a balance of probability that the 1st respondent had not done enough to eliminate institutional discrimination, in violation of art 27 of the Constitution and s 5(2) of the Employment Act to the detriment of the Petitioners.[1079] The Court of Appeal overturned the trial court ruling, holding that differential treatment on its own does not amount to discrimination.[1080] The court, then held that in this case reasonable explanation was given for differential treatment, [1081] and that the respondents

[1072] Section 5(3).
[1073] Section 5(3.)
[1074] Section 15(1); The Equal Rights Trust in Partnership with KH RC op cit note 871 at 132
[1075] Ibid.
[1076] [2014] eKLR, Petition 21 of 2013, Industrial Court of Kenya.
[1077] Dr. Samson Gwer & 5 others v (KEMRI) at para 7.
[1078] Supra note at para 18.
[1079] KEMRI v Samson Gwer [2019] eKLR, Civil Appeal 101 of 2015.
r. Samson Gwer & 5 others v (KEMRI) [2014] eKLR at para 81.
[1080] *KEMRI v Samson Gwer* [2019], *Federation of women lawyers FIDA Kenya & 5 others vs. Attorney General & Another* [2011] EKLR.
[1081] Supra note 1080.

did not prove that they had been subjected to racial discrimination in line with art 27(4) and (5**)** of the Constitution.[1082] The decision was appealed at the Supreme Court.[1083]

The Supreme Court does not say much about what indirect discrimination entails, save to acknowledge that it may be difficult to determine.[1084] This is despite one of the issues raised by the petitioners being for the court to define indirect discrimination.[1085] Additionally, the court demanded a higher standard of proof to show discrimination from the claimant and did not shift burden of proof to the respondent, it found that the petitioners had failed to prove a prima facie case of discrimination.[1086] Further, the court did not clarify if statistical evidence was necessary to sustain an indirect discrimination claim. The appeal was nevertheless disallowed.[1087]

d) Harassment

None of the Constitution, the Employment Act or the PWD Act explicitly recognises harassment as a form of discrimination. Some commentators, however, argue that the definition of discrimination found under the PWD also covers harassment, as it provides: that it "includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability".[1088] Notably, this aspect is left to the interpretation of the courts, and no case law has developed as of yet. Still, even if the courts take the view that an employee with a psychosocial condition or disability is not able to claim harassment as a form of discrimination based on the definition of "discriminate" provided under the PWD Act, employees with psychosocial disabilities still have recourse. An employee with a psychosocial condition who is registered as disabled and is discriminated against in the workplace can still claim anti-discrimination protection under art 2 of the CRPD directly.[1089] This claim is still only open to those who are registered as persons with disabilities, thereby excluding employees who claim anti-discrimination on the protected grounds of health status, mental status, or on an unspecified ground.

[1082] Ibid.
[1083] *The Samson Gwer v Kenya Medical Research Institute* [2020] eKLR Petition 12 of 2019.
[1084] Supra note 1083 at para 53.
[1085] Supra note 1083 at para 39.
[1086] Supra note 1083 at para 39.
[1087] Supra note 1083 at para para 65.
[1088] The Equal Rights Trust in Partnership with KHRC op cit note 906 at 186.
[1089] Duncan Otieno Waga v Attorney General; Antony Kipkorir Sang v Attorney General; Juliet Mwongeli Muema v Smollan.

e) Denial of Reasonable Accommodation

None of the Constitution, the Employment Act or the PWD Act explicitly provides that the unjustifiable denial of reasonable accommodation constitutes a form of discrimination. Only the PWD Act makes reference to reasonable accommodation, but not as an antidiscrimination duty.

The PWD Act prohibits disability discrimination based on accommodation in employment.[1090] One could argue that this means that the denial of reasonable accommodation amounts to discrimination based on this; however, there is no definition of what amounts to "accommodations" or any case law in support of this argument. Further, the same Act requires employers to reasonably accommodate persons with disabilities through the provision of facilities and modifications as may reasonably be required.[1091] It does not go on to specify what modifications should be made. This is left to the interpretation of the court. The Act also does not delve into much detail about what the duty entails. Further, the use of the words "reasonably as required" as a limitation of the right waters down the effect of this section.

Furthermore, the Act also provides tax incentives for employers who reasonably accommodate persons with disabilities in the workplace. It provides that private employer who improve or modify their physical facilities or avail special services in order to provide reasonable accommodation for employees with disabilities, are entitled to apply for additional deductions from their net taxable income equivalent to fifty per cent of the direct costs of the improvements, modifications or special services.[1092]

Notably, as has been highlighted above, the PWD Act is currently under review. The Persons with Disability Bill, 2020 has not been passed into law.[1093] However, although the Bill is subject to change between now and when it is passed into law, it is worth noting that it adopts a more detailed definition of reasonable accommodation that is similar to the definition adopted by the CRPD in art 2.[1094] However, the Bill does not provide that the unjustified denial of reasonable accommodation amounts to discrimination.

Despite the fact that the Constitution, the PWD Act and the Employment Act do not address the question as to whether the denial of unjustified reasonable accommodation is a

[1090] PWD Act s 15(1).
[1091] Ibid s 15(5).
[1092] Ibid s16(2).
[1093] Persons with Disabilities (Amendment) Bill (Senate Bill No. 29 of 2020); see Chapter 1, Heading II for further information about the Bill.
[1094] Persons with Disabilities (Amendment) Bill s 2.

form of discrimination, an employee with a psychosocial condition who is registered as having a disability can directly claim discrimination based on article 2 of the CRPD.[1095] Article 2 of the CRPD will easily be applicable because there is no provision in the Constitution, the Employment Act or the PWD Act which is contradictory or in conflict with the denial of reasonable accommodation being a form of discrimination. Indeed, there is a gap and art 2 of the CRPD applies. This is evident in a variety of cases. In *Antony Kipkorir Sang v Attorney General,*[1096] that dealt with disability based discrimination, the court, citing the CRPD[1097] found that the retirement on medical grounds of the claimant police officer with a disability, which was as a result of being shot while on duty, instead of reasonably accommodating him constituted discrimination.[1098] Similar decisions were taken in *Duncan Otieno Waga v Attorney General,*[1099] *Paul Pkiach Anupa v Attorney General,*[1100] and *Juliet Mwongeli Muema v Smollan Kenya Limited*.[1101]

Similar to the CRPD, an employee's right to reasonable accommodation may be limited if it leads to undue hardship for the employer. In the case of *Juliet Mwongeli Muema v Smollan Kenya Limited,*[1102] although the respondent alleged financial hardship, the court found that it was merely alleged before the court, but was not demonstrated at all.[1103] Accordingly, the court found that there would be no significant financial constraints or hardship imposed on the employer if they reasonably accommodated the claimant."[1104] In another case concerning the Police, the court was of the view that the Police Service possesses the economic power, facilities and logistics for accommodating the claimant who had a disability, and that by assigning the claimant alternative duties, the Police Service would not have suffered any undue hardship or prejudice.[1105]

[1095] Antony Kipkorir Sang –Versus- Attorney General at para 49; see also heading II above.
[1096] [2014] eKLR, Cause 2408 of 2012.
[1097] Supra note 1096 at para 58.
[1098] Supra note 1096 at para 58 para 1, 20, 43 and 57.
[1099] Duncan Otieno Waga v Attorney General [2014] eKLR Cause 89 of 2013, Industrial Court.
[1100] Paul Pkiach Anupa & Another v Attorney General & Another [2012] eKLR, High Court, Petition 93 of 2011, the High Court of Kenya at para 15 and 52
[1101] [2019] eKLR, Cause 104 of 2017. Court findings at para 2, Judgment at para 1 and 4.
[1102] Supra note.
[1103] Court findings at para 2.
[1104] Ibid.
[1105] Supra note 1101 at para 63.

Judging by these cases, it seems that when determining undue hardship, the courts seem to focus mainly on the financial impact and not necessarily the social impact or potential impact on future employees with the same or similar disabilities.[1106]

Although the above cases do not deal with employees with psychosocial disabilities or conditions specifically, it provides key insight into how Kenyan courts deal with the denial of reasonable accommodation as an anti-discriminatory duty. Even so, it is important to note that according to the law and case law this right to claim anti-discrimination protection for the denial of unjustified reasonable accommodation directly under the CRPD art 2 is only available to employees with psychosocial conditions who are registered as persons with disabilities.

VII. BURDEN OR ONUS OF PROOF

At the outset, it should be noted that the 'burden of proof', 'standard of proof' and 'evidentiary burden' are not synonymous terms. The burden or onus of proof is the duty or burden upon a litigant to adduce evidence to prove their case in order to win.[1107] The standard of proof, on the other hand can be defined as the quantum or degree of evidence that must be presented before a Court before a fact can be said to exist or not exist.[1108] Then evidentiary burden, refers to the burden that rests on a party to lead sufficient evidence in support of an assertion of fact, with due regard being had to the standard of proof demanded of the party under such obligation.[1109]

Section 5(7) of the Employment Act provides that the employer shall bear the burden of proving that the discrimination did not take place as "alleged", if the discriminatory act or omission is not based on disability and the other protected grounds mentioned in s 5(3).[1110] Hence, the Act adopts a shift in the burden of proof, and the implication is that the burden of proof rests on the employer. All an employee needs to do is allege discrimination, and thus if an allegation of discrimination is made by an employee and an employer fails to prove that discrimination did not take place, then the claim will stand. The use of allege implies alleviation of the evidentiary burden, and the standard of proof as a result, on the side of the employee. Case law seems to contradict this, and, in fact seems to even demand for a higher

[1106] See chapter 3 heading V(e)
[1107] PJ Schwikkard & Se Van Merwe *Principles of Evidence* 4 ed (2016) 602.
[1108] Worku Yaze Wodage 'Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases' (2014) 8(1) *Mizan Law Review* 252 at 253; Adrian Bellengère *The Law of Evidence in South Africa, Basic principles, procedural law* (2013) 1 at 34.
[1109] Wodage op cite 256; PJ Schwikkard & Se Van Merwe *Principles of Evidence* 4 ed (2016) 602
[1110] See heading VIII above for the protected grounds listed; *Jane Achieng & another v University of Nairobi [2015] eKLR*, Cause 2144 of 201 at para 26.

evidentiary burden, and hence a heavier standard of proof on the claimant than is intended by section 5 (7) of the Employment Act.

In *GMV v Bank of Africa Kenya Limited,*[1111] which involved a claim concerning pregnancy discrimination in employment, the court stated that 'all a claimant has to do is to establish a *prima facie* case, through "direct evidence" or "statistical proof", that they have been discriminated against at employment.'[1112] In order to establish a *prima facie* case the claimant needed to: '…. provide *prima facie* proof, that other explanations by the employer are *pretexual,* and the real reason for termination was the pregnancy and that the employee must as a "minimum" establish that there is a nexus between the adverse employment decision, and her pregnancy**.'**[1113]

In my opinion the implication of this interpretation is contrary to section 5(3) of the Employment Act. First, requiring the claimant to produce "evidence" rather than to establish "facts", is problematic. In discrimination cases generally, direct evidence is rarely available and a complainant will often rely on circumstantial evidence and not direct evidence in establishing a prima facia case.[1114] Second, as will be discussed in greater detail in chapter 6,[1115] the causal link between the differentiation and the prohibited ground is the most challenging for most claimants, because they often lack or do not have access to direct evidence, as it is often in the hands of the employer.

Then in *Dr. Samson Gwer v Kenya Medical Research Institute (KEMRI),*[1116] the Supreme Court, in deciding who bears the onus of proof in a discrimination claim brought under the Constitution, chose not to look for guidance from section 5(7) of the Employment Act, despite the case specifically concerning discrimination in employment,[1117] but instead relied on section 108 of the Evidence Act[1118] which provides that: 'The burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side.' In addition, s 109 of the Evidence Act declares that,

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[1111] [2013] eKLR..
[1112] Para 69.
[1113] Ibid.
[1114] Shari Engels 'Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom' (1994) 15(3) *Comparative Labour Law Journal,* 15(3), 340-370. 343 and 344
[1115] See chapter 6 heading IV
[1116] The Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR Petition 12 of 2019.
[1117] See above heading VII.
[1118] Chapter 80 Revised Edition 2014 [1989].

> "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The Supreme Court opined that the standard of proof was of a higher level in respect of constitutional safeguards, in this case the constitutional right of freedom from discrimination found in article 27, than in the case of the ordinary civil-claim balance of probability.[1119] The court's reasoning was as follows:

> '…virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.'[1120]

The court then reached the following conclusion:

> **"…**in the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent was unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."[1121]

The court then held that the petitioners failed, in this regard, to discharge their initial burden of proof,[1122] and as a result the appeal was disallowed.[1123] The court here seems to demand a heavier standard of proof than proving a prima facie case on a 'balance of probabilities', as is required in civil cases.[1124] Further, the aforementioned reasoning makes one wonder how an employee is required to have access to 'substantial material'.

In addition, the court emphasised that cases concerning constitutional rights require 'scrupulous individual appraisal'.[1125] This contrasts with the South African approach,[1126] that says the content of a right has to be interpreted generously and undeserving claims can be

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[1119] Supra note 1116 at para 48.
[1120] Ibid.
[1121] Supra note 1116 at para 51.
[1122] Supra note 1116 at para 53,
[1123] Supra note 1116 at para 65.
[1124] The standard of proof in civil cases is 'balance of probabilities', and in criminal cases is 'proof beyond reasonable doubt' generally. See Mark Schweizer 'The civil standard of proof—what is it, actually?' (2016) 20(3) *The International Journal of Evidence & Proof* at 217; John J. Barcel 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement' (2009) 42 *Cornell International Law Journal* 23 at 30.
[1125] Supra note 1080 at para 48.
[1126] See S Woolman & H Botha 'Limitations on the Bill of Rights under the South African Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa 2 ed (2006) Chapter 34, IM. Rautenbach 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17(6) *PELJ* 2229-2267.

screened out at the limitations stage, where the court asks whether the limitations on a right are justifiable or not. [1127] With this approach in Kenya, the court is closing off access to the right to freedom from discrimination at the outset. For people with psychosocial disabilities or conditions this approach may close off their access to a remedy unnecessarily. They are likely to struggle to be registered as disabled, as a medical report is required. Now they have to discharge a very onerous, unjustified burden they will often not be in a position to do. This position by the Supreme Court could potentially act as a barrier for anti-discrimination protection for persons with psychosocial conditions in employment, specifically where a constitutional claim is made.[1128]

VIII. JUSTIFICATION OF DISCRIMINATION

Kenyan antidiscrimination law allows for the justification of discrimination, and thus provides employers with avenues through which to avoid anti-discrimination obligations owed to an employee with psychosocial disabilities and conditions. The PWD Act provides that an employer shall not be deemed to have discriminated against a person with a disability if: the discriminatory act or omission was not wholly or mainly attributable to the disability of the said person;[1129] and where the disability in question was a relevant consideration in relation to the particular requirements of the type of employment concerned.[1130] Importantly, the Act fails to specify if it is 'all requirements' or just the 'inherent' or 'essential' requirements of the job that constitute a valid defence, as is provided under the South African anti-discrimination legal framework, and leaves it open to the interpretation of the courts. Also, it is not discrimination if special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.[1131] Nevertheless, the Act does not clarify if it is an objective inquiry or not, or even what factors will be taken into account in deciding what is reasonable or not.

The Employment Act, also goes on to provide that taking affirmative action measurers consistent with the promotion of equality or the elimination of discrimination in the workplace does not qualify as discrimination.[1132] Likewise , it is not discrimination to distinguish, exclude

[1127] Ibid.
[1128] Ibid.
[1129] Section 15(2)(a).
[1130] PWD Act s 15(2) (b).
[1131] Section 15(2)(c).
[1132] Employment Act s 5(4)(a).

or prefer any person on the basis of an inherent requirement of a job;[1133] or to employ a citizen in accordance with the national employment policy,[1134] or to restrict access to limited categories of employment where it is necessary in the interest of state security.[1135] These defences leave much leeway for employers to escape their anti-discriminatory obligations, and end up hampering the purposes of anti-discrimination law. It is up to the courts to interpret these defences restrictively, so as not to infringe unjustifiably on persons with disabilities' rights to equality and to work.

IX. REMEDIES

An employee who is discriminated against in employment is entitled to a variety of remedies under Kenyan law. The PWD Act provides that if an employer is guilty of an offence if they discriminate against an employee,[1136] the offence is punishable by a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.[1137] The court thus provides for both criminal and civil penalties. Also, the Employment Act provides that those found to have committed discrimination will be guilty of a criminal offence, [1138] while s 48 provides that a person who discriminates against an employee is liable to a fine or a term of imprisonment not exceeding one year, or both. Criminal remedies are limited, as they are heavily dependent on the availability of a labour inspectorate with sufficient resources to pursue claims.[1139] Inspectors are more often used to police other kinds of breaches of labour standards, such as minimum wages and health and safety provisions.[1140] Apart from criminal penalties similar to the PWD Act, the Employment Act also provides for civil remedies for wrongful dismissal and unfair termination and they include: monetary compensation,[1141] job reinstatement[1142] or the re-engagement of the employee in work

[1133] Employment Act s 5(4)(b).
[1134] Employment Acts 5(4)(c).
[1135] Employment Act, s 5(4)(d).
[1136] PWD Act s 26(1)b and c.
[1137] PWD Act s 26(2).
[1138] Section 5(6).
[1139] Sandra Fredman 'The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life, ohchr.org' 74.
[1140] Sandra Fredman, The Role of Equality and Non-Discrimination Laws in Women's Economic op cit note 71; Sandra Fredman, Anti-Discrimination Laws and Work in the Developing World: A Thematic Overview. Background Paper for the World Development Report; World Bank' 2013 at 45.
[1141] Section 49; Anthony Kipkorir Sang v Attorney General, para 58 ; *Juliet Mwongeli Muema v Smollan Kenya Limited*; *Elizabeth Wambui Mburu v Board of Directors, Kenya Plant Health Inspectorate Service* [2019] eKLR; discrimination cases on other grounds apart from disability: VMK v. CUEA (2013) eKLR; *David Wanjau Muhoro v. Ol Pejeta Ranching Limited* (2014) eKLR; *Mary Mwaki Masinde v. County Government of Vihiga & 2 Others (2015)* eKLR; *Janine Buss v. Gems Cambridge International School Limited (2016)* eKLR .
[1142] *Elizabeth Wambui Mburu v Board of Directors, Kenya Plant Health Inspectorate Service* [2019] eKLR.

comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.[1143] It is worth noting that the remedies provided are individual in nature and not remedies which have the potential to impact on systematic discrimination.

X. CONCLUSION

The Kenyan legal framework provides wide-ranging anti-discrimination protection in the Constitution, PWD Act and Employment Act with a far-reaching scope, which is further facilitated and amplified by the fact that Kenya is a monist state. However, as has been highlighted, a major limitation is its narrow definition of disability and resulting requirement that persons with disabilities must be registered. Although persons with psychosocial conditions can claim protection on other grounds if they fail to qualify as persons with disabilities, not all protected grounds are equal when it comes to anti-discrimination protection. As a result, a majority of employees with psychosocial conditions are more than likely destined to be excluded from adequate anti-discrimination because they fail to qualify as persons with disabilities.

[1143] Section 49.

CHAPTER 5: THE ANTI-DISCRIMINATION LEGAL FRAMEWORK IN SOUTH AFRICA

I. INTRODUCTION

In this chapter I will discuss the legal framework protecting persons with psychosocial conditions from discrimination in South Africa. I will analyse the Constitution and specific anti-discrimination legislation to identify the legal responses available to employees with psychosocial disabilities who have experienced or may experience discrimination.

I will highlight the following aspects: the definition of disability; the scope of anti-discrimination law; and the evaluation of provisions that regulate direct and indirect discrimination, harassment and the denial of reasonable accommodation. Finally, I will consider and deliberate on whether the available legislation provides adequate protection for employees with psychosocial disabilities against discrimination in employment.

II. INTERNATIONAL LAW WITHIN THE SOUTH AFRICAN LEGAL FRAMEWORK

Prior to 1994, South Africa was a country notorious for its neglect of internationally recognised human rights.[1144] It was not a signatory to a number of international instruments which advocate for the recognition and promotion of human rights.[1145] However, during the political transition in the early 1990s, an interim Constitution was agreed upon, after which the 1996 Constitution was enacted. This Constitution,[1146] which came into effect in 1997, enshrines a number of universally recognised rights. South Africa has also signed a number of international human rights instruments.[1147] The South African Constitution has now been characterised as one of the most international law-friendly constitutions in the world.[1148]

[1144] Celumusa Delisile Zungu, 'The Role, Relevance and Application of International Law in South Africa' (2015) 8(1) *International Journal of Sustainable Development* at 85.

[1145] Zungu, op cit note 1108.

[1146] *Constitution* of the Republic of *South Africa*, 1996.

[1147] They include : the conventions are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW),see more United Nations Human Rights Treaty Body 'Ratification Status for South Africa' available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN, accessed 20 October 2021; Zungu op cit note 1144 at 85; Fabrice Tambe Endoh 'Democratic constitutionalism in post-apartheid South Africa: the interim constitution revisited' (2015) 7(1) *Africa Review* 67 at 72.

[1148] D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *AHRLJ* at 310.

South Africa ratified the CRPD on 30 November 2007,[1149] thereby assuming a wide range of obligations.[1150] However, the avenues through which South Africa can be held accountable at domestic level in respect of its treaty obligations depends, in part, on the position of international law within the South African legal system. As highlighted in the previous chapter, Kenya adopts a monistic system.[1151] The South African Constitution, on the other hand, in s 39(1)(b), 231, 232 and 233, suggests that it takes a different approach.[1152]

It has been argued that the South African legal system is generally dualistic in its approach to international law.[1153] In a dualistic system, international law does not form part of the domestic law of a country unless and until it is enacted as part of national legislation.[1154] Nonetheless, the South African system although not monist, also does not bear perfectly dualist characteristics. Section 231 of the Constitution, which deals with the application of international law domestically, seems to lead to more questions than answers, as there exists a lack of clarity on when and how South Africa is bound by an international treaty (in this case the CRPD) at the domestic level.[1155]

The South African Constitution empowers the national executive to negotiate, sign, ratify, and all other stages of treaty-making.[1156] However, it is not automatically bound by an international agreement signed by the executive unless it is an agreement of a technical, administrative or executive nature.[1157] To produce that result, it requires, first, the approval by resolution of Parliament.[1158] Nonetheless, approval of an agreement by Parliament still does not make it law in the Republic, unless it is a self-executing agreement that has been approved by Parliament.[1159] Even so, approval by Parliament alone does not imply incorporation of a

[1149]United Nations Treaty Collection 'Convention on the Rights of Persons with Disabilities' available at<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed 17 October 2021.
[1150] MC Marumoagae 'Disability Discrimination and the Right of Disabled Persons to Access the Labour Market' (2012) 15 (1) *PER / PELJ* at 354.
[1151] Tuovinen op city note 826 at 438.
[1152] G Ferreira & A Ferreira-Snyman 'The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy between Monism and Dualism' (2014) 17(4) *PER / PELJ* 1471- 1496 at 1472 and 1473.
[1153] Tuovinen op cit note 861 at 438.
[1154]Section 231(3); Tuovinen op cit note 861 at 438.
[1155] Franziska Sucker 'Approval of an International Treaty in Parliament: How Does Section 231 (2) Bind the Republic' (2014) 5 *Constitutional Court Review* at 417.
[1156] Ibid; Section 231(1); Andre Stemmet 'The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law' (1999) 33(1) *The International Lawyer* 47 at at 50.
[1157] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 90.
[1158] Supra note para 89.
[1159] Section 231(3).

treaty into South African law.[1160] It must be enacted into law by national legislation.[1161] Thus, the CRPD only becomes law in South Africa when it is incorporated into South African law,[1162]and once incorporated, it bears the same status as any other legislation,[1163] unless elevated to a status superior to that of other national legislation by Parliament.[1164] The trend seems to be that South Africa becomes party to major human rights treaties without incorporating them into domestic law.[1165] In the case of the CRPD, the consequence is that it is impossible for persons with disabilities, including psychosocial conditions, to rely directly on the obligations found in the CRPD and other relevant treaties at domestic level.[1166] The South African Human Rights Commission (SAHRC) has stated that South Africa's approach to treaty law weakens the effect of the CRPD in South Africa.[1167]

Despite, the above, international treaty law can still apply despite not being incorporated domestically. Firstly, the Constitution obligates South African courts to prefer interpretations of domestic statutes that are consistent with international law over ones that conflict.[1168] Furthermore, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law. Nonetheless, the Constitution does not indicate the extent to which international law can be utilised as an interpretive tool.[1169] It also does not indicate whether or not there is any preferential treatment to be given to certain international instruments when interpreting rights.[1170] This can be problematic to litigants, because there is no certainty about the weight a court is likely to attach to certain international instruments.[1171]

As a result of all the above, Ferreira opines that one could argue that South Africa follows a monist approach with regard to customary international law, but a dualist one as far as treaties are concerned,[1172] and I am inclined to agree. The result is that customary international law is directly enforceable before a South African court, while treaty law must first be incorporated into South African legislation before it becomes enforceable in municipal

[1160] Ibid op cit note 426.
[1161] Section 231(4).
[1162] Supra note 1157 at para 99.
[1163] Supra note 1157 at para 100.
[1164] Ibid.
[1165] Sucker op cit note 1155 at 426.
[1166] Ibid.
[1167] Ilze Grobbelaar-du Plessis 'Africa Disability Year Book: South Africa' available at *http://www.adry.up.ac.za/index.php/2013-1-section-b-country-reports/south-africa*> accessed 27 February 2018.
[1168] Section 233.
[1169] Zungu op cit note 1144 at 85 and 86.
[1170] Ibid at 86.
[1171] Ibid at 88.
[1172] Ferreira op cit note 1116 at 1472 and 1473.

law. [1173] Worth noting, is unlike Kenya, South Africa has ratified both the CRPD and the Optional Protocol to the CRPD on 30 November 2007.[1174] Hence, an individual claim can be made directly to the CRPD Committee, but only after exhaustion of all available and effective domestic remedies.[1175] Though, the CRPD Committee's decisions are not legally enforceable.[1176]

III. SOUTH AFRICA'S EMPLOYMENT ANTI-DISCRIMINATION LEGAL FRAMEWORK

South Africa is one of a few jurisdictions that expressly protects the rights of persons with disabilities in its Constitution.[1177] The Constitution centres its commitment to equality, both as a founding value and as a justiciable right.[1178] Section 1 of the Constitution states that the Republic of South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of rights and freedoms.' These values are also echoed in s 9, which provides not only that everyone is equal before the law and has the right to equal protection and benefit of the law, but also that equality 'includes the full and equal enjoyment of all rights and freedoms.'[1179]

Equality is conceptualised to include both formal and substantive equality.[1180] Substantive equality[1181] This is especially important in South Africa, which has a deplorable history of discriminatory practices and structures, some of which still persist today.[1182] Therefore, while formal equality[1183] is useful, it is incapable of addressing structural inequalities inherited from the colonial and apartheid eras, which are currently reflected in

[1173] Ibid.
[1174]Ilze Grobbelaar-du Plessis & Annnnelize Nienaber 'Disability and Reasonable Accommodation: HmVSweden Communication 3/2011 (Committee on the Rights of Persons With Disabilities)'(2014) 30(2) *South African Journal on Human Rights* 366 at 372.
[1175] International Disability Alliance 'Factsheet on the Optional Protocol to the CRPD' 2013, available at https://www.internationaldisabilityalliance.org/resources/ida-factsheet-optional-protocol-crpd, accessed on 21 April 2021.
[1176] Ibid.
[1177] Viviers op cit note 59 at 46.
[1178] Meryl Candice du Plessis, Access to Work for Disabled Persons in South Africa (Pretoria University Law Press 2017)77. h
[1179] Andre van Niekerk & Nicola Smit et el 'Law @work' 5 ed (2019) at 121; The Constitution s 9(1) and (2).
[1180] See further explanation in Andre van Niekerk & Nicola Smit et el op cit note 122, AF van Staden A Strategy for the Employment of Persons with Disabilities (unpublished PhD thesis, University of Pretoria, 2011).
[1181] See footnote 641 where the difference between formal and substantive equality is explained.
[1182] MC Marumoagae 'Disability Discrimination and the Right of Disabled Persons to Access the Labour Market' 2012(15)1, 'PER / PELJ 345-348.
[1183] Ibid.

South Africa's huge income gap and grossly unequal distribution of wealth.[1184] The Constitutional Court has endorsed substantive equality on several occasions.[1185]

Similar to the CRPD, the Constitution prohibits both direct and indirect discrimination by public and private actors, respectively, on a number of listed, non-exhaustive grounds, which include disability.[1186] Section 9(3) reads:

> 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability,[1187] religion, conscience, belief, culture, language and birth.'[1188]

Section 9(4) prohibits persons other than the state from discriminating against anyone on the grounds enumerated in s 9(3).

Further, the Employment Equity Act (EEA)[1189] was passed together with Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[1190] in compliance with s 9(4) of the Constitution, which requires legislation to give effect to the right to equality. [1191] So, although the prohibition of unfair discrimination is protected in the Constitution, it is given more detailed substance for workplaces in Chapter II of the EEA.[1192] Further, it is important to note that, in South Africa, it is the EEA and not the Constitution,[1193] that is the primary vehicle through which equality in the South African workplace is promoted.[1194] This is in keeping with the principle of constitutional avoidance.[1195] Constitutional equality, as embodied in section 9 of

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[1184] Ibid.

[1185] *Republic of South Africa V Hugo* (1997(4) SA 1 (CC); see also *Minister of Finance &another v Van Heerden* (2004) 12 BLLR1181 CC, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 94, 95, 101, 102, 104, 106, see more Andre van Niekerk & Nicola Smith at 122;

[1186] Section 9(3)(4); Jim Fitzgerald 'The Road to Equality? The Right to Equality in Kenya's New Constitution' (2010) 5 The *Equal Rights Review* 55-69.

[1187] The Constitution does not define what amounts to disability.

[1188] 'What the specified grounds listed above have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalize and oppress persons who have had, or who have been associated with, these attributes or characteristics. *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* (2019) 40 ILJ 1159 (CCMA**)** at para 63.

[1189] Act 47 of 2013.

[1190] Act 4 of 2000.

[1191] Anton Francois Van Staden, 'A Strategy for the Employment of Persons with Disabilities' (PHD Thesis, University of Pretoria)118.

[1192] Ockert Dupper & Christoph Garbers 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' (2012 1) *Acta Juridica* at 244 and 245.

[1193] The Employment Equity Act.

[1194] Dupper & Garbers op cit note 1192 at 244 and 245.

[1195] A litigant cannot bypass the provisions of legislation that was enacted to give effect to a constitutional right by relying directly on the constitutional right. See more at *Minister of Health v New Clicks South Africa* (Pty) Ltd 2006 (2) SA 311 (CC) at para 93–97 and Rósaan Krüger 'Equality and unfair discrimination: Refining the Harksen test' (2011) 3 *South African Law Journal* 479 at 480. Nevertheless, it is important to note that, the principle of

the Constitution, forms the backdrop to the EEA and remains relevant in any context in which the EEA is considered.[1196] Further, the EEA seeks to give effect to both ILO Discrimination (Employment and Occupation) Convention 111 and the Constitution.[1197]Its purpose is to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and provide a framework for the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups (includes persons with disability), in order to ensure their equitable representation in all occupational levels in the workforce.[1198]

An employee with a psychosocial condition who is protected by the EEA[1199] and is discriminated against will bring their claim in terms of the EEA and not the Constitution. Workers who do not meet the criteria for employee status in terms of the EEA and who experience unfair discrimination can invoke the PEPUDA.[1200] Notably, the PEPUDA expressly provides that it does not apply in cases where the EEA applies.[1201] Due to space constraints and the centrality of the EEA in cases of employment discrimination, the focus in this thesis will be on the EEA rather than PEPUDA.

The EEA specifically obligates employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.[1202] Further, the EEA prohibits discrimination in employment and provides:

> '[N]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, [and] birth or on any other arbitrary ground.''[1203]

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constitutional avoidance does not mean the Constitution plays no role in the interpretation of legislation giving effect to the Constitution (as the EEA). It plays a role in a number of ways, first, the less legislation says, in this case the EEA does not say, the greater the role of the Constitution, see Christopher Garbers and Peter le Roux 'Employment Discrimination Law into the Future' 2018 (2) *Stell LR* 237 at 265. Furthermore, where the constitutionality of provisions in the EEA or the PEPUDA is challenged, those provisions will be tested against section 9 of the Constitution or where the remedy sought is the invalidation of a provision in an Act of Parliament. Also, where the remedy is only available under the Constitution and by the Constitutional Court. Du Plessis op cit note 44 at 78.

[1196] Viviers op cit note 58 at 74.

[1197] 1958 (No. 111); EEA s 3.

[1198] EEA s 2; Dupper & Garbers op cit note 1192 at 244 and 245; Viviers op cit note 58 at 47.

[1199] EEA s 1.

[1200] PEPUDA s 5(3).

[1201] Du Plessis op cit note 1178 at 82.

[1202] EE s 5.

[1203] EEA Act 47 of 2013, Amendment of s 6 of Act 55 of 1998 s 6(1)

As a result, employees with psychosocial conditions,[1204] including applicants for employment, who have been discriminated against can bring a claim under section 6(1) above.

Other legislation also seeks to give effect to the right to equality in employment is the Labour Relations Act (LRA).[1205] According to the LRA it is automatically unfair to dismiss any employee for reasons that are unfairly discriminatory.[1206]

An aggrieved employee with a psychosocial disability or condition will either approach the Commission for Conciliation, Mediation and Arbitration (CCMA) to conciliate the dispute (if the EEA applies) or bring an unfair discrimination claim in the Equality Court with jurisdiction (if the PEPUDA applies).[1207] In addition, as a result of the 2014 Employment Equity Amendment Act,[1208] more specifically the amendment to section 10, the Labour Court no longer enjoys exclusive jurisdiction to adjudicate unfair discrimination matters.[1209] This is a plus for employees because using the CCMA is advantageous because it specifically constituted to be cost effective, quick and procedurally straightforward.[1210] Nevertheless, this right to take the matter to the CCMA for adjudication is limited to employees who have alleged unfair discrimination on the grounds of sexual harassment;[1211] and the employee who earns less that the earnings threshold in terms of the Basic Conditions of Employment Act (BCEA)[1212] This threshold is currently set at R211 596.30 per annum.[1213] Cooper argues that the threshold should have been set at a much higher level in order for it to be more inclusive, because it excludes employees who although earn above the threshold, may not be able to afford litigation.[1214]

[1204] EEA s 9.
[1205] Act 66 of 1995.
[1206] LRA s 187(1)(f).
[1207] Du Plessis op cit note 1178 at 146.
[1208] Act 47 of 2013 s 10.
[1209] Du Plessis op cit note 1178 at 78.
[1210] Sandra Fredman, The Role of Equality and Non-Discrimination Laws in Women's Economic op cit note 71.
[1211] Amendment Act EEA s 10(6) a A (i).
[1212] Act 75 of 1997.
[1213] GN 77 in GG 44137 of 8 February 2021.
[1214] Darcy du Toit in 'Unfair Discrimination' in Darcy du Toit and Candice Ndzeku(ed) *Labour Relations Law*: *A Comprehensive Guide* 6 ed (2015) 718.

IV. PROTECTED GROUNDS UNDER WHICH AN EMPLOYEE WITH A PSYCHOSOCIAL CONDITIONS CAN BRING A CLAIM OF DISCRIMINATION

From the above, the EEA and the LRA would be the first port of call for aggrieved employee with psychosocial conditions to seek remedies for unfair discrimination.[1215] Further, looking at both Acts, an employee with a psychosocial condition who is discriminated against in employment can make a discrimination claim on two grounds: disability or on an arbitrary ground.

a) Disability

In order for employees with psychosocial conditions to claim antidiscrimination protection under the protected ground of disability, they must first qualify as having a disability. The EEA does not define disability, but instead defines 'people with disabilities', similarly to the CRPD. It defines 'people with disabilities' as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'.[1216] The vital part missing in this definition, in comparison with the CRPD, is reference to the 'interaction with various barriers', which emphasises that the disadvantage arising from being disabled is not only a feature of the individual, but, importantly, also a feature of the environment in which the person lives and works. The focus of this disability definition is on the individual.[1217]

The Code of Good Practice on the Employment of People with Disabilities (the Disability Code)[1218] adopts a similar definition as the EEA. It operates together with the EEA to provide a guideline for employers and employees on the governance of the rights and obligations attached to the employment of persons with disabilities.[1219] As a result, in making the determination on disability, courts use the definition of 'people with disabilities' as defined in the EEA, together with the Disability Code.

[1215] *NAPTOSA & Others v Minister of Education, Western Cape & Others 2001* (2) SA 112 (C); Du Plessis op cit note 44 at 76 and 77.

[1216] EEA s 1.

[1217] Marguerite Schneider and Motsoakgomo Papi 'Affirmative action and disability in South Africa' (2011) 77 *Transformation* 90 at 92.

[1218] The Code and the TAG constitute such guidelines See the EEA s 54 (1) a which is the enabling provision. The codes are intended to provide employers with information that may assist them in implementing the EEA. The code is a guide on promoting equal opportunities and fair treatment for people with disabilities as required by the EEA TAG item 2.2, see *National Education Health & Allied Workers Union on behalf of Lucas Department of Health* (Western Cape) (2004) 25 ILJ 2091(BCA) para 27; Holness op cit note 6 at 530 and 531.

[1219] Asheelia Behari 'Disability and Workplace Discrimination: *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 438 (LC)' 38(4) (2017) *ILJ* 2226 at 2228- 2229.

This approach has been questioned by some scholars. Ngwena & Pretorius for example question the use of 'disability' and 'people with disabilities' interchangeably.[1220] They argue that the definition of 'people with disabilities' found in section 1 of the EEA is specifically for affirmative action purposes, but not for discrimination purposes under section 6(1).[1221] According to them, although, the context of purposes for both affirmative action (Chapter III of the EEA) and anti -discrimination(chapter II) are both intended to advance equality, they are different.[1222] Further, affirmative action duties are not imposed on all employers like antidiscrimination duties, but only on designated employers, and are for the benefit of only a very limited class of persons and are not intended to benefit all those who belong to protected groups under s 6(1).[1223] They argue that the definition of 'people with disabilities' is restrictive, in keeping with the preferential nature of affirmative action.[1224]

I disagree with this position because the purpose of both antidiscrimination law and affirmative action it to achieve equality.[1225] If the legislature wanted 'disability' to have a different meaning to 'disabilities' in the notion of 'people with disabilities', it would have clarified that difference, since it would have been fundamental to the interpretation of disability rights within the EEA. Notwithstanding this position held by Ngwena & Pretorius, the courts and tribunals continue to use 'persons with disabilities and 'disability' in equivalent terms, and as a result continue to adopt the narrow definition of 'people with disabilities' to define who qualifies as disabled under the EEA for both affirmative action and antidiscrimination purposes.[1226]

In addition, it is important to note that the Disability Code goes further than simply adopting the definition of disability. It also provides that the scope of protection for persons with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.[1227] It has been argued that this inclusion by the Disability Code introduces a social approach into the definition of

[1220] Charles Ngwena & Loot Pretorius 'Conceiving Disability, and Applying the Constitutional Test for Fairness and Justifiability: A Commentary on IMATU v City of Cape Town' (2007) 28(4) *Industrial Law Journal* 747 at 759.
[1221] Ibid.
[1222] Ibid.
[1223] Ibid at note 760.
[1224] Ibid.
[1225] EEA s 2.
[1226] *IMATU v City of Cape Town* (CA 13/2013) [2015] ZALAC 68 (23 April 2015); *Smith v Kit kat Group (Pty)* 12 BLLR 1239 (LC).
[1227] Disability Code para 5.3.

disability. This has led some scholars like Behari,[1228] Viviers,[1229] and Christianson[1230] to argue that the South African legal framework conforms to the social construct of disability.[1231]

Lake, in contrast, argues that the Disability Code adopts both medical and social approaches to disability, but does so in an inconsistent manner.[1232] I agree with Lake. In my view, the second part of the definition still emphasises a medical approach to disability, a functional approach to be more specific. The functional model of disability is generally considered as a variant on the medical approach.[1233] In this approach, disability is identified, not so much in terms of an underlying medical condition, but by considering the functional limitations caused by impairments.[1234] Here disability is defined as role failure, meaning that the individual is not able, due to disability, to perform his or her functions or roles.[1235] It terms of this approach a person may have a medical condition, but that will not qualify as a disability, until the condition impacts on the said person's activities.[1236] This is because the Disability Code still requires that the existence of a disability must first be proved, and secondly, that protection is only activated based on the effects of the said disability on the person in relation to the working environment.

In my view, this approach in the Disability Code may work particularly severely against persons with psychosocial conditions because, first, it excludes those who do not qualify as having an impairment that is medically diagnosed. Second, even those who manage to qualify despite the restrictive definition are not guaranteed protection unless the disability has an effect on the person in relation to the working environment. Hence, even if the Disability Code goes on to state that the focus of protection should be on the effects of disability and not on the diagnosis or the impairment, it does not obviate the need to first still qualify as disabled. At this stage diagnosis and impairment are key. Third, it does not cover employees with

[1228] Behari op cit note 1219 at 2236.
[1229] Viviers op cit note 58 at 52.
[1230] Ibid.
[1231] Behari op cit note 1219 at 2236.
[1232] Rosalind Lake *Discrimination Against people with Mental Health Problems in the workplace: a comparative analysis* (Unpublished LLM thesis, Rhodes University, 2005) 48 and 49.
[1233]LCO (Law Commission of Ontario) 'Preliminary Consultation Paper: Approaches to Defining Disability' June 2009 at 20.
[1234]Julie F. Smart 'The Power of Models of Disability' (2009) 75(2) *Journal of Rehabilitation* 3 at 6; LCO op cit note 1233 at 20.
[1235] Smart op cit note 1134 at 6.
[1236] Ibid; LCO op cit note 1233 at 20.

psychosocial conditions who may suffer limitation in areas outside of the working environment.

i) *Mental Impairment*

The first hurdle an employee with a psychosocial condition has to overcome in order to qualify as disabled is to show that they have a mental impairment. A mental impairment is defined to mean: 'a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.'[1237] Nevertheless, both the EEA and the Disability Code do not provide a definition of what constitutes a mental condition or illness for antidiscrimination purposes.

Although the Mental Health Care Act[1238] provides a definition of what constitutes a mental condition, [1239] the definition fails to capture the fact that an impairment can be both as a result of a 'condition' as well as an 'illness', a fact that is particularly relevant for persons with psychosocial conditions, as has already been discussed.[1240] The purpose of the Mental Health Care Act is to regulate the mental health care for those who need it,[1241] so the definition of "mental illness" found in the Act is largely to determine how to diagnose and provide care to people who need it, and not for antidiscrimination purposes. Nonetheless, from its definition it can be deduced that in order to establish the existence of a mental illness and resulting mental impairment under South African law, the diagnosis must be made by a mental health practitioner who is qualified to do so.[1242] A mental health care practitioner under the Act is defined as:

> "A psychiatrist or registered medical practitioner or a nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services".[1243]

The diagnosis as to whether a person has a mental illness should be made based on an official and accepted diagnostic criteria.[1244] In practice, South Africa uses two classification systems, DSM-V and ICD-10 as diagnostic tools.[1245] Burns and Betancourt contend that the preference

[1237] Disability Code; Viviers op cit note 58 at 55.
[1238] Mental Health Care Act 17 of 2002.
[1239] A positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health practitioner authorised to make such diagnosis; Mental Health Care Act s 1 (xxi).
[1240] See chapter 3 heading IV where this is discussed.
[1241] Section 3.
[1242] Viviers op cit note 58 at 56.
[1243] Mental Health Care Act s 1 (xvii).
[1244] Viviers op cit note 58 at 18.
[1245] M Swanepoel 'Legal Aspects with Regard to Mentally ill Offenders in South Africa' (2015) 18 (1) *PER / PELJ* 3238 at 3242.; Lee Anna Clark & Bruce Cuthbert 'Three Approaches to Understanding and Classifying Mental Disorder: ICD-11, DSM-5, and the National Institute of Mental Health's Research Domain Criteria (RDoC)' (2017) 18(2) *Psychological Science in the Public Interest*

of the mental healthcare community in South Africa is the DSM;[1246] it is often referred to and cited by the country's judicial forums.[1247] This illustrates the South African judiciary's willingness to accept the use of the DSM in legal proceedings to establish the existence of mental impairments.[1248] As has already been highlighted, this medicalisation of psychosocial conditions comes with its share of challenges.[1249]

(*ii) Long-term mental impairment*

Once it is determined by a medical practitioner that a complainant with a psychosocial condition has a mental impairment, the next stage is to determine whether such impairment is 'long-term'. The Disability Code does not only define what long term means, but implies that long term also includes recurring impairments. It then goes on to define long-term, recurring and progressive conditions.

Long-term impairments are those that have lasted or are likely to persist for at least 12 months.[1250] Ngwena and Pretorius suggest that this should be interpreted flexibly and not literally, that 'the 12-month period should be considered as a useful starting point and not an inflexible period, as the medical diagnosis as well as the prediction of a prognosis is based more on probability than certainty'.[1251] I agree with this interpretation, as the language used implies this. The Disability Code also provides that it must be implemented with due regard for individual and situational difference.[1252]

Furthermore, although it can be argued that the long-term impairment requirement is necessary to ensure that it only covers employees who are experiencing or are likely to experience significant, real or substantial hurdles in entering into, or advancing in, employment on account of disability, it is restrictive.[1253] It excludes short-term impairments because of the misconception that short-term impairments are always minor or only temporary hurdles in entering into, or advancing in, employment on account of disability.[1254] It fails to capture

72 at 73; Moffat Ndou 'Mental Illness, Harassment and Labour Laws: Some Thoughts on Harassment by Employees Suffering from Mental Illness' (2020) 41(3) *Obiter 538* 1 at 3; Also see chapter 1, heading I.

[1246] Viviers op cit note 58 at 56.

[1247] Ibid.

[1248] Viviers op cit note 58 at 56. See, for example, *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 and (LAC) at para 24 and *Urquhart v The Compensation Commissioner* [2006] 2 All SA 80 (E) at para 9(8).

[1249] See chapter 3, heading 1V where this is discussed in detail.

[1250] TAG at item 5.4.2(i).

[1251] Viviers op cit 58 at note 57.

[1252] TAG at item 3.3.

[1253] Charles Ngwena & Loot Pretorius 'Code of Good Practice on the Employment of People with Disabilities: An Appraisal' (2003) 24(10) *Journal Indus. L.J. (JUTA)* 1816 at 1823.

[1254] Ibid.

psychosocial conditions, which, although short-term, may still be severely limiting. Indeed, just because a condition is long-term does not mean that it causes more substantial hurdles than a short-term condition.

The Disability Code then defines a recurring condition as one that is likely to happen again and to be substantially limiting. It includes a constant chronic condition, even if its effects on a person fluctuate.[1255] Psychosocial conditions often fluctuate unpredictably, disappear or become dormant for a certain period of time and then return.[1256] As a result, psychosocial conditions that are characterised by inter-episode remissions as the symptoms may fluctuate, continuously reoccur will satisfy the "recurring" requirement in terms of the EEA and the Disability Code.[1257]

The Disability Code goes on to further define progressive conditions as those that are likely to develop or change or recur. Here persons living with progressive conditions or illnesses are considered as people with disabilities only once the impairment starts to be substantially limiting.[1258] Therefore, a person with a long-term psychosocial condition which is progressive or recurring, but does not have overt symptoms, or which does not substantially limit that person, may not qualify as a person with a disability for purposes of the EEA.[1259]

(iii) Substantially limiting

The Disability Code requires an impairment to be 'substantially limiting'.[1260] First, it provides that an impairment 'is substantially limiting if in its 'nature, duration or effects', it substantially limits the person's ability to perform the 'essential functions' of the job for which they are being considered.'[1261] The implication of the substantial limitation requirement is that it does not matter if a person with a psychosocial condition has been diagnosed with a long-term impairment; they will not be protected as a person with a disability unless their symptoms are severe enough to substantially limit their ability to function in employment.

Ngwena rightly argues that it would not only be absurd, but would also defeat the purpose of s 6(1) of the EEA if an employer who discriminates against a job applicant on the basis of a disability that is associated with an impairment, is able to raise a defence that the

[1255] Disability Code 5.4.2(ii).
[1256] Viviers op cit note 58; Ngwena & Pretorius, Code op cit note 1217 at 1824.
[1257] Ibid.
[1258] Disability Code at para 5.4.2(iii).
[1259] Disability Code at para 5.4.2(iii); Ngwena & Pretorius, Code op cit note 1217 at 1823.
[1260] Viviers op cit note 58 at 60.
[1261] Disability Code at para 5.4. 2(i).

limitations arising from the impairment were not substantial enough.[1262] Moreover, Lake points out that another potential shortcoming of the substantial limitation requirement is the creation of a catch-22 in the workplace where 'a person may be too impaired to perform his or her work effectively, but may not be substantially limited in discharging the inherent requirements of the job.'[1263] Consequently, a person with a mental impairment may be too impaired to execute his or her employment duties effectively, but may not be regarded as sufficiently disabled to receive protection under the EEA.[1264]

The second component of the substantial limitation requirement is that an impairment that can easily be controlled, corrected or lessened does not meet the definition of a disability. This medicalised conception of impairment raises important questions. It fails to clarify how easily controlled an impairment must be in order to fall into this category. Also, the example provided by the Disability Code of 'easily corrected' conditions, namely visual impairments that are addressed by glasses or contact lenses, fails to take into account how common and stigma-free these impairments are. It also assumes that all persons have the means to afford these assistive devices, which is not the case for many people.

Furthermore, this assessment to determine whether the effects of impairment are substantially limiting must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed. [1265] This focus on the person's function instead of on how society experiences the person and are likely to respond to them is, in my view, unnecessarily limiting. It is certainly inconsistent with the professed social approach to disability that the Disability Code says it follows. The focus should be on stigma rather than on how easily the impairment can be addressed medically.

A noteworthy decision in this regard is *IMATU v City of Cape Town*,[1266] in which it was held that because the complainant's diabetes could be controlled with medication it did not amount to a disability, despite the fact that it qualified as a long-term impairment.[1267] This medialised approach fails to recognise that the mischief of disability discrimination is

[1262] Ngwena & Pretorius op cit note 1253 at 760.
[1263] Viviers op cit note 58 at 61.
[1264] Ibid.
[1265] Disability Code at para 5.4. 2(iii).
[1266] (CA 13/2013) [2015] ZALAC 68 (23 April 2015).
[1267] Supra note 1266 para 91.

frequently stigma.[1268] Just because a person receives medication for a psychosocial condition and the condition is controlled to the point where they experience no substantial functional limitations, does not prevent disability from flowing from the stigma and negative stereotypes that lead to disadvantage.[1269] The successful intervention in a medical sense does not necessarily remove the disability.[1270] Prescribed medications successfully control symptoms in most individuals with severe psychosocial conditions and improves patient outcomes.[1271]

In contrast, the court in *Smith v Kit Kat Group (Pty) Ltd* adopted a very generous approach to the definition of disability.[1272] In determining if the condition was 'substantially limiting', they held that it is of little relevance what the employee may think about his or her ability to fulfil the obligations and duties of the position.[1273] The focus should be on how the employer perceives the disability and its consequences. Once the employer thinks that because an employee has a disability and that this disability impacts on the employee's ability to do the job, discrimination protection ought to follow.[1274]

Furthermore, the successful management of a psychosocial condition does not always prevent individuals from experiencing stigma.[1275] Such an approach fails to extend protection to persons who are not actually disabled, but are treated as if they are, perceived disabilities.[1276] It fails to acknowledge that an employer's attitudes, perceptions and prejudices may limit an employee's entry into or advancement in employment.[1277] Further, people with psychosocial disabilities have historically been excluded from jobs,[1278] not necessarily on the basis of the

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[1268] Maureen Mswela 'Does Albinism Fit Within the Legal Definition of Disability in the Employment Context? A Comparative Analysis of the Judicial Interpretation of Disability under the SA and the US Non-Discrimination Laws' (2018) 21 PER / PELJ 1 at 9.

[1269] Du Plessis op cit note 1178 at 110.

[1270] Ngwena & Loot op cit note 1253 at 762.

[1271] Dawn Velligan & Martha Sajatovic 'Why do psychiatric patients stop antipsychotic medication? A systematic review of reasons for nonadherence to medication in patients with serious mental illness'2017) 3(11) *Patient Prefer Adherence* 449-468 ; Agumasie Semahegn & Kwasi Torpey et al 'Psychotropic medication non-adherence and associated factors among adult patients with major psychiatric disorders: a protocol for a systematic review' (2018) 7(10) *Systematic Reviews* 1-5 at 2 and 5; Irma H. Mahone 'Medication Decision-making by Persons With Serious Mental Illness' (2004) 18(4) *Archives of Psychiatric Nursing* 126-134 at 126. Notably, taking medication is particularly important for positive outcomes for persons serious mental illness, particularly schizophrenia. See Beth Angell 'Measuring Strategies Used by Mental Health Providers to Encourage Medication Adherence' (2006) 33 *The Journal of Behavioural Health Services & Research* 53.

[1272] (2016] 12 BLLR 1239 (LC).

[1273] *Smith v Kit kat Group* para 42.

[1274] Ibid.

[1275] Viviers op cit note 58 at 61

[1276] Ibid note 52.

[1277] Ibid note 61.

[1278] I Ebuenyi & D Ikenna et al 'Employability of Persons with Mental Disability: Understanding Lived Experiences in Kenya' (2019) 10 *Frontiers in psychiatry* at 1; I Ebuenyi & Alida J. van der Ham 'Expectations

severity of their disabilities, but merely on the basis that any long-term or recurring impairments they have, or are perceived to have, are viewed negatively.[1279] The strongest and oldest rationale for antidiscrimination law is combating prejudice and stereotyping based on aversion towards certain group characteristics.[1280]

b) Arbitrary grounds

As highlighted above, because of the nature of psychosocial conditions, not all such conditions may qualify as disabilities in terms of the EEA. However, persons with psychosocial conditions can still be protected under South African antidiscrimination law on so-called 'arbitrary grounds.

Even prior to an EEA amendment in 2014, which added 'arbitrary ground' to the prohibited grounds of discrimination, the grounds in s 6 were not exhaustive.[1281] There were therefore instances where employees claimed protection because the discrimination was on grounds that were 'analogous' grounds to the listed grounds.[1282] The Labour Court interpreted this to mean that the ground relied on had to be clearly identified and to be shown that it was 'based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparable manner.'[1283]

The court in *Ndudula v Metrorail*[1284] acknowledged that parliament's reasons for adding the phrase 'or any other arbitrary ground' to s 6(1) was not clear.[1285] It has been argued that since the word 'including' in s 6(1) has in the past been interpreted to signify that the grounds listed were not exhaustive, it is unnecessary to add 'any other arbitrary ground'.[1286]

Apart from the critiques on whether the additions of the phrase was necessary, different interpretations of what it means have led to conflicting judgments.[1287] On a wide interpretation,

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management; employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' 2019 42(12) *Disability and Rehabilitation* at 1687.

[1278] Willene Holness, 'The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32(3) *South African Journal on Human Right*s 510 at 511.

[1279] Ngwena & Pretorius, op cit note 1220 at 759.

[1280] Ibid at 759 and 758.

[1281] *Ndudula and Others v Metrorail PRASA* (Western Cape) [2017] 7 BLLR 706 (LC) para 80.

[1282] Supra note para 82.

[1283] Supra note, *Numsa & Others v Gabriels (Pty) Ltd* [2002] 12 BLLR 1210 (LC).

[1284] Supra note 1283 para 80.

[1285] Supra note.

[1286] Supra note 1283 para 83.

[1287] *Naidoo and Others v Parliament of the Republic of South Africa* [2019] 3 BLLR 291 (LC) para 13; *Kadiaka v Amalgamated Beverage Industries* (J1168/97) [1998] ZALC 88 (28 October 1998) at para 42 and 43; *Chitsinde*

arbitrariness in itself is a ground of discrimination.[1288] On a more narrow interpretation, in order to qualify as an arbitrary ground, the ground relied upon must be analogous to a listed ground of discrimination, in the sense that it has the potential to impair the complainant's human dignity in a comparable manner as a listed ground, or have a similarly serious consequence.[1289] Case law suggests that the courts adopt the latter approach. In cases specifically dealing with employment discrimination involving employees with psychosocial conditions, the courts have held that although they may not qualify as a disability they instead qualify as an arbitrary ground.[1290] The implications of this for persons with psychosocial conditions will be discussed below.[1291]

V. THE MEANING OF UNFAIR DISCRIMINATION

In line with the Constitution, the EEA does not prohibit mere discrimination, but only discrimination that is 'unfair'. The interpretation of 'unfair discrimination' has proven to be a source of controversy.[1292] According to Du Toit the term 'unfair discrimination' in s 6 of the EEA should be interpreted to be synonymous with the term 'discrimination' as provided in ILO Convention 111.[1293] Thus 'unfair' should 'emerge as an adjective describing the open-ended range of discriminatory grounds, listed and unlisted, that are or might be prohibited in terms of s 6.'[1294] He continues that the value-laden term 'unfair' does little to clarify the issue, but potentially confuses it by encouraging the notion that discrimination on a prohibited ground must, in addition, be shown to be 'unfair'.[1295] In contrast **,** section 9(5) of the Constitution seems to affirm and establish that the use of 'unfair' in the Constitution, together with discrimination, is intentional and cannot be explained by the pejorative and benign meanings that attach to the term 'discriminate'.[1296]

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v Sol Plaatje University [2018] 10 BLLR 1012 (LC), *Sethole and Others v Dr Kenneth Kaunda District Municipality* [2018] 1 BLLR 74 (LC) (21 September 2017).

[1288] *Naidoo and Others v Parliament of the Republic of South* Africa para 14.

[1289] *Naidoo and Others v Parliament of the Republic of South Africa* para 15; *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC) at para 24, 25 and 26; *EWN v Pharmaco Distribution (pty) Ltd* (2016) 37ILJ 449(LC) para 47; *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others* [2016] 9 BLLR 942 (LC)para 55. See, also *Ntai v SA Breweries* (2001) 22 ILJ 472 (LC); P.A.K. le Roux, The Employment Equity Act: New amendments set problems and posers' 2014 14(1) *Contemporary Labour Law* 1-10 at 3.

[1290] *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* para 26*; Jansen v Legal Aid South Afric*a para 43 and 45; *EWN v Pharmaco Distribution Ltd* (2016) 37ILJ 449(LC) para 47.

[1291] See chapter 3, heading VIII where this is explained.

[1292] Andre Van Niekerk and Nicola Smit et el 'Law @work' 5 ed (2019) 125.

[1293] Darcy Du Toit 'The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law' (2006) 27 *ILJ* 1311 at 1340.

[1294] Ibid.

[1295] Ibid; This is reflected in *Association of Professional Teachers and Another v Minister of Education and Others* (1995) 16 ILJ 1048 (IC).

[1296] Niekerk & Smit op cit note 1292 at 125.

Van Niekerk et al argue that the use of the 'term 'unfair discrimination' rather than that of 'discrimination' delineates a zone of justifiable classification and differentiation between classes of persons'.[1297] This interpretation requires a court to take two steps, to first determine whether a challenged differentiation constitutes discrimination and, if it does, to consider whether the discrimination is unfair.[1298] The Constitutional Court's exposition of the inquiry into unfair discrimination in *Harksen v Lane NO*, which has been adopted in labour jurisprudence, further cements the idea that the use of 'unfair discrimination' instead of 'discrimination' was intentional.

a) The Harsken test

In *Harksen* the court established a three-stage enquiry into an alleged violation of the equality clause. Stage one: Does the provision differentiate between persons or categories of persons? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of what is now s 9(1).[1299] Even if it does bear a rational connection, it might nevertheless amount to discrimination.

Stage 2: Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: First, does the differentiation constitute 'discrimination'? If it is on a listed ground, discrimination will have been established. If it is on an unlisted or analogous ground, whether it amounts to discrimination will depend on whether, objectively, differentiation on that ground has the potential to impair the fundamental human dignity of persons as human beings or to affect them negatively in comparably serious ways.[1300] Second, if the differentiation amounts to 'discrimination', is such discrimination unfair? If the discrimination is found to have been on a listed ground, then unfairness will be presumed. If the discrimination is found to have been on an unlisted ground, the complainant has to prove unfairness.[1301]

The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others who are correspondingly situated. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there is no violation of the equality provisions. The following non-exhaustive factors were held to be relevant in the unfairness

[1297] Ibid.
[1298] *Harksen v Lane NO and Others* 1998 (1) SA 300 at para 45; Niekerk & Smit op cit note 1292 at 125.
[1299] Supra note 1298 at para 42.
[1300] Differentiation and unfairness on specified grounds is presumed to be discrimination because historically people have been discriminated against on those grounds. See *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (2007) 28 ILJ 537 (CC) at para 43.
[1301] Supra note 1300 para 42.

inquiry: first, the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, and whether the discrimination is on a specified ground or not.[1302] This is particularly key for persons with psychosocial conditions who have historically been discriminated against, mistreated and excluded from participation in society.[1303] In fact, persons with psychosocial disabilities are amongst the most disadvantaged even within the disability movement in general.[1304] Second, a court or tribunal will look at the nature of the discriminatory provision or power and the purpose sought to be achieved.[1305] Lastly, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature, will be considered.[1306] Thus, 'fairness' primarily depends on the impact on the complainant, but also depends on the vulnerability of the group in question; it is determined by the cumulative effect of these factors.[1307]

Stage 3: If the discrimination is found to be unfair, a determination will have to be made as to whether it can be justified in terms of the general limitations' clause in s 36 of the Constitution.

The South African courts have consistently held that there is a close link between the right to equality and the protection of a person's dignity. At the 'heart of the prohibition of unfair discrimination is the recognition that all human beings, regardless of their position in society, must be accorded equal dignity.'[1308] Thus, it can be concluded that the South African legal framework does adopt a dignity-based approach in the determination of unfair discrimination.[1309] The use of dignity as an organising principle in the court's equality

[1302] Supra note para 51(a).
[1303] S J Hoffman & Sritharan et al 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada' (2016) (2016) 16 (28) *BMC International Health and Human Rights* 1 at 2.
[1304] M Swanepoel 'Human rights that influence the mentally ill patient in south African medical law: A discussion of sections 9; 27; 30 and 31 of the constitution' (2011) 14(7) *PER / PELJ* 1 at 1-2; See also chapter 1 heading I.
[1305] Supra note 1300 para 51(b).
[1306] Supra note 1300 para 51(c).
[1307] Christopher Garbers and Peter le Roux 'Employment Discrimination Law into the Future' 2018 (2) *Stell LR* 237 at 245.
[1308] *Hoffmann v South African Airways* 2000 (11) BCLR 1211 at para 27.
[1309] Garbers & Le Roux op cit note 1307 at 245.

jurisprudence has not been without its share of controversy, but discussion of these debates fall beyond the scope of this research.[1310]

b) Multiple and Intersectional discrimination

It can be argued that an employee with psychosocial conditions who experiences multiple or intersectional discrimination can find recourse under section 6(1) of the EEA which prohibits discrimination based on "one or more grounds". [1311] Indeed, although there is no case law that deals with multiple discrimination in the context of the EEA, the Constitutional Court has recognised intersectional discrimination on several occasions. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Sachs J stated:[1312]

> 'One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.'

Similarly, in *Mahlangu v Minister of Labour*,[1313] Victor AJ cited various cases that have adopted an intersectional approach[1314] to discrimination and commends it in the following terms:

> 'Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination.'

[1310] See arguments for and against the dignity approach ion: Susie Cowen (2001) Can 'Dignity' Guide South Africa's Equality Jurisprudence? (2001) 17(1) South *African Journal on Human Rights* 34-58 at 48, 49 and 55; Evadne Grant 'Dignity and Equality' 7(2) 2007 *Human Rights Law Review (HRLR)* 299–329 at 301; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 *ICON* 267 at 279–280; Rinie Steinmann "The Core Meaning of Human Dignity"2016(19) PER / *PELJ* 1-32 at 2; Chris McConnachie 'Human Dignity, 'Unfair Discrimination' and Guidance' 34(3) 2014 *Oxford Journal of Legal Studies* 609–629 at 620; Conor Gearty *Principles of Human Rights Adjudication Oxford University Press* (2005) 85; Rory O'Connell 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (2008) (2) *International Journal of Constitutional Law* 267-286; Cathi Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' *South African Journal on Human Rights (SAJHR),* 14(2) 248-276 at 257, 260 and 272; Laurie Ackermann *Human Dignity: Lodestar for Equality in South* Africa (2012); Rosaan Kruger 'Equality and unfair discrimination: Refining the Harksen test(2011) 3 *South African Law Journal* 479-512 at 500.

[1311] Constitution s 9(3) and EEA s 6(1).

[1312] 1999 (1) SA 6 (CC) para 113.

[1313] [2021] 2 BLLR 123 (CC).

[1314] Supra note paras 76-91.

It is therefore important that when considering the position of persons with psychosocial conditions, courts and tribunals should pay attention to how disability or whichever protected ground is found to be relevant, intersect with other grounds, which may include race, gender, social origin, religion and age.

c) Discrimination by association

South African antidiscrimination law has not yet dealt explicitly with discrimination by association and certainly not in the context of psychosocial conditions. Discrimination by association occurs 'when the direct victim of discrimination is a person associated with the disabled person, such as a parent who is the primary carer for a disabled child.'[1315] The protected ground of 'family responsibility' may be the more intuitive grounds where an employer discriminates against an employee because a family member, for example, has a disability, but an intersectional lens may implicate disability as well. Nothing in the text of s 6(1) requires that the complainant be the person who has a disability. While this aspect falls beyond the scope of this thesis, because the focus is on employees with psychosocial disabilities, it raises important questions about the scope of antidiscrimination law and warrants further research.

VII FORMS OF DISCRIMINATION

a) Direct and indirect discrimination

The Constitution and the EEA do not define discrimination, but the PEPUDA does. Given that PEPUDA similar to the EEA also seeks to give effect to the right to equality in the Constitution, it can be argued that, unless persuasive reasons are advanced for interpreting discrimination differently under the two Acts, the definition in the PEPUDA can provide much needed guidance in defining discrimination under the EEA.[1316] This is still applicable even though the legislature chose not to include a definition of discrimination when the EEA was amended in 2013'. The PEPUDA defines discrimination as:

> any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly – (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.[1317]

[1315] Ann Stewart& Silvia Niccolai et al 'Disability Discrimination by Association: A Case of the Double Yes? (2020) 20(2) *Social & Legal Studies* 173 at 174.
[1316] Du Plessis op cit note 1178 at 97.
[1317] Ibid.

Further, as has been highlighted above the EEA and PEPUDA prohibits both direct and indirect discrimination.[1318] Although the law does not differentiate between the two types of discrimination, case law provides some guidance. In *Police and Prison Rights Union v Department of Correctional Services*,[1319] differentiates between both direct and indirect discrimination. It provided that direct discrimination refers to situations in which some people are treated differently from others on the basis of a protected trait. On the other hand, indirect discrimination occurs when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable.[1320] The courts have not required complex statistical evidence to show impact on a group.[1321] This may not necessarily be a negative thing, because as has been highlighted when courts focus on the need for complex statistics it may lessen the chances of a successful claim of indirect discrimination by employees with psychosocial conditions.[1322] Nevertheless, Dupper and Garbers argue that, while this that although this cavalier approach by South African courts may work for now, complex statistical evidence may be required to prove more subtle forms of indirect discrimination.[1323] Significantly, despite the law providing for both types of discrimination, most of the case law discussed in this report revolve around direct discrimination. This is because in South Africa, similarly to Kenya, indirect discrimination claims are not often pursued. Such claims are often more difficult and time-consuming to litigate because statistical evidence may be required to prove disproportionate impact.[1324]

i) The use of a comparator

It is not clear whether the use of a comparator is adopted in the determination of whether unfair indirect or direct discrimination took place or not. In some cases, it has been treated as a necessity, while other cases do not require it.[1325] As highlighted above, the use of a comparator has implications for persons with psychosocial conditions who may want to claim unfair

[1318] See chapter 3, heading I where the difference between direct and indirect discrimination is discussed.
[1319] 2010) 31 ILJ 2433 (LC) at para 123.
[1320] Ibid.
[1321] *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others* (1998) 19 ILJ 285 (LC) 293; *Singh v Minister of Justice and Constitutional Development & Others* 2013 (3) SA 66 (EqC), *SADTU obo Makua v Mpumalanga Education Department* [1999] 5 BALR 638 (IMSSA).
[1322] See chapter 3, heading I.
[1323] Dupper and Garbers op cit note 1195 at 100.
[1324] Du Plessis op cit note 1178 at 101.
[1325] *Lewis v Media 24 Ltd* (2010) 31 ILJ 2416 (LC) at para 37.

discrimination in employment.[1326] In *Lewis v Media 24 Ltd*,[1327] the Labour Court held that a comparator was not necessary in every situation. In specific instances, it may be evident that the employee is treated differently from others precisely because of the targeted nature of the treatment, for example sexual harassment or trade union victimisation.[1328] Correspondingly, Krüger argues that the focus in unfair discrimination cases should be on 'the impact of the discrimination on the complainant (i.e. whether the discrimination undermined the fundamental dignity of the complainant) which indicates that the identification of a 'dominant group' would not be necessary or desirable in all instances where unfair discrimination is alleged.'[1329]

In contrast, in *Simmadari v Absa Bank Ltd*,[1330] Steenkamp J found that that the use of a comparator is a necessity in proving unfair discrimination.[1331] This seems to have been the position taken in *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys*,[1332] in which the Commissioner held that the applicant failed to identify a comparator. Subsequently, she failed to show that the manner in which she was treated was different to a comparator, and thus her claim failed.[1333]

b) Failure to provide reasonable accommodation

The EEA defines reasonable accommodation to mean "any modification or adjustment to a job or to the working environment that will enable a person from a designated group[1334] to have access to or participate or advance in employment".[1335] However, the EEA, similar to the Kenyan legislation,[1336] does not explicitly acknowledge that the denial of reasonable accommodation amounts to discrimination. Instead, the EEA provides that affirmative action measures implemented by a designated employer should include reasonable accommodation

[1326] See chapter 3, heading V(b).
[1327] *Lewis v Media 24 Ltd* at para 37; *Impala Platinum Ltd v Jonase and Others* (2017) 38 ILJ 2754 (LC) (24 August 2017) at para 14; *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* (2019) 40 ILJ 1159 (CCMA) at para 37.
[1328] Supra note at 1327.
[1329] Rósaan Krüger 'Equality and unfair discrimination: Refining the Harksen test' (2011) 3 *South African Law Journal* 479 at 488.
[1330] **(**2018) 39 ILJ 1819 (LC).
[1331] Supra note 1330 at 1820.
[1332] (2019) 40 ILJ 1159 (CCMA).
[1333] Supra note 1332 at para 56 and 57; See also *SA Clothing & Textile Workers Union & others v Berg River Textiles—A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC).
[1334] EEA s 1 provides: designated group is defined to include means black people, women and person with disability.
[1335] Section 1.
[1336] See chapter 4 heading VII.

for persons with disabilities.[1337] As a result, Ngwena argues that this might lead to a misconception that under the EEA reasonable accommodation is a mere affirmative action measure that is confined to claims in Chapter III of the EEA.[1338]

The Disability Code, after its amendment in 2015, now provides that discrimination against persons with disabilities includes the denial of reasonable accommodation.[1339] It also states that the reasonable accommodation requirement applies to all disabled job applicants and employees. This would probably not have been its position had reasonable accommodation been regarded only as an affirmative action measure.[1340] Despite the positions taken by the Disability Code and the TAG, it worth noting that guidelines to statutes are not the only determinants of the meaning of such statutes, they simply provide interpretative guidance when more than one feasible interpretive option exists. [1341]

Aside from the above codes, because the aim of reasonable accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job,[1342] it implies that the duty is owed to individual employees. This is in contrast with it only being an affirmative action measure.[1343]A further justification for interpreting reasonable accommodation as an antidiscrimination measure is that legislation must be interpreted in compliance with South Africa's international obligations.[1344] Therefore, the fact that the CRPD considers a failure to reasonably accommodate disabled persons a form of discrimination is critically important.[1345]

Additionally, unlike the EEA, the PEPUDA explicitly regards the denial of reasonable accommodation on the basis of disability amounts to an unfair discrimination.[1346] The PEPUDA provides that 'failing to take steps to reasonably accommodate the needs' of people on the basis of race, gender or disability will amount to unfair discrimination.[1347]

[1337] Section 15(2)(c) of the EEA; also See Laetitia Fourie & Anri Botes 'Disability discrimination in the South African workplace: the case of infertility' (2018) 22(7) *The International Journal of Human Rights* 910 at 925.
[1338] Charles Ngwena 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law: Part II (Reasonable accommodation)' 2005 16(3) *Stell LR* 534 at 561.
[1339] Item 5.1.
[1340] Du Plessis op cit note 1178 at 141.
[1341] Ibid.
[1342] Item 6.3.
[1343] C Botha cited by Du Plessis op cit note 1178 at 141.
[1344] The Constitution s 39.
[1345] Du Plessis op cit note 1178 at 141.
[1346] Section 9(c) the PEPUDA.
[1347] Ibid.

Significantly, the South African understanding of reasonable accommodation applies to all persons, regardless of disability, and as such must be provided to ensure equal opportunities on account of not only disability, but other grounds for discrimination such as age and sex.[1348] The duty extends beyond disability.[1349] This stance is evident in case law which has recognised the duty to reasonably accommodate to avoid unfair discrimination on protected grounds such as cultural belief[1350] and religion.[1351] What this means is that employees with psychosocial condition who do not qualify as persons with disabilities, can still claim reasonable accommodation in employment.

i) When and how accommodation must be provided

An employer under the South African legal framework is obligated to provide reasonable accommodation at all stages of the employment process including: job profiling,[1352] job advertisements[1353] and applicants, interview process,[1354] assessments or skills testing,[1355] performance management and rewarding of performance.[1356] Essentially, reasonable accommodation is to be provided during the different stages of employment, provided the accommodation allows someone to perform the essential functions of the job concerned.[1357]

South African case law emphasises the need of an Occupational Therapist (OT) report in the determination of how to reasonably accommodate an employee.[1358] Although an employee with a psychosocial disability or condition may rely on a psychiatrist[1359] or a

[1348] EEA s 1, the court acknowledged the duty of an employer to reasonable accommodate an employee with Type 1 diabetes, see more Supra note 1190 para 109; the court acknowledged the duty of an employer to reasonable accommodate an employee with Type 1 diabetes, see more *Smith v Kit kat Group (Pty) Ltd* at para 58.
[1349] MEC for Education: Kwazulu-Natal and Others v Pillay; Christian Education South Africa v Minister of Education 2000 (4) SA 757.
[1350] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* [2014] 3 BLLR 207 (SCA); Department of *Correctional Services v Popcru* 2013 (4) SA 176 SCA.
[1351] Supra note at 1348 at 74.
[1352] TAG at item 6.3.1.
[1353] TAG at item 6.3.2.
[1354] TAG at item 6.3.3.
[1355] TAG at item 6.3.4.
[1356] TAG at item 6.3.10.
[1357] *City of Cape Town v South African Municipal Workers Union obo Damons* [2020] 9 BLLR 875 (LAC).
[1358] Standard Bank of South Africa v CCMA [2008] 4 BLLR 356 (LC) at para 109; *Wylie and Standard Executors & Trustee (2006) 27 ILJ 2210 (CCMA)* at 2021, Supra note 1182 at head notes & para 44.
[1359] A medical doctor specialised in mental disorders, who is legally allowed to prescribe medication and provid e verbal-based psychotherapy. Available at https://medical-dictionary.thefreedictionary.com/psychiatrist, accessed on 29 March 2021; psychiatrists: a medical doctor who diagnoses and treats mental, emotional, and behavioural disorders : a specialist in psychiatry https://www.merriam-webster.com/dictionary/psychiatrist; A psychiatrist is a doctor who treats people suffering from mental illness, available at https://www.collinsdictionary.com/dictionary/english/psychiatrist, accessed 29 March 2021.

psychologist[1360] to diagnose and prescribe treatment, an OT is also needed as they help in the process of identifying relevant and efficient reasonable accommodation.[1361] Occupational therapy interventions focus on eliminating environmental barriers to independence and participation in daily activities.[1362] It facilitates the modification of tasks, teaching the skill, and educating the client/family in order to increase participation in and performance of daily activities, particularly those that are meaningful to the client.[1363]

In *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* the court stated that without an OT report, the Bank could not undertake any investigation to determine whether and how it should accommodate an employee or to even decide to dismiss an employee.[1364] The OT must give a copy of the completed report to the employee in question, thus giving them an opportunity to correct any factual errors, and not to change the opinion expressed in the report, even if said employee disagrees with it. After the employee's input has been considered, the report must be submitted to the department and the costs of the report must be borne by the employer.[1365]

Employees have to be actively involved in the consultation process because the process of reasonably accommodating an employee ought to be interactive and responsive.[1366] This consultation process is particularly important for persons with psychosocial conditions, because of the varied and individual ways in which a psychosocial condition may manifest and affect different employees.[1367] Thereafter, once the report and consultation happen, the

[1360] A non-physician mental healthcare worker with either a Master of Art degree (MA) or a Doctorate in Philosophy (PhD) who, depending on the jurisdiction, may prescribe drugs for mental disease, available at https://medical-dictionary.thefreedictionary.com/psychologist, accessed on 29 March 2021; a person who specializes in the study of mind and behaviour or in the treatment of mental, emotional, and behavioural disorders : a specialist in psychology https://www.merriam-webster.com/dictionary/psychologist; A psychologist is a person who studies the human mind and tries to explain why people behave in the way that they do, available at https://www.collinsdictionary.com/dictionary/english/psychologist, accessed on 29 March 2021.

[1361] https://medical-dictionary.thefreedictionary.com/occupational+therapy, accessed on 29 March 2021.

[1362] Ibid.

[1363] The Health Professions Council of South Africa, available at https://www.hpcsa.co.za/?contentId=0&menuSubId=49&actionName=For%20Professionals, accessed on 29 March 2021.

[1364] [2008] 4 BLLR 356 (LC) para 107.

[1365] National Education Health & Allied Workers Union on behalf of Lucas Department of Health (Western Cape) (2004) 25 ILJ 2091(BCA) para 47.

[1366] Supra note 1364 para 91; *McMahon v BDFM Publishers* (PS53/17) [2019] ZAECPEHC 43 (5 July 2019), para 1 and 23.

[1367] Viviers op cit note 58 at 58; Supra note 1364 at para 91.

employer is obligated to proceed as agreed. Therefore, it is not enough for an employer to consult, and then proceed to ignore the recommendations.[1368]

In my opinion OT reports may be of integral importance for employees with psychosocial conditions to assert their rights, because their conditions may often not be readily visible and how they should be accommodated is not always evident. These reports could offer invaluable guidance on how to reasonable accommodate employees with psychosocial conditions, or even how to identify low-cost accommodations and adaptation for persons. [1369]

ii) Undue hardship

Reasonable accommodation must not impose an 'unjustifiable hardship' upon the employer.[1370] Hence, an employer is not obliged to accommodate a qualified applicant or an employee who has a psychosocial condition that would impose an unjustifiable hardship on the employer.[1371] Nonetheless, this limitation only applies if the accommodation is otherwise "reasonable". The reasonableness of the accommodation has to be determined before we consider whether it creates unjustified hardship. The EEA does not define the meaning of undue hardship; however, a definition is found in the Disability Code. It defines undue hardship as: 'action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.'[1372]

Holness argues that in considering cost for reasonable accommodation, the cost of an accommodation should not be the only factor considered. There are also social factors such as the impact of lack of accommodation on staff morale, and in turn on productivity – where a co-employee is disabled and forced to leave.[1373] Pretorius et al argue that apart from the financial consideration, reasonable accommodation must also not pose a major risk to health and safety, or significantly disrupt business operations.[1374] However, courts or tribunals should also consider the benefits of the accommodation, not just for the disabled person concerned, but other disabled persons and even non-disabled persons.[1375]

[1368] Supra note 1364 at para 91; Wylie and Standard Executors & Trustees at 2010 at 2221- 2222; National Education Health & Allied Workers Union on behalf of Lucas and Department of Health at headnote and para 33.
[1369] Holness 1278 at 511.
[1370] Supra note 1364 para 95.
[1371] Holness op cit note 1278 at 533.
[1372] Item 6: 12.
[1373] Holiness op cit note 1278 at 534.
[1374] Viviers op cit note 58 at 149 and 150.
[1375] See chapter 3, heading 111 for the list.

Further, the TAG provide that South Africa adopts a higher standard than in some other countries to the phrase "undue hardship", because there has been so little employment and accommodation of persons with disabilities. Employers are therefore required to make more effort to reduce and eliminate discrimination.[1376] Employers must objectively assess and take into account the impact of providing or failure to provide accommodation to the employee and the systemic patterns of inequality in society. The objectives of the Act and the Constitution should also be considered'.[1377] The assessment should also take into account the impact of providing or failure to provide reasonable accommodation to the employee and the systemic patterns of inequality in society.[1378] In addition, just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. This is because some hardship is envisaged.[1379] Thus, a minor interference or inconvenience does not come close to meeting the threshold but a substantial interference with the rights of others does.[1380] Therefore, in order for an employer to claim unjustifiable hardship, more than mere means negligible effort will suffice.[1381]

Viviers suggests that the use of the principle of proportionality would result in a more reliable test for determining the limits of reasonable accommodation.[1382] Further, that a balance should be found 'between the interests of the employer to operate a profitable business free from a disproportionate burden, and the rights of employees not to be discriminated against and to have their dignity respected.'[1383] Hence , the antidiscrimination rights of persons with psychosocial conditions and inherent human dignity will be weighed up against the employer's interests to operate a profitable business without a disproportionate burden.[1384] Viviers argues that the 'employer's interests will very seldom, if ever, be significant enough to outweigh an individual's basic human rights to dignity and equality.'[1385] However, this argument does not take into account that one of the aspects to be considered is the fairness of holding a particular employer to a duty that often seeks to remedy structural deficits that are beyond individual employers' control. Fairness therefore demands that the burden not be disproportionate.[1386]

[1376] Item 6: 11.
[1377] Holness op cit note 1278 at 534.
[1378] Para 6:12.
[1379] Supra note 1364 at 98.
[1380] Ibid.
[1381] Supra note 1364 para 98, 139- 140; Supra note 1365 para 42.
[1382] Ngwena cited by Viviers op cit note 58 at 149.
[1383] Ibid.
[1384] Ibid at 150.
[1385] Ibid at 150.
[1386] Viviers op cit note 58 at 150.

No clear-cut rule can be set as to what constitutes undue hardship. Each case has to be individually determined on its own facts.[1387]

c) Harassment

Case law in South Africa suggests that sexual harassment is the most common form of workplace harassment.[1388] The EEA specifically prohibits harassment as a form of unfair discrimination on any one or any combination of the grounds listed in section 6(1) of the Act, which include disability or any other arbitrary ground.[1389]

Although the EEA does not provide a definition of harassment, direction as to what constitutes harassment may be found in the PEPUDA, the Domestic Violence Act [1390] and the Prevention of Harassment Act (Harassment Act).[1391] Firstly, the PEPUDA defines harassment as:

> '[U]nwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-(a) sex. gender or sexual orientation; or a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.'[1392]

This definition, although it is not specifically defined for employment purposes alone, provides key insights into what qualifies as harassment. In *Mkhize and Dube Transport,*[1393] the commissioner implied that victimisation and bullying is a form of harassment, and that it has to be dealt with in terms of the EEA as unfair discrimination.[1394]

The Harassment Act,[1395] which came into effect on 27 April 2013,[1396] defines harassment as:[1397]

> '[D]irectly or indirectly engaging in conduct that the respondent knows or ought to know: a) causes harm[1398] or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably- (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides,

[1387] Supra note 1364 para 99.
[1388] Niekerk & Smit op cit note 1292 at 127.
[1389] See chapter 5, heading III.
[1390] Act no 116 of 1998.
[1391] Act no 17 of 2011.
[1392] PEPUDA s 1.
[1393] (2019) 40 ILJ 929 (CCMA).
[1394] Supra note 1393 para 1820.
[1395] No. 17 of 2011.
[1396] *Mnyandu v Hanamachi* (AR162/2014) [2016] ZAKZPHC 78; [2016] 4 All SA 110 (KZP); 2017 (1) SA 151 (KZP) (1 August 2016), para 41.
[1397] 1(a).
[1398] 1(b) defines harm to mean any mental, psychological, physical or economic harm.

> works, carries on business, studies or happens to be; (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to. or brought to the attention of, the complainant or a related person; or (b) amounts to sexual harassment of the complainant or a related person.'[1399]

The definition of harassment in terms of the Harassment Act offers more insight into what constitutes harassment and even takes into account relatively modern platforms where harassment has recently proliferated, for example online bullying. It is broader than the definition found in the PEPUDA. While the Harassment Act is not specifically directed towards employers and employees, its ambit is wide enough to include employment harassment.[1400] In *Mnyandu v Padayachi*[1401] Moodley J held that the Harassment Act has application and may prove useful in the workplace environment, as it enhances the remedies for harassment in the workplace available under the EEA and LRA.[1402]

Conduct does not have to be repetitive to constitute harassment. In *Mnyandu v Padayachi,* [1403] Moodley J held that in order for the conduct referred to in the Protection from Harassment Act to constitute harassment,

> '… it must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim. Alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.'[1404]

Nevertheless, it is important to note that harassment on its own can take various forms, depending on the purpose of the legislation.[1405] In the case of unfair discrimination, an employee who has a psychosocial disability or condition must do more than show that harassment took place in order to claim antidiscrimination protection under the EEA or PEPUDA. In *Aarons v University of Stellenbosch,*[1406] Waglay J held that in claiming harassment as a form of discrimination, a complainant must do more than to make an allegation,

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[1399] 1(b).
[1400] AA Landman & MM Ndou "The Protection from Harassment Act and its implications for the workplace" (2013) 22(9) *CLL Contemporary Labour Law* at 81.
[1401] Supra note 1396.
[1402] Supra note 1396 para 43; Moffat Maitele Ndou 'Mental illness, harassment and labour laws: some thoughts on harassment by employees suffering from mental illness' 2020 41(3) *Obiter* 538 at 547.
[1403] Supra note 1396 para 43
[1404] Stalking is defined as repeatedly following, pursuing or accosting the complainant, see Supra note 1306 para 53.
[1405] Chapter 3, heading V(d).
[1406] (2003) 24 ILJ 1123 (LC).

he or she must clearly set out why the harassment amounts to unfair discrimination.[1407] Therefore, an applicant must show that the harassment was on a listed or other arbitrary ground.[1408] A complainant must establish a causal link between the act of harassment and the disability or arbitrary ground. In this case it was held that she failed to show that she was discriminated against by her employer, and as a result was not entitled to any relief. Further, in *Simmadari v Absa Bank Ltd*[1409] Steenkamp J found that that the use of a comparator is still necessary to prove harassment as a form of unfair discrimination.[1410] If this precedent is upheld, an employee with a psychosocial condition who alleges harassment will still have to identify a comparator in order to make a successful ant-discrimination claim in court. As has already been discussed, the use of a comparator comes with its share of challenges.[1411]

VIII. BURDEN OF PROOF

The EEA places the burden of proof on the employer to prove, on a balance of probabilities, that discrimination on a specified ground did not take place as alleged; is rational and not unfair, or is otherwise justifiable.[1412] This in effect creates a rebuttable presumption that once discrimination is shown to exist by the applicant, the employee in this case, it is assumed to be unfair. Hence, the employer must justify it.[1413] However, where an employee with a psychosocial condition alleges discrimination on an arbitrary ground, the burden is on the complainant to prove on a balance of probabilities that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.[1414] Therefore, the full onus of persuasion remains on the employee in case of an arbitrary ground.[1415] Some cases have left open the issue as to whether psychosocial conditions are regarded as disabilities and opted to treat the discrimination as having occurred on an arbitrary ground. This does have implications for the onus of proof, the implications of which will be discussed in the next chapter.

[1407] Supra note 1406 at para 18.
[1408] Supra note 1296 para 34 and para 73; Supra note 1332 at 1820.
[1409] (2018) 39 ILJ 1819 (LC)
[1410] Supra note 1409 at 1820.
[1411] See chapter 3, heading III; also, chapter 6 heading.
[1412] Section 11(1) a and b.
[1413] Supra note 1365 para 79, see also Jooste *v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; and Hoffmann v South African Airways 2000 (11) BCLR 1211 para 27.
[1414] Section 11(2) a, b and c; *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC) at para 27; *Supra* note 1296 at para 61.
[1415] Garbers & Le Roux op cit note1271 at 263.

IX. JUSTIFICATION OF DISCRIMINATION

Section 6(2) of the EEA provides that it is not unfair discrimination to: take affirmative action measures consistent with the purpose of the EEA; or 'to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job'.[1416] Therefore, in response to a charge of unfair discrimination by an employee with a psychosocial disability, an employer may argue that the discrimination is justified because of the inherent requirements of the job or for purposes of affirmative action.[1417]

Roux and Garbers has questioned whether the presence of these two defences means there is no discrimination to begin with, or whether it makes the discrimination fair, or whether it justifies unfair discrimination.[1418] In *Independent Municipal and Allied Trade Union v City of Cape Town*, the justificatory stage was described as one in which the respondent seeks to justify otherwise unfair discrimination.[1419] However, in *South African Municipal Workers Union obo Damons v City of Cape Town*,[1420] the court reasoned that s 6(2) of the EEA does not contain justifications for unfair discrimination,[1421] that what it provides instead of justification is complete defences to an allegation of unfair discrimination.[1422]

Notably, as far as the inherent requirement of a job is concerned, the SCA in *Department of Correctional Services v Police and Prisons Civil Rights Union* was quite comfortable to view inherent requirement of a job as justification for unfair discrimination.[1423] Therefore the general position seems to be that section 6(2) of the EEA provides for defences that can be used as justification for unfair discrimination, and that is the position this research will take. For reasons of expediency and space, the only defence that will be dealt with in-depth here is the one most likely to be raised by employers when it comes to employees with psychosocial conditions in general, namely the inherent requirements of the job.

[1416] Section 6(2) a and b
[1417] Garbers op cit note 1178 at 219.
[1418] Garbers & Le Roux op cit note1271 at 246.
[1419] Supra note 1230 at para 99.
[1420] [2018] 8 BLLR 829 (LC).
[1421] *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 at para 18; South African Airways (Pty) Ltd v V and Another [2014] 8 BLLR 748 (LAC at para 45.
[1422] Supra note.
[1423] Ibid.

a) Inherent requirement of a job

The inherent requirement of a job is a statutory defence that allows an employer or potential employer to answer an allegation of unfair discrimination by showing that the complainant cannot perform the essential functions of a job. [1424]

The EEA does not define the phrase "inherent requirement of the job," which leaves the interpretation of the term open to the courts. However, in the case of *Independent Municipal and Allied Trade Union and Another v City of Cape Town*,[1425] when interpreting "inherent requirement of the job, "the court emphasised a need for a strict interpretation.[1426] It provides examples of unacceptable requirements: the evaluation of an individual's competence for a task based on stereotypes of the group to which the employee belongs; requirements based on the preferences of employees and clients; requirements that tasks should be performed in a particular way when there are other reasonable ways of doing so; and qualifications based on 'light' or 'heavy' work which amount to a veiled distinction between the sexes that might impede the promotion of women.[1427]

This strict interpretation has been supported by Dupper & Garbers, because

> 'any legislatively formulated justification of discrimination constitutes, in effect, a limitation on the constitutionally entrenched right to equality and this militates against an expansive reading of the phrase.'[1428]

The courts seem to have taken this position too, as case law suggests that 'inherent requirement of a job' as a defence is restrictively interpreted.[1429]

Case law suggests that inherent requirements must be permanent features of the job; must be necessary or essential to the job; and must be indispensable attributes to the performance of

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[1424]Ann Lee Basser and Jones Melinda 'The Disability Discrimination Act 1992 (CTH): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26(2) *Melbourne University Law Review* 254 at 2743; Mariëtte Redelinghuys *Addressing obesity in the workplace: the role of employers* (Unpublished LLM thesis, University of Pretoria, 2018) 44.

[1425] [2005] 10 BLLR 1084 (LC) (18 July 2005).

[1426] Supra note 1425 at at para 101.

[1427]. Supra note 1365 at para 102.

[1428] Dupper & Garbers op cit note 1155 at 158, *Association of Professional Teachers and Another v Minister of Education and Others* (1995) 16 ILJ 1048 (IC); Supra note 1365 at para 101; Stella Vettori 'Employer duties towards pregnant and lactating employees in the hospitality industry in South Africa' (2016) 5(4) *African Journal of Hospitality, Tourism and Leisure* 1 at 6.

[1429] Supra note 1308 para 34; *Whitehead v Woolworths (Pty) Ltd* [1999] 8 BLLR 862 (LC); *Dlamini & others v Green Four Security* (15) [2006] 11 BLLR 1074 (LC); *Professional Teachers& Another v Minister of Education and Others and CWIU* 1995 16 ILJ 1048 (IC) 87 1997 (9) BLLR 1186 (LC) 88 v *Johnson& Johnson (Pty) Ltd*(1997 (9) BLLR 1186 (LC) ; *Department of Correctional Services and Another v Police and Prisons Civil Rights Union and Others* (2013) 34 ILJ 1375 para 23 and 25; *Association of Professional Teachers and another v Minister of Education and others* (1995) 16 ILJ 1048 (IC) ; Supra note 1266 at 101.

the work.[1430] It can therefore be held that an inherent requirement is an attribute without which the job would be compromised to such an extent that it would be detrimental to the employer.[1431] It has also been argued that the inherent requirement of a job refers to the ability of an incumbent to do the job as opposed to the degree of performance of the job.[1432] Thus, just because there is someone who does not possess a protected attribute, in this case a disability, and may be able to perform the job better than the incumbent, does not in itself justify discrimination.[1433] The constitutional rights to equality and dignity trump the employer's operational interests or requirements.[1434] In addition, experience and knowledge may be essential requirements for a particular job and the refusal to appoint a person who do not possess these qualities is permissible within the meaning of the inherent requirements of the job.[1435]

In *Hoffman v SAA*[1436] the Constitutional Court emphasised that employers cannot rely on clients' or customers' prejudiced attitudes and stereotypes about certain groups and their ability to work to define an inherent requirement of a job.[1437] The assessment of whether an employee is able to meet the inherent requirements of a job involves an individual and not a group assessment,[1438] therefore a blanket ban may on all persons who bear a certain characteristic may constitute unfair discrimination.[1439]

The Labour Appeal Court in *TDF Network Africa (Pty) Ltd v Faris*[1440] provided a useful explanation of the inquiry into inherent requirements of a job:

[1430] Du Toit et al, Labour Relations Law (4th Ed Butterworths) at 569; Supra note 1266 at 102.
; Dupper and Garbers 1192 op cit note 83, Shamier Ebrahim 'Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms of the Employment Equity Act 55 of 1998' 2018(21) *PER / PELJ* 1 at 32; Vettori op cit note 1428 at I at 5 and 6; See *Whitehead v Woolworths* (1999) 20 ILJ 2133 (LC); Supra note 1308; Supra not 1365 at para 101; *Department of Correctional Services v POPCRU* [2013]7 BLLR 639 (SCA); *South African Airways (Pty) Ltd v GJJVV* [2014] 8 BLLR 748 (LAC) at para 54; *Woolworths (Pty) Ltd v Whitehead (Woolworths)*215 (2000) 6 BLLR 640 (LAC), Mariëtte Redelinghuys op cit note 45; *Whitehead V Woolworths Pty Ltd [1999] 8 BLLR 862 9 (LC),* at para 36.
[1431] *Whitehead V Woolworths Pty Ltd [1999] 8 BLLR 862 9 (LC),* at para 16.
[1432] Vettori op cit note 1428 at 5-6.
[1433] Ibid.
[1434] Ibid.; Supra note 1308 at para 34; Supra note 1365, *Whitehead v Woolworths* at para 14; *Dlamini & others v Green Four Security* (15) [2006] 11 BLLR 1074 (LC).
[1435] *Lagadien v University of Cape Town* 2001 1 BLLR 76 (LC) 83; Shamier Ebrahim 'Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms of the Employment Equity Act 55 of 1998' 2018(21) *PER / PELJ* 1 at 31 and 32.
[1436] (2000) 21 ILJ 2357 (CC) at par 37.
[1437] Supra note 1308 at para 37.
[1438] Supra note 1266 at 104.
[1439] Supra note 1266 at 1045 and 110.
[1440] [2019] 2 BLLR 127 (LAC*).*

> "[T]he tests for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry. A mere legitimate commercial rationale will not be enough. In general, the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose.[1441]

In line with this reasoning, Ngwena & Pretorius argue that it is also important in disability discrimination cases that the inherent job requirement defence is interpreted in terms of a methodology that squarely situates it within the fairness enquiry.[1442] This involves considerations of fairness between the employee who alleges unfair discrimination, the employer, other interested parties (such as co-employees), or public interest considerations (such as the risks to public safety involved).[1443]

The inherent requirements of the job defence may risk considerable prejudice to persons with psychosocial conditions if not applied appropriately. This is because persons with mental illness are sometimes perceived as not fit or able to work.[1444] Employers tend to perceive individuals with mental illnesses as aggressive, dangerous, unpredictable, unintelligent, unreasonable, unreliable, lacking self-control, and frightening,[1445] unproductive or violent, and potentially a liability.[1446]

X. REMEDIES

Employees who are successful in their unfair discrimination claims against their employers have may be awarded various remedies that include:[1447] payment of compensation by the employer to that employee; payment of damages by the employer to that employee;[1448] an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.[1449]

[1441] Supra note 1440 at para 37.
[1442] Charles Ngwena and Pretorius, Loot 'Conceiving Disability, and Applying the Constitutional Test for Fairness and Justifiability: A Commentary on IMATU v City of Cape Town' (2007) 28(4) *Indus. L.J. (JUTA)*747at 768.
[1443] Ibid at 767.
[1444] I Ebuenyi & D Ikenna et al 'Employability of Persons with Mental Disability: Understanding Lived Experiences in Kenya' (2019) 10 *Frontiers in psychiatry* 1-at 6.
[1445] Zlatka Russinovaa 'Workplace prejudice and discrimination toward individuals with mental illnesses' (2011) 35 *Journal of Vocational Rehabilitation* 227 at 228.
[1446] I Ebuenyi & Alida J. van der Ham et al 'Expectations management; employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' (2020) 42(12) *Disability and Rehabilitation* 1687 at 1688.
[1447] EEA s 50(2).
[1448] *Wallace v DuToit* (2006) 8 BLLR 757(LC); *Christian V Colliers Propertieds*(2005) 5 BLLR 479(lc); *Ntasabov Real Security* CC (2004) I BLLR 58(LC). On the distinction between damages and compensation in terms of the EEA as opposed to the LRA, see *SAA(Pty)Ltd V GJJVV* at para 74-80) see more Cooper op cit note 1178 at 719.
[1449] EEA s 50(2).

The EEA sets no limit on the amount of compensation which may be ordered beyond the requirement that any remedy must be 'just and equitable'.[1450] Furthermore, in the case of unfair dismissal, the remedies include: reinstatement; re-employment; or monetary compensation.[1451]Section 194 of the LRA imposes a cap on the amount of compensation that the Labour Court or the arbitrator may order.[1452] Section 195 further provides that any order or award of compensation will not affect or substitute any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

The Constitutional Court in *Hoffmann V SAA*[1453] provides that when determining a remedy in unfair discrimination cases, objectives that can be pursued include addressing the wrong, deterring future violation, and ensuring fairness to all those who might be affected by the relief.[1454]

XI. CONCLUSION

The South African legal framework provides wide-ranging antidiscrimination protection. It includes all the forms of discrimination specified in the CRPD, and relevant provisions are drafted to recognise multiple and intersectional discrimination and arguably even discrimination by association. It provides a wide range of remedies – from individualised remedies to positive duties-imposed employer to address structural discrimination. Moreover, it protects employees with psychosocial disabilities specifically, and to some extent employees who fail to qualify as persons with disabilities. However, in some instances, the medicalised approach to disability may cause many persons with psychosocial conditions not to qualify as disabled, which impacts on the burden of proof they have to satisfy and may be fatal to their claims.

[1450] *Whitehead V Woolworths Pty Ltd [1999] 8 BLLR 862 9 (LC),* Cooper op cit note 1178 at 721; s 50 (2) (a)
[1451] Section 193.
[1452] Example, the compensation awarded to an employee whose dismissal is automatically unfair should not be more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal- see section 194(3).
[1453] [2000] 12 BLLR 1365 (CC) at para 45.
[1454] Ibid.

CHAPTER 6. ANALYSIS OF KENYA AND SOUTH AFRICA'S COMPLIANCE WITH ARTICLE 27(1)(A) OF THE CRPD

I. INTRODUCTION

In the preceding two chapters I examined the available antidiscrimination legal frameworks in both Kenya and South Africa that protects employees with psychosocial disabilities and conditions in employment. This chapter focuses on whether the laws in these two jurisdictions comply with art 27(1)(a) of the CRPD, which was contextualised and analysed in chapter 3. This compliance audit will focus on the following aspects: (a) the definitions of disability to determine which employees with psychosocial disabilities are protected; (b) the key elements that are used to determine if discrimination has taken place; (c) defences to discrimination claims and; (d) the available remedies, and access to these as part of a comprehensive antidiscrimination framework.

II. DEFINITIONS OF DISABILITY AND PURPOSES OF ANTIDISCRIMINATION LAW AT CRPD LEVEL

The definition of who qualifies as persons with disabilities, is of particular relevance to this research because in order for employees with psychosocial conditions to be a protected in terms of the CRPD, they must first qualify as persons with a disability in terms of that Convention.[1455]

There is no single definition of disability.[1456] Usually, the legal definition of disability varies according to legal context and the intended purpose of the law.[1457] Indeed, the purpose of a statute not only influences legislative definitions, but also case law that develop around the terms.[1458] A social welfare law providing personal assistance benefits, for example may target a different group of disabled persons than that of an antidiscrimination law.[1459] This is because the distribution of social benefits often adopts a needs-based approach in order to identify those who are most in need.[1460]It is based on the assumption of need and helplessness.[1461] Definitions of disability provide parameters that determine one's eligibility

[1455] Art 1 of the CRPD
[1456] Rosalind Lake *Discrimination Against People with Mental Health Problems in the Workplace: A Comparative Analysis* (Unpublished LLM thesis, Rhodes University, 2005),
[1457] Theresia Degener 'The Definition of Disability in German and Foreign Discrimination Law' (2006) 26(2) *Disability Studies Quarterly Spring* 2006, available at http://www.dsq-sds.org, accessed on 29 March 2021; Marguerite Schneider & Motsoakgomo I 'Papi' Nkoli 'Affirmative action and disability in South' (2011) 77(1) *Transformation Critical Perspectives on Southern Africa, transformation* 90 at 91; LCO(The Law Commission of Ontario) June 2009 at 10 and 1.
[1458] LCO (Law Commission of Ontario) 'Preliminary Consultation Paper: Approaches to Defining Disability' June 2009 at 11.
[1459] Degener op cit note 1457.
[1460] Ibid
[1461] Ibid.

for programs and services, and in this case eligibility for anti-discrimination protection in employment. Hence because definitions play such a vital role, they need to be clear and precise.[1462]

In contrast, equal treatment as a right, not a benefit, should be accessible to all persons potentially affected by discrimination, and not only those in need.[1463] Therefore, unlike a social welfare law that provides disability related benefits that might target only a small group of persons with disability, an antidiscrimination law covers a much larger group and, hence, require a wide-ranging definition of disability.[1464] This is because not only severely disabled persons are affected by disability-based discrimination.[1465]

Moreover, generally, the role of antidiscrimination is to redress structural disadvantage and to counterbalance the underlying power inequalities in society.[1466] Hence, because unequal and unfavourable treatment is rooted in stereotypes and stigma,[1467] antidiscrimination law should challenge societal stereotypes and stigma in order to reflect the social realities of disability,[1468] This is because on account of prejudice, other people can treat a person as though they have or had a disability, regardless of any actual physical or mental impairment.[1469] Therefore, if the objective of antidiscrimination law is to eliminate discrimination, then, to be effective, the definition of disability must challenge the stigma, misconceptions, stereotyping and indifferent social and physical arrangements.[1470]

This is particularly important for persons with psychosocial conditions, as they face stigma and prejudice, and in the context of employment often face presumptions about their inability to work, often more so than persons with other types of impairments or conditions.[1471] Further, it does not help that in the African context discussions about psychosocial conditions are often taboo.[1472]

[1462] LCO op cit note 1458 at 11.
[1463] Degener op cit note 1457.
[1464] Ibid.
[1465]Ibid.
[1466] Degener op cit note 1457.
[1467] Ibid.
[1468]. Ibid; Ngwena & Pretorius op cit note 1253 at 1824; Ngwena & Pretorius 1220 at 763.
[1469]. Ngwena & Pretorius op cit note 1253 at 1824
[1470] Maureen Mswela 'Does Albinism Fit Within the Legal Definition of Disability in the Employment Context? A Comparative Analysis of the Judicial Interpretation of Disability under the SA and the US Non-Discrimination Laws' (2018) 21 *PER / PELJ* 2018 1 at 9.
[1471] See chapter 1, heading 1(b).
[1472] Ibid.

In order for Kenya and South African to protect persons with psychosocial disabilities from discrimination in the workplace, in line with art 27(1)(a) of the CRPD, the definition of disability in both states should be in compliance with the definition of disability in the CRPD, as read within the context of the overall purpose of the convention.[1473] The CRPD defines its purpose as '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.'[1474] Further, the scope of discrimination in the CRPD is wide and prohibits includes all forms of discrimination.[1475] Basically, state parties should adopt a broad, flexible and inclusive definition of disability in order to facilitate the purposes of the CRPD.[1476] A definition that 'includes those who have long-term physical, including psychosocial, intellectual or sensory impairments, and should include past, present, future and presumed disabilities, as well as persons associated with persons with disabilities.'[1477]Lake argues that a narrow definition of disability that excludes less severely disabled persons, as well as those with a past, future or imputed impairment is not only unjustifiable, but distorts the reality of disability discrimination and fails to capture the fact that 'it is not an individual feature of the disabled person which triggers discrimination, but the reaction of society towards such an existing or assumed feature.'[1478] The result is that it excludes deserving persons from the provisions of the convention.[1479] Furthermore, the benefits of a broad definition like the one adopted by the CRPD means that the focus of discrimination cases will be on the actions of the alleged discriminator, and not on the person bringing the action.[1480] It also ensures that legal actions do not flounder at the threshold because of a technical decision about who qualifies as a person with disability.[1481]

However, while a broad definition comes with many benefits, it should also not be so wide that it has the potential to 'open the floodgates' for malingering persons desirous of

[1473] See chapter 3 heading 1V.
[1474] CRPD art. 2.
[1475] CRPD art 2 and 5. See chapter 3 heading III.
[1476] See chapter 3, heading IV.
[1477] General comment No. 6 para 73(b).
[1478] Rosalind Lake *Discrimination Against people with Mental Health Problems in the workplace: a comparative analysis* (Unpublished LLM thesis, Rhodes University, 2005) 41.
[1479] Ibid.
[1480] Lee Ann Basser & Melinda Jones 'The Disability Discrimination Act 1992 (CTH): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26 (2) *Melb. U. L. Rev*254 at 261.
[1481] Ibid.

claiming that they have been discriminated against.[1482] If this were to occur it would undermine the experience of disability and bring those who really are prejudiced by disability into disrepute.[1483] It has been argued by disability rights activists that for legislation to have impact, the definition should be broad enough to encompass both those with a medically recognised disability, and those whom society stigmatise as 'disabled' and discriminate against as a result.[1484]

In my opinion, the CRPD's conception of disability, including the committee's comments, strike an appropriate balance. It creates boundaries in that not anyone can claim protection, yet it is generous enough to recognise presumed, past and future disability as grounds upon which persons may experience discrimination.

a) Defining disability in South African antidiscrimination laws

As highlighted in the previous chapters, both the Kenyan and South African antidiscrimination legal frameworks adopt a medical understanding in their definitions of disability.[1485] South Africa adopts a functional limitations approach,[1486] which, although to some extent recognises that disability may be influenced by social factors, firmly maintains the role of impairment in causing disability.[1487] The courts in South Africa also adopt a narrow, restrictive approach when it comes to interpreting the definition of disability.[1488] This approach is based on a defective presumption that disability discrimination is invoked only by a certain degree of impairment, the reverse as it is often the result of treatment, attitudes and social structures.[1489] Often the impairment of the victim does not matter at all, except for being a vent for prejudice and stigma.[1490] The EEA fails to recognise this.

A narrow definition can lead to the rejection of many claims at the preliminary stages. Furthermore, the fact that psychosocial conditions are frequently misunderstood, episodic, invisible and not well identified, lowers the chances of such conditions qualifying as disabilities, going by the current definition of disability as provided in the EEA and Disability

[1482] Jennifer Hamilton 'Disability' and 'Discrimination' in the Context of Disability Discrimination Legislation: The UK and Australian Acts Compared' (2000) 4 *International Journal of Discrimination and the Law* 203 at 213.
[1483] Hamilton op cit note 1445 at 213.
[1484] Ibid.
[1485] See chapter 5, heading IV (a).
[1486] Ibid.
[1487] Ibid.
[1488] Ibid,
[1489] Degener op cit note 1457.
[1490] Ibid.

Code.[1491] As a result, persons with psychosocial conditions under the South African legal framework have a better chance of qualifying for antidiscrimination protection on an arbitrary ground rather than on the basis of disability.

The advantage of psychosocial conditions being treated as arbitrary grounds is that people who don't regard themselves as disabled don't have to assume that status. However, it also means that there is no presumption that differentiation on that ground constitutes discrimination and the claimant has to prove that the differentiation has the potential to impair their fundamental human dignity. There is also no presumption of unfairness.[1492] This does not mean that the claimant will be unable to win a case. There are examples of cases in which conditions were not recognised as disabilities, but the claimants still succeeded in proving unfair discrimination.[1493] Also, as will be highlighted below, employees who claim discrimination on arbitrary grounds, as opposed to disability, may be faced with heavier evidentiary burden when it comes to proving discrimination.[1494]

This is not in compliance with the CRPD, which protects persons with psychosocial conditions as persons with disabilities specifically.[1495] Specific advantages flow from recognition as persons with disabilities. It will be easier for them to claim protection in terms the CRPD, parts of which were drafted with specific rights for persons with psychosocial conditions in mind. It also means they will not enjoy the benefit of group protection under a ground that is more developed and recognised, and garners more negotiating influence.[1496]

b) Defining disability in Kenyan antidiscrimination laws

The Kenyan legal framework, unlike its South African counterpart, adopts three definitions of disability in the Constitution, PWD Act and Employment Act, respectively.[1497] However, the applicable definition in employment disability discrimination is the one found in the PWD Act.[1498] Notably, the definition of disability found in the Act is not only restrictive because it

[1491] See chapter 2, heading IV; and chapter 5, heading IV (a).
[1492] chapter 5, heading IV (b).
[1493] *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 (LAC) para 26; *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 37ILJ 449(LC) para 47; *IMATU v City of Cape Town,* [2005] 10 BLLR 1084 (LC); *Hoffmann v South African Airways* 2001 (1) SA 1 para 40.
[1494] See chapter 5, heading IX.
[1495] See chapter 3, heading II.
[1496] Ibid.
[1497] See chapter 4, heading VI.
[1498] Ibid.

adopts a medical model of disability,[1499] but because it serves a variety of purposes which contrast.[1500] The definition of disability under the PWD Act is not only used by the NCWPD[1501] to register persons with disabilities for social welfare purposes, but also for antidiscrimination purposes and for claiming other rights.[1502] As has been highlighted above, the Act has erred in its use of one definition of disability for both social welfare law and antidiscrimination purposes.[1503] The definition of disability in the PWD Act is not in compliance with the CRPD and constitutes an unnecessary barrier for employees with psychosocial conditions who seek antidiscrimination protection in employment.

c) Critique of definitions in both jurisdictions

i) Past, future and presumed disabilities

Although the CRPD requires the recognition of past, present, future and presumed disabilities, both Kenya and South Africa are not fully compliant. Kenya can be said to recognise presumed disabilities as it recognises perceived disabilities, but it does not recognise past and future disabilities**.** Consequently, an employee who had a psychosocial disability in the past may not be considered eligible for protection on the basis of disability. This approach unfortunately fails to make room for the consideration of 'potentially long-term social consequences of disability as well as its current effects.'[1504]

South African law does not recognise presumed disabilities explicitly, but the formulation of its prohibitions of discrimination in the Constitution, as well as the EEA, arguably leave room for presumed disabilities to be included. This is because persons are prohibited from discriminating unfairly on the "basis of certain grounds." Hence, the requirement is not that the complainant must have a disability at the relevant times. It can also be argued that South African law provides protection for past and future disability, as it recognises recurring conditions in its definition of disability.[1505]

[1499] Ibid.
[1500] Ibid.
[1501] Ibid.
[1502] Ibid.
[1503] Degener op cit note 1457.
[1504] Townshend-Smith cited by Lake op cit note 1478 and 60.
[1505] Disability Code 5.4.2(ii); also see Chapter 5, heading V(c).

ii) Adherence to medical model of disability

Both South Africa and Kenya adopt a medical approach to disability. As a result, determinations about eligibility for antidiscrimination protection are often left to the discretion of individual medical professionals. While South Africa requires that a mental impairment must be 'clinically recognised',[1506] in Kenya a 'medical report'[1507] is required for the purposes of identifying or confirming disability. [1508] Basically, they require medical practitioners to certify that the person in question has the asserted limitation or impairment. [1509]

The medicalisation of the definition of disability creates profound challenges for persons with psychosocial impairments or conditions in the two jurisdictions. It elevates medical professionals to be the gatekeepers of who should qualify for protection from barriers created by society, as medical diagnoses are key to accessing rights and disability-related supports and benefits.[1510] These medicalised definitions also create challenges which may be unique to low and middle -income African countries like Kenya and South Africa. Access to psychiatric or psychological care in both Kenya and South Africa is a luxury, which means that the vast majority of people may not have access to the formal diagnoses upon which their protection by antidiscrimination laws rest.

There is a shortage of psychiatrists in low- and middle-income countries who are required to provide a mental health diagnosis.[1511] In South Africa for example, a national survey conducted found that there is on average 0.31 public sector psychiatrists per 100,000 uninsured population.[1512] This is low, but the number is even lower in Kenya where the psychiatrist: population ratio is 1 per 500,000 population.[1513] This is in contrast to countries like the United States and England that have roughly 200 times more psychiatrists than most countries in Africa.[1514] Furthermore, in both Kenya and South Africa the majority of

[1506] Chapter 5, heading IV(i).
[1507] Chapter 4, heading VI (a)ii.
[1508] Ibid.
[1509] LCO op cit note 1458 at 17.
[1510] Ibid.
[1511] Steven J. Hoffman & Lathika Sritharan 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada' (2016) 16(28) *BMC International Health and Human Rights* 1- at 2; IOM (Institute of Medicine) 'Mental, Neurological, and substance use disorders in Sub-Saharan Africa: Reducing the Treatment Gap, Improving Quality of Care: Summary of a Joint Workshop' (2010) xv.
[1512] Sumaiyah Docrat & Crick Lund et al 'An Evaluation of the Health System Costs of Mental Health Services and Programmes in South Africa' October 2019 at 46.
[1513] Office of the Auditor General 'Performance Audit Report on Provision of Mental Healthcare Services in Kenya' December 2012 at 15.
[1514] IOM (Institute of Medicine) 'Mental, Neurological, and substance use disorders in Sub-Saharan Africa: Reducing the Treatment Gap, Improving Quality of Care: Summary of a Joint Workshop' (2010) 2.

psychiatrists work in or near major or urban cities.[1515] On top of that health professionals (psychiatrists in this case) in both States are increasingly choosing to work in the private sector.[1516] Given the low absolute levels of psychiatrists currently working in the public sector in both countries, mental illness remains under reported and underdiagnosed.[1517] In South Africa for example, it is estimated that 75 per cent of people with a mental disorder do not receive the mental health services they need.[1518]

Another barrier, is that diagnosis is costly. In Kenya, in both public and the private sector, the cost of diagnostic testing acts as a deterrent for patients. [1519] Persons with psychosocial conditions also experience everything from incorrect diagnosis,[1520] lack of clear diagnosis, to diagnosis differing over time,[1521] and this is not only costly but it may discourage persons with psychosocial conditions or impairment from seeking medical diagnosis.

In South Africa, according to the South African Depression and Anxiety Group, compared to a global average of 35 per cent, 43 per cent of South Africans with mood disorders only received a correct diagnosis after multiple undiagnosed visits to four or more doctors, each visit incurring noticeable expenditure on the part of the mental health care user and medical aid.[1522] It is estimated that, on average, in excess of R 22,000 may be spent in attempts to obtain a suitable diagnosis and access treatment.[1523] It does not help that psychiatric experts often disagree about the exact diagnosis, [1524] or that there is the issue of which diagnostic

[1515] David Kiima & Rachel Jenkins 'Mental health policy in Kenya -an integrated approach to scaling up equitable care for poor populations' (2010) 4 *Int J Ment Health Syst* 1 at 4; Sumaiyah Docrat & Donela Besada et al 'Mental health system costs, resources and constraints in South Africa: a national survey' (2019) 34(9) *Health Policy and Planning* 706 at 716.
[1516] IOM op cit note 1514 at 13.
[1517] JC Meyer & M Matlala et al 'Mental health care - a public health priority in South Africa' (2019) 61(5) *South African Family Practice* 25-29 at 25; Docrat & Besada op cit note 1479 at 716; National Academies of Sciences Engineering, and Medicine 'Providing sustainable mental and neurological health care in Ghana and Kenya: Workshop summary' (2016) 1 at 17; IOM op cit note 1514 at 2; Kiima &Jenkins op cit note 1515; Natalie Drew & Michelle Funk 'Human rights violations of people with mental and psychosocial disabilities: an unresolved global crisis' (2011) 378 *Lancet* 1664 at 1666 and 1667.
[1518]Mncedisi Michael Willie 'On Depression and Mental Disorder in South Africa' (2017) 3(4) *Medical & Clinical Reviews* (*Med Clin Rev)* at 1.
[1519] Ibid note 17.
[1520]Kristina Engwall 'How disability is conceptualized in individual discrimination complaints' (2016) 16(4) *International Journal of Discrimination and the Law* 214 at 222.
[1521] Hamilton op cit note 1482 at 212.
[1522] *SADAG* **(**The South African Depression and Anxiety **G**roup) **'**Early Diagnosis of Mental Illness Key to Saving Costs' available at http://www.sadag.org/index.php?option=com_content&view=article&id=460:early-diagnosis-of-mental-illness&catid=74&Itemid=132, accessed in 13 March 2021.
[1523] Ibid.
[1524] Lake op cit note 1478 at 50; See chapter 3, heading IV(a).

instrument is applicable. In South Africa both the DSM-V[1525] and ICD-11 are used.[1526] On the other hand in Kenya there is a lack of clarity on the matter, so much so that it has been argued that there is a pressing need for consistent, evidence-based guidelines for the diagnosis and treatment of mental health, neurological, and substance use (MNS) disorders.[1527] It also does not help matters that insurance companies are not always keen to provide medical health insurance. A study done in Kenya found that employees with psychosocial conditions faced challenges from insurance companies that refused to allow them to take out a policy.[1528]

Medicalised definitions of disability also do not take account of the reality that in both Kenya and South Africa traditional healers play an important role in the management of mental illness. [1529] An estimated 60–80 per cent of individuals with mental disorders in developing countries first seek care through traditional healers.[1530] In Kenya, research shows that both traditional and faith healers are often the first line of contact for individuals suffering from mental disorders.[1531] This is often motivated by the fact that drugs that are needed are either in short supply or are too costly.[1532] In the end, the patients and their families prefer to stay at home or relying on traditional healers for health care.[1533] Hence, a diagnosis in terms of 'Western' diagnostic systems is not a reality for most.

The diagnosis of psychosocial conditions in South Africa is further hampered by the historical racist past of psychiatry.[1534] Notably, according to national policy, health services were divided along racial lines.[1535] Of all the medical specialities, psychiatry and psychology were the most criticised by the international community.[1536] As a result, the experiences of people with mental illnesses in South Africa is characterised by levels of inequality and

[1525] See chapter 5, heading IV(a).
[1526] Ibid.
[1527] National Academies of Sciences Engineering, and Medicine 'Providing sustainable mental and neurological health care in Ghana and Kenya: Workshop summary' (2016) 1 at 17.
[1528] Ikenna D. Ebuenyi & Mònica Guxens et al 'Employability of Persons with Mental Disability: Understanding Lived Experiences in Kenya' (2019) 10(539) *Front Psychiatry* 1 at 6.
[1529] IOM op cit note 1514 at 2.
[1530] Ibid.
[1531] Victoria N. Mutiso & Christine W. Musyimi et al 'Perceived impacts as narrated by service users and providers on practice, policy and mental health system following the implementation of the mhGAP-IG using the TEAM model in a rural setting in Makueni County, Kenya: a qualitative approach' (2019) 13(56) *(Int J Ment Health Syst)* 1 at 2.
[1532] IOM op cit note 1514 at 2.
[1533] Ibid
[1534] M Swanepoel 'Human rights that influence the mentally ill patient in south African medical law: A discussion of sections 9; 27; 30 and 31 of the constitution' (2011) 14(7) *PER / PELJ* at 1 and 2.
[1535] Ibid.
[1536] Ibid at 2.

discrimination;[1537] it is marred with unequal access to resources.[1538] Further, the 2018 Life Esidemeni mental health scandal of is an illustration of how far South Africa still has to go in protecting the rights of mental health care users.[1539]

From the aforementioned contextual factors, it is apparent that the criterion that conditions should be medically diagnosed before an employee with a psychosocial condition can qualify as disabled for antidiscrimination protection purposes constitutes a major barrier for applicants and employees with psychosocial conditions from claiming antidiscrimination protection in both Kenya and South Africa. This is contrary to CRPD. Indeed, under the convention one does not have to have a clinically recognised impairment to qualify as disabled.[1540] This is because the CRPD, unlike Kenya and South Africa, adopts a broad definition of disability. Indeed, a broad definition minimises the need to involve medical and other professionals in claims of discrimination.[1541] This would benefit persons with psychosocial condition or disabilities.

Many employees with psychosocial conditions in both Kenya and South Africa may likely fail to qualify as persons with disabilities, and hence will not benefit from the protection specifically provided for persons with disabilities, as is required by the CRPD.[1542] Nonetheless, in both states employees with psychosocial conditions who do not qualify as disabled can make a claim under other protected grounds. In Kenya they can seek protection under health status or mental status or unspecified ground,[1543] while in South Africa they can claim under arbitrary ground.[1544] Although this seems to provide some reprieve for employees with psychosocial conditions who may not qualify as disabled or who through personal choice do not want to identify as disabled, it comes with detrimental implications, which will be discussed in the next section.

[1537]Ibid.
[1538] Ibid.
[1539] Between October 2015 and June 2016, 1,711 people were relocated from mental health facilities operated by long-term provider Life Esidimeni in the South African province of Gauteng to alternative facilities managed by multiple nongovernmental organizations (NGOs), and this resulted in the death of 144 mental health care patients and the exposure of 1,418 others to torture, trauma, and poor health outcomes. The state was unable to ascertain the whereabouts of a further 44 patients. See Ebenezer Durojaye & Daphine Kabagange Agaba 'Contribution of the Health Ombud to Accountability: The Life Esidimeni Tragedy in South Africa' (2018) 20(2) Health *and Human Rights Journal* at 161.
[1540] See chapter 3, heading IV.
[1541] Lake op cit note 1 at 88.
[1542] See chapter 4 heading VI (a), heading VI, and chapter 5 1V(a), heading.
[1543] Chapter 4, heading VI (b, c, and d).
[1544] Chapter 5, heading IV(b).

III. THE DEFINITION OF DISCRIMINATION

a) Motive

The CRPD Committee[1545]is quite clear that motive should never be a requirement for the determination of whether discrimination took place or not.[1546] It emphasises the fact that the focus of inquiry should be on the discriminatory act or omission.[1547]The difficulty with allowing motive to be relevant to the issue of whether there has been discrimination, is that employers will rarely admit that a person's disability or condition is the reason for the different treatment, but will try and put forward some alternative explanation.[1548] Hamilton states that, if motive is allowed to be relevant in determining whether there has been discrimination, 'there is a real risk that less favourable treatment based upon, for example, stereotypical assumptions about what disabled persons can and cannot do will be unchallengeable (provided, of course, the court is satisfied that those assumptions are genuinely held).'[1549] The result of doing away with motive as a determining element of discrimination is that if an employer genuinely, but erroneously, believes a person with a disability is incompetent, that employer will not be guilty of discrimination.[1550] Consequently, if motive is requirement, then an employer who differentiates against an employee with a psychosocial condition because of his personal and misplaced assumption that persons with psychosocial conditions are generally unreliable and lazy,[1551] may get away with it because they genuinely held that assumption no matter how inappropriate. Notably, when it comes to motive, both Kenya and South Africa are rightfully in compliance with the CRPD.

b) Differentiation

As has been highlighted,[1552] the definition of discrimination in general often adopts a comparative approach. This is also evident in the definition of discrimination found in the CRPD and in Kenyan and South African laws.[1553] They all rely upon comparisons of treatment and are founded on the principle that all persons have the right to equal treatment, to be treated the same way as others are treated.[1554] Hence, in order to prove that differentiation took place,

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[1545] See footnote 114; chapter 3, heading III.
[1546] See chapter 3, heading III.
[1547] Hamilton op cit note 1482 at 219.
[1548] Ibid note 218.
[1549] Ibid.
[1550] Ibid.
[1551]See chapter 1, heading I.
[1552] See chapter 3, heading V(b).
[1553] Ibid; See chapter 4, heading VII(b); and chapter 5, heading VII(a) i.
[1554] Hamilton op cit note 1478 at 216.

the implication is that the use of a comparator is often adopted.[1555] However, identifying the appropriate comparator (real or hypothetical) but who in any event must be in materially the same circumstances as the complainant, often proves to be problematic in practice.[1556] This is applicable not just in discrimination case law generally, but in disability discrimination claims specifically. In fact, the use of a comparator can prevent claimants from making a successful disability discrimination claim.[1557]

i) Comparators and psychosocial disabilities

The definition of discrimination found in the CRPD requires "less favourable" treatment when it comes to discrimination,[1558] and this necessarily entails making comparisons.[1559] Nonetheless, when one considers the communication received by the CRPD Committee,[1560] it seems to suggest a different focus. CRPD case law seems to show that the Committee does not put any emphasis on a comparator and barely mentions the use of a comparator and instead seems to adopt the test of "unfavourable treatment" which does not require the use of a comparator. [1561] It instead chooses to focus on the purposes of the CRPD.[1562] Indeed, it would be absurd for the Committee to focus on a comparator, or lack thereof, and not on the elimination of all forms of discrimination. Accordingly, Crasnow and Butlin argue that when it comes to the use of comparators, there needs to be a greater attention on the CRPD Committee's approach, whose focus is on accessibility and the removal of societal barriers,[1563] and not necessarily on identifying an adequate comparator.[1564]

The identification of an appropriate comparator is so problematic that it has been identified as one of the biggest challenges in disability discrimination.[1565]Although there are many challenges created by the use of a comparator in antidiscrimination claims in general, it

[1555]See chapter 3, heading IV(b).
[1556] Hamilton op cit note 1478 at 216.
[1557] See chapter 3, heading IV(b).
[1558] Ibid.
[1559] Ibid;(P-RR-LADI) Working Group on legislation to counter discrimination against persons with disabilities (in co-operation with Heinz-Dietrich Steinmeyer) 'Integration of people, with disabilities, legislation to counter discrimination against persons with disabilities' October 2000 at 1 at 58.
[1560] *Jungelin v Sweden* CRPD/C/12/D/5/2011; *Liliane Gröninger et al. vs. Germany*, CRPD/C/D/2/2010; *Marie-Louise Jungelin V Sweden* CRPD/C/12/D/5/2011; *Ms. S.C. vs. Brazil* CRPD/C/12/D/10/2013; *Y v. United Republic of Tanzania* CRPD/C/20/DR/23/2014.
[1561] Colin Campbell & Dale Smith 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' (2015) 43 Federal *Law Review (Fed. L. Rev.)* 91 at 93.
[1562] See above heading I; Art 1 of the CRPD.
[1563] Rachel Crasnow & Sarah Fraser Butlin 'Disabled Compared to Whom? An Analysis of the Current Jurisprudence on the Appropriate Comparator Under the UK Equality Act's Reasonable Adjustments Duty' (2015) 15 *The Equal Rights Review* 75 at 86.
[1564] See chapter 3, heading IV(b).
[1565] Crasnow and op cit note 1563 at 83.

raises particular difficulties in cases of disability discrimination. [1566] This is because very often persons with disabilities will not, by virtue of their disability, be in a similar position to non-disabled persons. This is further amplified by the fact that disability is not homogeneous and as such varies in types and degrees of severity. [1567]

Lake argues that the difficulty with the use of the comparator is that it applies the traditional, generic antidiscrimination legislation formula to the unique problem of disability discrimination.[1568] Similarly, Hamilton argues that the use of a comparator for direct discrimination was initially established to combat sex discrimination, and does not seem appropriate for disability discrimination.[1569]Tyler notes that this is because where there are real differences between the persons compared, the comparison will be impossible.[1570] Furthermore, it is important to note that the use of a comparator is not only challenging when it comes to direct discrimination, but also in indirect discrimination. [1571]

As has been highlighted in previous chapters, in both Kenya and South Africa it is not clear if the courts adopt the use of a comparator or not in the determination of whether discrimination took place. In Kenya, for example, although some cases have emphasised the necessity of using a comparator in order to determine if discrimination took place, in other cases, specifically case involving disability discrimination, the courts seemed to put less emphasis on it and adopt the CRPD's approach.[1572]

In South Africa the question of whether the courts adopt the use of a comparator is not clear. Although the role of comparator is magnified in some cases, in others it is barely mentioned.[1573] Nevertheless, worth noting, is that the jurisprudence of the South African courts has indicated that the use of a comparator is not necessary in all instances of alleged discrimination under the Constitution.[1574] The same position has been held by the labour courts. This approach is consistent what is required by the CRPD.

[1566]Ibid; P-RR-LADI op cit note 1559 at 58
[1567] P-RR-LADI op cit 1559 at 58.
[1568] Lake op cit note 1478 at 90.
[1569] Hamilton op cit note 1482 at 219.
[1570] Lake op cit note 1478 at 90.
[1571] See Chapter 3, heading V(b).
[1572] See chapter 4, heading VII(b)
[1573] See chapter 5, heading VII(a) i.
[1574]See chapter 5, heading IX.

IV. BURDEN OF PROOF

The question of who bears the burden of proof in discrimination claims has been especially difficult.[1575] Generally, in civil litigation, the burden is normally on the claimant to establish the facts they allege.[1576] The choice of who bears the burden of proof in employment discrimination cases often determines the outcome of litigation.[1577] If complainants are required to bear too great a burden, not only will they fail in their attempts, but their lack of success may also deter others from also coming forward with a discrimination claim .[1578] As a result, there is a growing consensus amongst the international community that victims of discrimination should not be subjected to an undue burden when establishing their complaint.[1579]

Proving discrimination can be divided into two broad stages. In the first stage the complainant must convince the court that they suffered harm because they were treated less favourably, which may require a comparator depending on the jurisdiction in question.[1580] Once the claimant is successful in establishing differentiation (direct or indirect), the basis of the claim has been laid.[1581] The next stage is to determine whether the differentiation amounts to discrimination.[1582] A causal relationship between the differentiation and a specified ground (disability), or other protected ground (arbitrary ground, mental or health status) must be established during this stage.[1583] An employee with a psychosocial impairment or condition must show that they were treated less favourably because of disability or other protected ground.[1584]

According to Ringelheim, and Dupper and Garbers this causal link between the less favourable treatment and the protected ground is a major challenge facing complainants who

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[1575]Panos Kapotas 'Commentary: Reversing the Burden of Proof in Discrimination Cases: A Losing Battle?' (2017) 3 *International Labour Rights Case Law* 442 at 443; The meaning of burden of proof is defined in chapter 4, heading VII.

[1576] Julie Ringelheim 'The Burden of Proof in Antidiscrimination Proceedings. A Focus on Belgium, France and Ireland' (2019) 2 *European Equality Law Review* at 49; Magdalena Jankowska-Gilberg & Dagmara Rajska 'Handbook on European non-discrimination law – 2018 edition' 21 March 2018 at 231.

[1577] Shari Engels 'Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom' (1994) 15(3) Comparative Labour Law Journal, 340-370 at 340.

[1578] Shari Engels op cit note 1578 at 340.

[1579] Dominique Allen 'Reducing the Burden of Proving Discrimination in Australia; (2009) 31 Sydney law review 580 at 581 and 598.

[1580] Ringelheim, op cit note 1576 at 52.

[1581] Ngwena & Pretorius op cit note 1253 at 1830.

[1582] Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys (2019) 40 ILJ 1159 (CCMA,) para 26.

[1583] Ngwena & Pretorius op cit note 1217 at 1830; Ringelheim op cit note 1576 at 52.

[1584] Hamilton op cit note 1482 at 217.

allege discrimination.[1585] Ringelheim argues that this is fuelled by the fact that discrimination leaves no material traces[1586] and that even where documents that could constitute evidence of the discriminatory character of a measure do exist, they are often in the hands of the discriminator, the employer .[1587] In addition, if there are witnesses, Lustgarten says, 'they are usually what he terms 'interested parties', such as employees of the respondent, so they may not be interested in testifying against the respondent and jeopardising their own situation.'[1588] Hence, Kapotas states that requiring 'victims of discrimination to produce hard evidence of what was discussed or decided behind closed doors or in internal memos and confidential emails, is bound to render the protection of equality legislation little more than dead letter,'[1589] and almost akin to giving a free pass to discriminatory conduct.[1590]

Hence, an employee with a psychosocial condition who bears a full burden of proof will face an uphill task in successfully establishing discrimination, as it will be difficult to discharge their burden.[1591] Farkas and O'Farrell argue that it is at the point of proving a causal link when complainants are most in need of effective judicial protection.[1592] Hence, the standard rule on the burden of proof in civil litigation cases works against the complainant, as it ignores the inequality between the parties in accessing the proof that typically characterises discrimination cases,[1593] and as a result, jeopardises the effectiveness of the protection against discrimination.[1594]

a) Reversal or shift of the burden of proof

To help counteract the effects of the standard rule on the burden of proof in civil litigation, the Committee[1595] advocates for procedural rules to shift the burden of proof in civil procedures from the claimant to the respondent in cases where there are "facts from which it may be

[1585] Ockert Dupper and Christoph Garbers 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' (2012) 1 *Acta Juridica* 244 at 247; Ringelheim op cit note 1576 at 52.
[1586] Ringelheim at 1576 at 49.
[1587] Ibid; Dupper and Garbers op cit note 1585 at 247.
[1588] Laurence Lustgarten 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212 at 213; Allen op cit note 1579 at 586.
[1589] Kapotas op cit note 1575 at 443
[1590] Ibid.3
[1591] Allen op cit note 1579 at 581; Dominique Allen '*Reconsidering Australia's anti-discrimination laws 2013*' (Unpublished paper presented at Berkeley Comparative Anti-Discrimination Law Conference, April 2013) 1-13 at 3; Peter le Roux & Christoph Garbers 'Employment Discrimination law into the Future' 2018 (2) *StellLR* 237 - 269 at 263.
[1592] Lilla Farkas and Orlagh O'Farrell 'Reversing the burden of proof: Practical dilemmas at the European and national level' European Network of Legal Experts in the Non-discrimination' 17 April 2015 at 7.
[1593] Ringelheim at 1576 at 49.
[1594] Allen op cit note 1591 at 4; Ringelheim, op cit note 1576 at 49.
[1595] See Chapter 3, heading III.

presumed" that there has been discrimination.[1596] Then, once a presumption of discrimination has been established, that the onus shifts to the respondent, who has the burden of demonstrating that no discrimination has occurred.[1597] The potential effects of this provision has been the subject of much controversy. There are those who believe that the shift does not lighten the burden of proof on the claimant.[1598] Allen argues that the shift in the burden of proof only addresses the complainant's inability to explain the respondent's behaviour or to establish the unreasonableness of the respondent's implementation of a requirement or condition,[1599] and does not address the difficulties that the complainant often has with reaching the prima facie threshold, or automatically reduce the evidentiary burden.[1600] A similar position is taken by Dupper and Garbers.[1601]

However, Ringelheim, Farkas and O'Farrell take a contrary position in discussions on EU antidiscrimination law.[1602] Ringelheim, commenting on the shift of burden adopted in the EU, argues that although the shift in the burden of proof does not mean that complainants in discrimination cases are exempt from providing evidence of their claims,[1603] its purposes is to lighten the burden of proof weighing on claimants in discrimination cases.[1604] Correspondingly, Farkas and O'Farrell argue that it alleviates the burden on plaintiffs to show a clear causal link between the protected ground and the maltreatment. [1605]

Although it is clear that the burden of proof should be alleviated, questions of what facts will be sufficient to prove the casual link in a manner that creates a presumption of discrimination, and therefore shift the onus onto the respondent is not dealt with by the Committee.[1606] EU law may offer some guidance. According to all EU antidiscrimination directives, a claimant has to proof a prima facie case in order to shift the burden of proof. [1607] Nonetheless, what amounts as a prima facie case of discrimination sufficient to shift the burden seems to be subject to diverse interpretations and modes of application in different EU Member

[1596] General Comment No.6 para 73(i).
[1597] Ringelheim op cit note 1576 at 55; Allen op cit note 1591 at 4.
[1598] Difference between standard or proof and burden of proof See chapter 4, heading VII.
[1599] Allen op cit note 1579 at 598, 581 and 604.
[1600] Ibid.
[1601] Dupper and Christoph Garbers op cit note 1585 at 247.
[1602] Ringelheim op cit note 1576 at 51; Farkas and O'Farrell op cit note 1555 at 47.
[1603] Ringelheim op cit note 1576 at 51
[1604] Ibid.
[1605] Farkas and O'Farrell op cit note 1592 at 47.
[1606] Julie Ringelheim op cit note 51.
[1607] Adrijana Martinović, Applying the Burden of Proof Rules in Gender Discrimination Cases: the Croatian experience' (2018) 1 *EU and Comparative Law Issues and Challenges Series (ECLIC)* 275–291.

States.[1608] Ringelheim argues that to establish a prima facie case of discrimination, complainants must adduce facts that are adequately raise a suspicion of discrimination. They have to persuade the court of the likelihood that they suffered discrimination.[1609] In his view, the burden of proof shifts even if the causation between the protected ground and the harm is only probable or likely.[1610] Kapotas then argues that the rationale of the reversal of the burden under EU law is intrinsically connected to the principle of effectiveness, especially in relation to the obligation to provide effective remedies and the principle of effective judicial protection.[1611] I agree with Ringelheim's and Kapotas' views. Whatever approach Kenya and South Africa adopt, both states must ensure that victims of discrimination are not unduly inhibited in obtaining redress or re-victimized.[1612] In my opinion the only way that the shift in the burden of proof will facilitate the goals of antidiscrimination law is if it also leads to the alleviation of the evidentiary burden proof for the complainant.[1613]

b) South Africa's approach to the burden of proof

In South Africa, the essence of the 2014 amendment to s 11 of the EEA[1614] is that the full onus of persuasion rests on the employer where a case is based on a listed ground, in this case disability.[1615] On paper this seems to be compliant with the CRPD. Nonetheless, Dupper and Garbers argue that the biggest challenge still facing employees in South Africa in discrimination cases is not the possibility of justification by the employer, but it is the requirement that the employee has to show a causal link between the differentiation to a ground of discrimination.[1616] Therefore, the reversal in burden of proof does not automatically ease or enhance the process of claiming discrimination.[1617] I partly agree with their argument, however, I am of the view that the biggest challenge is not the reversal of the burden itself, but how the courts interpret what is required. South African courts' interpretation is not in compliance with the CRPD and could in effect, render the purported shift redundant. Du Toit et al note: to date there is no definite meaning or jurisprudence that has been developed about the words "alleged"

[1608] Panos op cit note 1575 at 446
[1609] Ringelheim op cit note 1576 at 51; Farkas and O'Farrell op cit note 1556 at 34; Fiona Palmer 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof' (2006) European Anti-*discrimination Law Review* 25.
[1610] Lilla Farkas and Orlagh O'Farrell op cit note 1575 at 47.
[1611] Panos op cit note 1575 at 444 and 445.
[1612] General Comment No. 6 para 73(i)).
[1613] For the meaning of burden of proof and evidentiary burden see Chapter 4, heading VIII.
[1614] See chapter 5, heading IX.
[1615] Peter Le Roux and Christoph Garbers 'Employment Discrimination Law into the Future' 2018 (2) StellLR 237 at 263.
[1616] Dupper and Garbers op cit note 15498at 247.
[1617] Ibid.

and "allegation."[1618] used to describe the evidentiary burden on the applicant.[1619] They recognise that 'an unsupported allegation of unfair discrimination clearly cannot succeed, however, they acknowledge that the exact evidentiary proof required is still unclear'.[1620] In their view the term 'alleged', as used in s 11(1), must be presumed to mean something less than making out a prima facie case, as would be required in the ordinary course when the burden of proof is not reversed.[1621]

Furthermore, even if the burden of proving fairness rests on the employer, it has been held that an employee should provide sufficient evidence in support of his or her claim 'to cast doubt on the employer's explanation or 'to show that there is a more likely reason than that of the employer'.[1622] The case of *Sasol Chemical Operations (Pty) Ltd v CCMA* took a similar position.[1623] Here again it is not clear what "sufficient" evidence amounts to, but it seems to raise the evidentiary bar higher and therefore does not to alleviate the burden on the complainant. The reversal of the burden of proof has not relieved the evidentiary burdens on complainants, as is intended by the CRPD Committee. This is likely to have detrimental implications and even dissuade employees with psychosocial disabilities or conditions from seeking relief for unfair discrimination.

While the burden of proof rests on the employer where a case is based on a listed ground, the opposite is true when discrimination is alleged on an arbitrary ground. In the latter instance, the complainant bears the full burden of proof.[1624] As has been noted previously, persons with psychosocial conditions under the EEA often do not qualify as persons with disabilities, so have to prove discrimination on an arbitrary ground.[1625] When discrimination is found to have occurred on an arbitrary ground, there is no presumption of discrimination, and thus the person wanting protection has to prove that the differentiation has the potential to impair their fundamental human dignity. There is also no presumption of unfairness.[1626]

[1618] *Independent Municipal and Allied Trade Union obo Mzuza and Others v Gmagara Local Municipality* [2019] 7 BLLR 696 (LC)para 13
[1619] See chapter 5, heading IX.
[1620] Labour Relations Law: A Comprehensive Guide (6 ed 2015) at 696, importantly, the book was published after the amendments to EEA s 1.
[1621] Ibid.
[1622] Supra note 1618.
[1623] *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* 1 BLLR 91 (LC) para 15.
[1624] Section 11 of the EEA; See chapter 5, heading IX.
[1625] See chapter 5, heading 1V(b).
[1626] See chapter 5, heading IX.

It is not surprising that a case review[1627] carried out by Garbers and Dupper prior to the 2014 amendments identified four key reasons why unfair discrimination cases failed to succeed in South African courts. Top of the list was difficulty in proving causation, and not far behind was where complainants relied on unlisted grounds and were unable to convince the court that such grounds were worthy of recognition.[1628]

From the above it appears that South African law is limited in its protection of employees with psychosocial conditions. It does not help that the CRPD position is not clear and that many of the issues that plague South Africa are actually apparent at CRPD level as well.

c) Kenya's approach to the burden of proof

Kenya's antidiscrimination law seems to reverse or shift the burden of proof when it comes to discrimination claims,[1629] but case law seems to take two different positions. In *GMV v Bank of Africa Kenya Limited*,[1630] the court required the claimant to bear a heavier burden of proof than a prima facie case. In *Gwer v Kenya Medical Research Institute (KEMRI)*,[1631] a Supreme Court case involving the antidiscrimination right found in art 27 of the Kenyan Constitution, the claimant was required to satisfy an even heavier standard of proof than the usual civil-law "balance of probabilities" standard.[1632]

The Supreme Court's reasoning is not consistent with the rationale for the shift in the burden of proof. It also results in a lack of uniformity, because when an employment discrimination claim is brought under the Employment Act or PWD Act, the burden of proof is on the employer, but if brought under the Constitution the burden is on the employee. This position stifle antidiscrimination protection unduly, specifically where a constitutional claim is made.[1633] Employees with psychosocial conditions are likely to struggle to be registered as disabled, not just because registration is required, but because the eligibility requirements are onerous. In terms of the *Gwer* decision, they now also have to satisfy a heavy, unjustified burden.

[1627] Dupper and Garbers op cit note 1585 at 247 **(**This is a restatement of the review included in Garbers "The prohibition of discrimination in employment: Performance and prognosis in a transformative context" in Labour Law into the Future.)

[1628] Dupper and Garbers op cit note 1585.

[1629] See chapter 4, heading VII.

[1630] [2013] eKLR.

[1631] *The Samson Gwer & 5 others v KEMRI* [2020] eKLR Petition 12 of 2019

[1632] See chapter 4, heading VII.

[1633] Ibid.

V. SCOPE OF DISCRIMINATION IN THE CRPD

The CRPD, in art 27(1) (a), prohibits discrimination in all the different stages of employment. These include conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions. Kenya and South Africa have similar provisions, although the wording is not always identical to the list provided by the CRPD.[1634] Both jurisdictions have open ended lists, so any area not specifically mentioned, for example safe and healthy working conditions, can still be read into the scope covered by both nations. It can therefore be argued that the scope of application of antidiscrimination law in Kenya and South Africa is compliant with art 27(1)(a) of the CRPD. Additionally, the CRPD prohibits discrimination by both public and private employers; both Kenyan and South African antidiscrimination laws are compliant in this regard. [1635]

As highlighted in chapter 3 above, the definition of discrimination in the CRPD is broad and includes multiple and intersectional discrimination, and also discrimination by association.[1636] Additionally, the duty to prohibit discrimination under the CRPD includes all forms of discrimination.[1637] This includes: direct discrimination; indirect discrimination; denial of reasonable accommodation; and harassment and unjustified failure to provide reasonable accommodation.[1638]

a) Intersectional Discrimination

The CRPD recognises intersectional discrimination,[1639] which occurs when an employee is discriminated against on the basis of more than one protected ground. [1640] Unlike in cases of multiple discrimination, the grounds interact with each other at the same time and are inseparable.[1641] This recognition by the CRPD allows for employees who have psychosocial disabilities who may be deterred from making complaints or litigating because their experience of discrimination does not clearly fit within one of the protected grounds to find recourse. For example, in the United States, research has found that women with disabilities experience

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[1634] See chapter 4, heading VII; and Chapter 5, heading V.
[1635] Ibid
[1636] Ibid.
[1637] Lisa Waddington & Andrea Broderick 'Combatting disability, combatting disability discrimination and realising equality: A comparison of the UN Convention on the Rights of Persons with Disabilities and EU equality and non-discrimination law' October 2018 at 63
[1638] See chapter 3, heading III and V.
[1639] Ibid.
[1640]Paola Uccellari 'Multiple Discrimination: How Law can Reflect Reality' (2008) 1 *The Equal Rights Review* 24 at 24; Chris McConnachie 'Equality and Unfair Discrimination in Education' in Faranaaz Veriava & Anso Thom et al (eds) *Basic Education Rights Handbook – Education Rights in South Africa* ed (2017)96 ; Timo Makkonen op cit note 11.
[1641] Waddington & Broderick op cit note 1637 at 67.

discrimination in employment at a higher rate than men with disabilities. It found that securing employment appears to be particularly difficult for women with disabilities; they are less likely to be employed than men with or without disabilities and women without disabilities.[1642]

In South Africa, according to the latest Commission for Employment Equity Annual Report, being a disabled black woman is a great disadvantage in accessing and maintaining employment.[1643] This is because white disabled persons are more likely to have had access to educational and other opportunities that will allow them a competitive advantage relative to their black counterparts.[1644] given the history of racial oppression. [1645] So, despite both a black and white employee each having a psychosocial disability or condition, the intersection between race and disability may mean their experiences of discrimination differ markedly. If one adds gender to the mix, a black woman with a disability may face specific types of discrimination not experienced by a black man with a disability may not.[1646] This is because the South African labour market is more favourable to men than it is to women and men are more likely to be in paid employment than women, regardless of race.[1647] A black female employee with a psychosocial disability or condition therefore belongs to several overlapping identity groups (gender, race, disability) may experience intensified disadvantage because of belonging to more than one disadvantaged group.[1648] This makes accessing and maintaining employment difficult. Yet, most troubling is the fact that research shows that sex and gender differences play a key role in the prevalence, symptomatology, risk factors and influencing factors, or course of mental disorders.[1649] Thus, it is well known that women have a higher lifetime prevalence of mood or anxiety disorders than men or a later onset of schizophrenic psychoses.[1650]

[1642] Robyn Lewis Brown & Mairead Eastin Moloney 'Intersectionality, Work, and Well-Being: The Effects of Gender and Disability' (2019) 33(1) *Gender & Society* 94–122 at 95.
[1643] CCE report op cit note 49 at 16, 20, 24 and 27
[1644] Du Plessis op cit note 1178 at 174.
[1645] Ibid.
[1646] Timo, Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the most Marginalized* (unpublished LLM, Institute for Human Rights Åbo Akademi University 2002)11.
[1647] Stats SA How do women fare in the South African labour market? Available at http://www.statssa.gov.za/?p=11375, accessed on 26 April 2021; CCE report op cit note 49 at 16.
[1648] Sandra Fredman *The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal* (Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life) 1-92 at 28; Sandra Fredman *Anti-discrimination laws and work in the developing world: A thematic overview* (Background Paper for the World Development Report 2013) 1 at 19
[1649] Anita Riecher-Rössler 'Sex and gender differences in mental disorders' (2017) 4(1) *The Lancet Psychiatry* at 8.
[1650]Ibid.

As has already been highlighted the Kenyan domestic antidiscrimination legal framework does not make provision for intersectional discrimination. However, it can be argued that Kenya is partially compliant with the CRPD because being as a monist state, intersectional discrimination can be read into Kenyan law courtesy of the CRPD.[1651] However, its application is limited in that it will only apply where it is not in conflict with any other legislation or where there is a gap in the domestic laws. Furthermore, it will only apply to employees who are registered as persons with disabilities.[1652]

Although South African law does not protect employees from intersectional discrimination in explicit terms, case law suggest that intersectional discrimination is recognised. It was recognised in the recent Constitutional Court case of *Mahlangu v Minister of Labour*[1653] that when race, sex and gender intersect, not only is the discrimination presumptively unfair but the level of discrimination is aggravated.[1654] The court opined that in considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds. [1655]

b) Multiple discrimination

Multiple discrimination reflects an understanding of discrimination based on multiple grounds individually, such that discrimination needs to be proved based on each ground separately.[1656] An example in employment would be if a black, female employee with a psychosocial disability is discriminated against on the basis of race and denied a promotion and paid less than her male co-workers based on her gender, and then she is denied reasonable accommodation for her psychosocial disability or condition.

[1651] See chapter 4, heading VII.
[1652] Ibid.
[1653] *Mahlangu and Another v Minister of Labour and Others* [2021] 2 BLLR 123 (CC) ; It has also been invoked and recognised in a number of cases *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 113.
[1654] *Mahlangu and Another v Minister of Labour and Others* [2021] 2 BLLR 123 (CC) para 73.
[1655] Supra note 1653 at paras 65, and 73-107
[1656] Shreya Atrey 'Comparison in intersectional discrimination' (2018) 38(3) Legal *Studies* 379 at 386 and 387.

In Kenya the relevant legislation is silent on multiple discrimination and it is doubtful that the full scope of the CRPD's requirements in relation to multiple discrimination are met. Further, there is no case law which adequately engages with this. Nonetheless, because Kenya is a monist state, I argue that as long as multiple discrimination is not contradictory to any other national legislation, then an employee with a psychosocial condition who is registered as a person with a disability can directly claim multiple discrimination under the CRPD. However, this recourse is not available to employees who do not qualify as persons with disabilities.

South Africa's laws allow for claims involving multiple discrimination, as the relevant legal provisions allow for discrimination to be based on "one or more grounds". [1657] The fact that intersectional discrimination has successfully been recognised by the courts in South Africa helps to solidify arguments in favour of the recognition of multiple discrimination.

c) Discrimination by association

According to the Committee the CRPD prohibits any discrimination against individuals who associate with a person who has a disability, the main target being the perpetrator's prejudice.[1658] The CRPD's application is therefore not limited to people who are themselves disabled, but also applies where someone who is discriminated against on account of their relations with someone who has a disability.[1659]

According to Waddington and Broderick, although the CRPD and the Committee do not mention distinct sub-categories of discrimination by association, it is arguable that States Parties to the CRPD are required to target all forms of discrimination by association. [1660] Hence, the CRPD provides protection to an employee who has experienced direct or indirect discrimination or even harassment or the unjustified denial of reasonable accommodation as a result of their association with a person with a psychosocial disability, such as a family member.[1661] It does not matter that the person encountering the discrimination was not personally disabled. An example is where an employer discriminates against an employee,

[1657] Constitution section 9(3) and EEA section 6(1).
[1658] See chapter 3, heading 111 and V.
[1659] Gregor Maučec 'Combating discrimination on the grounds of disability in international and EU law' (2013) 6(1) *Innovative Issues and Approaches in Social Sciences* 64 at 72.
[1660] General Comment No. 6.
[1661] Waddington & Broderick op cit note 1637 at 73.

based on the disability of the employee's child.[1662] Therefore, an employee who is a parent and primary care giver of a child [1663] or spouse who has a psychosocial disability can make a discrimination claim against their employer if they receives unfavourable treatment by an employer, based on the fact that their child or spouse is a person with disability.[1664]

This also means that, an employee who is the carer for a spouse or child with a psychosocial disability would be able to request reasonable accommodation, example, flexibility working hours in order to facilitate the provision of assistance to a person with a disability at particular times.[1665] This is particular important in countries such as Kenya and South Africa where, because of a lack of awareness and exposure there is still so much stigma surrounding mental illness, to the point where anyone associated with a person who has a mental illness is likely to be also ostracised and as a result discriminated against in the community. [1666] Also, there are inadequate structures to help with caregiving, which means that many employees may have care responsibilities related to disabled family members.

Both the Kenyan and South African antidiscrimination legal frameworks are silent on this matter. There is no available case law in either country that touches on discrimination by association. Despite this, however an argument can be made that South African law does prohibit discrimination by association, this is based on the wording of the discrimination provision found both in the Constitution and EEA.[1667] Further, because Kenya is a monist state, I argue that as long as discrimination by association is not in contrary with any other national legislation, an employee who is a primary carer giver of a spouse or child with a psychosocial disability can claim discrimination directly under the CRPD if they are harassed or otherwise discriminated against because of their association with their spouse or child.[1668] However, this may not apply to employees who have associates who are not registered as disabled under Kenyan law.[1669]

[1662] Lisa Waddington & Anna Lawson (European Network of Legal Experts in the non-discrimination field) 'Disability and non-discrimination law in the European Union An analysis of disability discrimination law within and beyond the employment field' July 2019 at 18.
[1663] Ibid.
[1664] Maučec op cit 1659 at note 72.
[1665] Waddington & Broderick op cit note 1637 at 73.
[1666] See chapter 1, heading I (b).
[1667] See chapter 5, heading VI(c).
[1668] See chapter 4, heading VII(a).
[1669] See chapter 4, heading VII(b) and (c).

VI. FORMS OF DISCRIMINATION

a) Direct and Indirect Discrimination

Kenya and South Africa are compliant with the CRPD, as both jurisdictions prohibit direct and indirect discriminations.[1670] Most claims in both countries allege direct and not indirect discrimination. [1671] These may be because of general challenges that plague indirect discrimination claims that include: a lack of meaningful understanding of its role and purpose, difficulties in identifying a comparator group; difficulties in presenting evidence of a disproportionate impact on a particular group or groups; and challenges in distinguishing between provisions that disadvantage a group, but do not constitute indirect discrimination.[1672]

The reach and potential impact of direct discrimination is limited, as it fails to recognise existing disadvantage in a world structured by, and for, those without disabilities.[1673] Indirect discrimination, on other hand, has a variety of advantages,[1674] especially for persons with psychosocial disabilities and conditions who have historically been marginalised and would as a result find substantive equality, which is reflected in the concept of indirect discrimination, useful as a tool to promote equality.[1675]

In Kenya there is barely any jurisprudence on indirect discrimination. The only case that deals with it, *Dr. Samson Gwer v KEMRI* which was decided in 2020**.**[1676] In this judgment the Supreme Court fails to provide a definition of indirect discrimination as requested by the parties and instead relies on the definition provided by the parties in the case. In fact, going through the case one can almost sense an uncertainty or know how as the courts deals with this category of discrimination.[1677] South Africa has more cases that deal with indirect discrimination,[1678] nonetheless, they are still few and there is none that deals with discrimination of an employee with a psychosocial condition or disability in employment. Example, the case of *Singh v Minister of Justice and Constitutional Development* where a blind woman applied for a position as a magistrate. One of the requirements was that a candidate

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[1670] Ibid; See chapter 5, heading VII (a).
[1671]See chapter 4, heading VII(b) and (c); chapter 5, heading VII (a).
[1672] Kasper Lippert-Rasmussen 'Discrimination' in Hugh LaFollette (ed) *The International Encyclopedia of Ethics* ed (2013) 7.
[1673] Hamilton op cit note 1482 at 220.
[1674] See chapter 3, heading V(c)
[1675] Ibid.
[1676] See chapter 4, heading VII(b) and (c)
[1677] Ibid.
[1678] *See Dlamini & Others V Green Four Security* [2006] 11 BLLR 1074(LC); Leonard Dingler Employee Representative Council V Leonard Dingler Pty Ltd (1997) 11 BLLR 1438 (LC); Ntai v SAB Ltd i[2001] 2 BLLR 186 (LC).

must have a valid driver's licence, which a blind person cannot obtain. Although this case was not decided in terms of the EEA but in terms of PEPUDA, it is still relevant for purpose of indirect discrimination. The Equality Court didn't explicitly frame the case as one of indirect discrimination, but it's a classic example of an apparently neutral requirement that would have a disproportionate impact on blind and perhaps other disabled persons. [1679]

Cases of indirect discrimination are often challenging. However, its biggest challenge and drawback is the fact that in some jurisdictions it adopts the use of statistics in the determination of whether discrimination took place.[1680] The position in Kenya and South Africa on the use of statistics is not clear as of yet.[1681] In Kenya, although the only case that claims indirect discrimination uses statistics, the appeal courts did not place any emphasis on its importance or necessity.[1682]

b) Harassment

The CRPD, and the Committee do not provide adequate information about harassment as a form of discrimination. The CRPD only identifies it as a form of disability-based discrimination, and defines what harassment as a form of discrimination entails.[1683] From the definition what is clear is that it is not comparable in nature; the perpetrator does not have to have intention; and lastly the action complained about does not have to be repetitive.[1684] This This is because harassment takes on the form of verbal, non-verbal or physical abuse, and further, its effects may violate human dignity.[1685]Additionally, there is no CRPD case law yet that deals with harassment as a form of discrimination.

As has already been highlighted previously South African antidiscrimination framework is compliant with the CRPD in this regard as it protects employees with psychosocial disabilities and conditions from harassment as a form of discrimination. [1686] Even

[1679] 2013 (3) SA 66 (EqC).
[1680] See chapter 3, heading V(c); Manuela Tomei 'Discrimination and Equality at Work: A Review of the Concepts' (2003) 142(4) International Labour Review 401-418 at 405.
[1681] See chapter 4 (VII)c; and chapter 5, heading VII(a).
[1682] *The Samson Gwer & 5 others v K EMRI* [2020] eKLR Petition 12 of 2019.
[1683] See chapter 3, heading V(c),
[1684] Ibid.
[1685] Magdalena Jankowska-Gilberg and Dagmara Rajska 'Handbook on European non-discrimination law' (2018) 66.
[1686] See chapter 5, heading VI(b).

if a person does not qualify as disabled, they can still claim harassment as a form of discrimination[1687]

Kenya, in contrast to South Africa, does not explicitly provide for harassment as a form of discrimination. However, an argument can be made that it is possible to read harassment into the PWD Act in its definition of 'discriminate'. [1688] Apart from that an employee with a psychosocial disability who is harassed in the workplace can claim antidiscrimination protection based on CRPD directly.[1689] This option is only available to persons with psychosocial who are registered as persons with a disability. It is also not available to employees who seek antidiscrimination protection on the ground of health status or mental status or even an unspecified ground. This is not in compliance with the CRPD.

c) The Denial of Reasonable Accommodation

The CRPD defines discrimination to include the denial of reasonable accommodation.[1690] Kenya's antidiscrimination legal framework does not define failure to make a reasonable accommodation as a form of discrimination.[1691]Nonetheless, an employee with a psychosocial condition who has been registered as disabled,[1692] although they may not be able to make a discrimination claim if they are denied reasonable accommodation by an employer under the PWD Act or Employment Act,[1693] may still claim in terms of art 2 of the CRPD directly.[1694] However, it is worth noting, that this duty to reasonably accommodate an employee specifically applies only to employees with psychosocial conditions who are registered as persons with disabilities.[1695] This is because looking at Kenyan case law, courts will only decide a case that deals with disability rights only once a person is registered as a person with disability, and only once they are registered can they claim rights directly from the Constitution or any other law.[1696] Employers with psychosocial conditions who do not qualify and instead fall under the protected grounds of mental status or health status or unspecified ground are, however,[1697] excluded with no recourse. This is worrying because going by the restrictive definition of

[1687] See chapter 4 VII(e).
[1688] Ibid.
[1689] Ibid
[1690] Article 2 of the CRPD.
[1691]. See chapter 4 VII(e); chapter 5, heading VI(b)
[1692] See chapter 4 VII(e).
[1693] Ibid.
[1694] Ibid.
[1695]Ibid. Also see Chapter 4, heading VI(a) where it is explained why only it applies to an employee registered as a person with a disability.
[1696] Ibid.
[1697] Ibid.

disability provided in the PWD Act, it is likely that a number of Kenyan employees with psychosocial conditions will not qualify as having a disability and hence will be left out from claiming reasonable accommodation which is key for their access to and maintenance of employment.[1698] This is not in compliant with the CRPD.

In contrast, South African courts have stepped in to clarify that the denial of reasonable accommodation of persons with disabilities amounts to discrimination.[1699] However, because of the narrow definition of disability and consequent narrow interpretations, case law shows that persons with psychosocial conditions are more likely to qualify for protection on an arbitrary ground rather than on the basis of disability. Even so, unlike in Kenya, the right to reasonable accommodation is a duty owed in respect of all protected grounds.[1700] Therefore, employees with psychosocial conditions who do not qualify as disabled or do not identify with having an impairment can still make a discrimination claim if they are denied reasonable accommodation in employment. In this regard South Africa is compliant with the CRPD.

Although the CRPD is in support of a procedural element in the provision of reasonable accommodation, it does no expand on it. However, in South Africa the TAG[1701] and case law provides express requirements in support of a procedural element to reasonable accommodation. In Kenya, it is barely provided for. In this one area, South Africa law provides a good example, as it requires consultation, not just between the employer and employee, but also experts. [1702] Case law has established the need for employers to require and pay for an employee to first get an Occupation Therapist's (OT) report[1703] before reasonable accommodation is considered.[1704] In my opinion, this is key not only for consultation between the employer and employee, but helps in identifying how a workplace can be altered or restructured in order to can best accommodate an employee.[1705] An OT can help to come up with possible adjustments that is individual and specific to the employee in question.[1706] The

[1698] Ibid.
[1699] chapter 5, heading VII(b); see *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* [2008] 4 BLLR 356 (LC) para 107. *Lewis v Media 24 Ltd* at para 37; *Impala Platinum Ltd v Jonase and Others* (2017) 38 ILJ 2754 (LC) (24 August 2017) at para 14; *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys* (2019) 40 ILJ 1159 (CCMA) at para 37.
[1700] Ibid.
[1701] chapter 5, heading VII(b); Chapter 3V(e).
[1702] chapter 5, heading VII(b)(i) to see *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* [2008] 4 BLLR 356 (LC) para 107.
[1703]Ibid.
[1704] Ibid.
[1705] Ibid.
[1706] Ibid, the role of an OT(i) is explained.

fact that so much can be done as part of reasonable accommodation often leads to employers saying that they do not know what to do, but an expert can help bring some much-needed direction especially when dealing with psychosocial conditions.

Further, complicating the matter is the fact that psychosocial conditions may exist on a spectrum from mild to severe,[1707] to episodic where they unpredictably fluctuate.[1708] As a result, even if an employee were to disclose their psychosocial condition to an employer there is a lack of know-how on how to accommodate the said employees.[1709] According to the World Health report in 2000, although knowledge of mental health issues has increased over the past few decades, employers and enterprises have lagged behind in their understanding and mental health problems.[1710] Most human resource management and public administration training programmes do not cover adequately the area of mental health and employment.[1711]

In line with this, a study concerning depression in the workplace in South Africa found that when confronted with employees with depression or suspected depression, a large proportion of managers were not sure how to respond or responded inappropriately.[1712] A possible solution would be the creation of awareness and training of employers and human resource managers about these conditions in the workplace, and the involvement of experts in the discussion of how to reasonably accommodate persons with psychosocial conditions in the workplace. An OT report may also assist in considering how to reasonably accommodate side effects of medication. Statistics for South African treatment programmes show that although medication is effective in over 62 per cent of cases, a startling 45 per cent drop out of the treatment at some time due to the medication's side effects and as a result many patients will experience relapses of their disorder.[1713]

[1707](OHRC)Ontario Human Rights Commission 'Policy on preventing discrimination based on Mental health disabilities and addictions' 31 January 2014 at 6.

[1708] Ibid.

[1709] Katharina Vornholt & Patrizia Villotti et al 'Disability and employment – overview and highlights' (2018) 27(1) European *Journal of Work and Organizational Psychology* 40 at 47.

[1710] Gaston Harnois (on behalf of WHO (World Health Organisation) and Phyllis Gabriel (on behalf of ILO (International Labour Organisation) 'Mental health and work: Impact, issues and good practices' 2000 at 1 at 11.

[1711] Ibid.

[1712] Marthinus P. Stander & Margreet Bergh et al 'Depression in the South African workplace' (2016) 22(1) *(S Afr J Psychiat* 1 at 2.

[1713] The South African Depression and Anxiety **G**roup, available at http://www.sadag.org/index.php?option=com_content&view=article&id=460:early-diagnosis-of-mental-illness&catid=74&Itemid=132, accessed on 26 April 2021.

Although expert opinion has benefits, it also has limitations. There are instances where employers and experts may exclude affected employees, which is in itself discriminatory.[1714] It may also feed into the medical model's disregard for disabled persons' agency and autonomy. Further, the same flexibility that allows for consultation with an expert, and allows for the consideration of an individual employee's circumstances in the determination of reasonable accommodation, also renders an employee vulnerable in the event of a backlash and also establishes an element of uncertainty when it comes to litigation and judicial interpretation.[1715] Nonetheless, these do not take away from the important role that experts can play as a link that enhances the communication between the employer and the employee.

Additionally, one of the biggest challenges for persons with psychosocial impairments in claiming reasonable accommodation is not only the unjustified denial by an employer, but the fact that it's a duty that is activated by disclosure by the employee to the duty-bearer, the employer.[1716] Necessary accommodations can only be implemented upon disclosure.[1717] Nevertheless, employees often do not disclose their psychosocial conditions or disabilities. This is problematic, as these conditions are often hidden or invisible, [1718] concealable,[1719] and affected employees' skills and needs are not immediately ascertainable.[1720]

Employees with psychosocial impairments or conditions, or those who have experienced psychological impairments in the past, often choose not to disclose their impairment to employers and so forego the opportunity to be reasonably accommodated.[1721] This is fuelled by the fact that persons with psychosocial impairments or conditions belong to one of the most stigmatised groups in society.[1722] This stigma not only leads to fear that disclosure will result in rejection or acts of hostility,[1723]but to misguided negative misconceptions about their workability in employment.[1724] Therefore, the reluctance to

[1714] chapter 5, heading VI(b).
[1715] Anna Lawson *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (2008) 297.
[1716] Anna Lawson 'People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities' (2008) 26(2) *Law in Context: Socio-Legal Journal (Law Context: A Socio-Legal J.)* 62 at 78; Vornholt & Villotti op cit note 1709 at 49.
[1717] Vornholt & Villotti op cit note 1709 at 48 and 49.
[1718] Lawson op cit note 1716 at 78
[1719] Vornholt & Villotti op cit note 1709 at 48 and 49
[1720] Vornholt & Villotti op cit note 1709 at 47.
[1721] 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' December 2016 1 at 86; Lawson op cit note 1716 at78.
[1722] Vornholt & Villotti op cit note 1709 at 47.
[1723] Lawson op cit note 1679 at 78.
[1724] See chapter 1, heading I.

disclose is, perhaps, unsurprising.[1725] Studies have found that in many workplaces, employees choose to suffer their mental illness in silence, fearing stigma that comes with disclosure, while employers are uncomfortable around the topic and do not know how to deal with such a disclosure .[1726] According to a South African 2015 IDeA (Impact of Depression at Work Audit) report,[1727] on average, people with depression took 18 days a year off work due to their condition, and of those 80 per cent did not tell their employer the reason why.[1728]Similarly, a recent study conducted in Kenya found that the discrimination and stigma associated with mental illness often prevents disclosure by employees.[1729] Further, according to the study, disclosure during an interview was bound to affect employment opportunities depending on the potential employers attitude towards psychosocial conditions, and so for most employees non-disclosure was the better option.[1730]

If reasonable accommodation is discussed before the job offer is made, it may be difficult to prove that there was no discrimination on the basis of disability.[1731] The TAG provides that an employee discloses their reasonable accommodation needs to a potential employer before a conditional offer is made and the offer is then withdrawn, the withdrawal may be seen to relate to the employer's prejudice towards the persons disability. The courts could regard such reluctance as discrimination on the basis of the person's disability.[1732] However, it is important to note that this does not prevent selection committees to simply frame their reasons for not employing a person in such a way that the link between the protected ground of disability and the decision not to appoint the person cannot be proven. As a result, a potential recruit may choose to disclose the condition only once an offer is made, which then

[1725] Lawson op cit note 1716 at 78.
[1726] Dr Ali Hamdulay, Manage Mental Illness In The Workplace , Proactive Management Is The Best Medicine for mental illness in the Workplace, available at http://www.sadag.org/index.php?option=com_content&view=article&id=2279:manage-mental-illness-in-the-workplace&catid=61&Itemid=143, accessed on 26 April 2021, South African 2015 IDeA (Impact of Depression at Work Audit) Report, which was conducted by SADAG in collaboration with health and economic research organisation Hexor and pharmaceutical company Lundbeck.
[1727] Depression and anxiety**:** New Research on Depression In The Workplace
A 2015 South African IDeA, available at http://www.sadag.org/index.php?option=com_content&view=article&id=2391:new-research-on-depression-in-the-workplace&catid=11:general&Itemid=101, accessed on 26 April 2021.
[1728] Ibid.
[1729]Ikenna D. Ebuenyi & Mònica Guxens 'Employability of Persons with Mental Disability: Understanding Lived Experiences in Kenya' (2019) 10 *Frontiers in psychiatry* 1 at 2 and 6
[1730] Ibid at 6.
[1731] TAG 6.4.
[1732]Ibid.

requires an employer to consider possible accommodations. This sequencing is important in order to protect job applicants.[1733]

In addition, to stigma, another limitation of disclosure by an employee with a psychosocial condition could be facilitated by 'a perception that in requesting reasonable accommodation, one might be setting oneself apart from one's colleagues or asking for special treatment'. [1734] Also, low self-esteem, and the view that it is the individual who must change and not the workplace are also barriers to employees requesting reasonable accommodation.[1735] Whatever the reason for non-disclosure, it creates practical obstacles to persons with psychosocial conditions who require reasonable accommodation in order to access or maintain employment.[1736] The CRPD does not provide any guidance on how to handle confidentiality concerns of employees or applicants with psychosocial conditions or impairments.

As has already been highlighted, employers in both Kenya and South Africa exist in a society and community where psychosocial conditions are highly stigmatised[1737] It is not too farfetched to assume that negative attitude by employees is common. A study done in Kenya found that disclosure of mental illness resulted in negative reactions from employers, which lead to further stigmatisation and discrimination in the work place. [1738] Attitudinal barriers may persist in the face of legal duties, [1739] and that is why one will find that although the legislation in many states provide that employer should employ persons with disabilities, many employers decide against it.[1740]

In addition, reasonable accommodation may require employers to incur costs, which employers are expected to bear.[1741] As has already been highlighted[1742] there is however a tension that exists at Committee level. The Committee has been split on how far employers can be expected to go to provide reasonable accommodation.[1743] Ngwena argues that 'this 'privatisation' of redistribution means that accommodation will be heavily dependent on the

[1733] Holness op cit note 1278 at 510 and 511.
[1734] Lawson op cit note 1716 at 79.
[1735]Ibid.
[1736] Mark Bell and Lisa Waddington (European network of legal experts in gender equality and non-discrimination) 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' December 2016 1 at 86.
[1737] See chapter 1, heading I.
[1738] Ebuenyi & Guxens op cit note 1729.
[1739] Du Plessis op cit note 1178 at 175.
[1740] Vornholt & Villotti op cit note 1709 at 47.
[1741] Maxwell Peprah Opoku & Wisdom Kwadwo Mprah et al 'Access to employment in Kenya: the voices of persons with disabilities' (2016) *Int J Disabil Hum Dev* 1 at 10.
[1742] See Chapter 3, heading V(e).
[1743] Ibid.

resources the employer has at its disposal relative to the expense required by a particular adjustment'.[1744] As a result, even when employers are willing to hire and accommodate persons with disabilities, it is too costly.[1745] Although large business entities may not be affected by cost of reasonably accommodating employees with disability, the same cannot be said of small scale businesses. [1746] Hence, employees are faced with the predicament of whether to fulfil the requirements of reasonable accommodation for persons with disabilities on the one hand and ensuring productivity and profit on the other.[1747] This is especially significant in low-income countries such as Kenya, where there is mass unemployment, no incentives for employers, and a large pool of labour force from which employers can easily employ.[1748]

It also does not help that employers may have the wrong perception that work accommodations are too costly.[1749] These beliefs remain 'persistent despite studies showing that the majority of accommodations cost little or nothing'.[1750] Furthermore, it should be mentioned that because of the negative perceptions about disability, any extra cost of employing persons with disabilities in general, no matter its magnitude, can be a disincentive to employers.[1751] Therefore, costs or assumed costs to the employer are a significant limitation to the potential of reasonable accommodation of persons with disabilities.[1752]

States parties must address employers' concerns about the cost of accommodating persons with disabilities at the workplace, otherwise attitude will remain a major barrier.[1753] Notably**,** there may be ways in which to subsidise the accommodation costs and to create public-private partnerships to share the financial burden of accommodation.[1754] Kenya, provides tax cuts for employers who reasonably accommodate employees with disabilities

[1744]Ngwena cited by Du Plessis op cit note 1178 at 176.
[1745] Vornholt & Villotti op cit note 1709 at 47.
[1746] Opoku & Mprah op cit note 1741 at 10.
[1747] Ikenna D. Ebuenyi & Alida J. van der Ham 'Expectations management; employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' (2020) 42(12) *Disability and Rehabilitation* at 1687.
[1748] Opoku & Mprah op cit note 1741 at 10.
[1749] Vornholt & Villotti op cit note 1709 at 47.
[1750]. Vornholt & Villotti op cit note 1709 at 45
[1751]. Opoku & Mprah op cit note 1741 at 10.
[1752] Du Plessis op cit note 1178 at 177.
[1753]. Opoku & Mprah op cit note 1741 at 10.
[1754] Ibid.

specifically, but no such provision exists for employees who may not qualify as disabled. A recent study done in Kenya found that generally employers are not aware of these tax cuts – none of the employers interviewed in the said study had ever accessed the government tax rebates available for employers of persons with disabilities in Kenya.[1755] Although South Africa does not provide for tax cuts, it has learnership rebates and many learnerships are for disabled persons, so there are some financial incentives offered to employers.[1756] The effectiveness of these initiatives is, however, not clear.

Lastly, the individual or medical model of disability retains a tighter grasp over psychosocial impairments than over other types of impairment. While the defining features of a medical approach is the emphasis placed on making changes to the individual by curing them or by adapting their behaviour, the emphasis of reasonable accommodation, in contrast, is on making changes to social features which are external to the disabled individual. Thus, reasonable accommodation strategies will struggle to be effective as long as the medical model retains its grasp.[1757]

VII. JUSTIFICATIONS OF OR DEFENCES TO DISCRIMINATION CLAIMS

As discussed in chapter 3,[1758] the CRPD itself does not provide for any defences that justify discrimination. Also, the General Comments do not deal with defences, except with regard to the unjustified denial of reasonable accommodation. As it stands, it is unclear whether the CRPD advocates for the justification of discrimination.[1759]

The Kenya antidiscrimination law in both the Employment Act and the PWD Act provides a number of defences an employer may cite to justify discrimination.[1760]These defences are unfortunately not always clear and require further development.

The defences available in the South African legal framework to justify discriminatory behaviour by an employer are the inherent requirements of the job and affirmative action. South African labour courts have cautioned that the inherent requirements of the job defence must be

[1755] Ebuenyi & J. van der Ham op cit note 1747 at 1694.
[1756] See https://speccon.co.za/Learnerships-tax-rebate.asp and http://www.dhrs.uct.ac.za/sites/default/files/image_tool/images/147/Disability%20Catalyst%20Africa%205%202016%20Monitoring%20Disability%20Inclusion%20and%20Social%20Change.pdf#page=76, accessed on 26 April 2021.
[1757] Lawson op cit note 1716 at 68.
[1758]See Chapter 3, heading V(e).
[1759] Ibid.
[1760] See chapter, heading 4 VII (e).

interpreted strictly so that it does not unjustifiable limit the rights of employees to be free from discrimination.[1761] Basically it adopts a strict approach when it come to the use of defences to justify discrimination. [1762] Research suggests that employers in South Africa do not win discrimination cases because they are able to justify their discrimination, but complainants lose cases because they cannot prove discrimination.[1763] This could also be true in the Kenyan context because case law available seems to focus more on employees proving discrimination and rarely gets to critically analyse the defences claimed, and as a result the defences available are not well developed, if at all.[1764]

The CRPD and the Committee are not clear about whether discrimination can be justified or not. It is therefore not clear whether Kenya and South Africa are in compliance on this aspect. Kenya, at least, needs to review the defences allowed and clarify the parameters of the defences.

VIII. REMEDIES

According to the Committee for anti-discrimination law to be effective in protecting employees from disability-based discrimination in employment, the law should include provision of appropriate and effective legal remedies and sanctions. Further, where the discrimination is systemic nature, simply granting compensation to an individual may not have any real effect, thus states parties should also implement 'forward looking, non-pecuniary remedies.' The Committee then provides that this means 'further effective protection against discrimination carried out by private parties and organisations is provided by the State.'[1765]

The remedies provided for in Kenyan antidiscrimination laws, as has already been discussed, include everything from criminal penalties, to reinstatement or the re-engagement of the employee in work comparable to that in which the employee was employed prior to their dismissal, or other reasonably suitable work, at the same wage, damages and monetary compensation.[1766]

In South Africa the antidiscrimination laws provide individualised remedies like damages and reinstatement, but also remedies in form of positive duties, for example, an order

[1761] See chapter 5, heading XII.
[1762] See chapter 3, heading III
[1763] Dupper & Garbers op cit 1585 at 251.
[1764] See chapter 4, heading VI and IX.
[1765] General Comment No. 6, para 22.
[1766] See chapter 4, heading X.

directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees. [1767] This is in line with the CRPD. Further, it is worth noting, that although the PEPUDA does not apply to this research specifically, it provides a wide variety of positive duties that can help remedy structural discrimination and as such are compliant with the CRPD and that can be described as 'forward looking, non-pecuniary remedies.'[1768]

It is evident that while the remedies provided in Kenya are more individual in nature and stop at providing solutions for the individual employee discriminated against only,[1769] the South African legal framework not only gives the courts more leeway in the provision of remedies, but to also goes beyond providing individual solutions to the said employee affected by discrimination. It is useful in those instances where structural discrimination may be embedded within an organisation. This is in line with the CRPD.

IX. GENERAL REVIEW OF KENYAN AND SOUTH AFRICAN LAW

Kenya and South Africa provide employees with psychosocial disabilities who may be discriminated against some remedies in terms of antidiscrimination law. These laws comply compliant with art 27(1)(a) of the CRPD in a number of ways, but also bear certain limitations.

The first factor that could potentially limit the impact of antidiscrimination legislation is the fact that the laws in both countries adopt a medical approach to disability, and not a social approach, as required by the CRPD.[1770] It is not only the definition of disability that does not adopt a social approach, but even the procedural and substantive laws are partial to medical approaches. Correspondingly, it affects how judges interpret the said law. It also seeps into the scope of discrimination in both Kenya and South Africa. Medicalisation affects how discrimination is determined, with courts in both South Africa and Kenya choosing to focus on the identification of an appropriate comparator and/or the functional limitations of the complainant instead of the employer's alleged discriminatory acts.

[1767] See chapter 5, heading X.
[1768] Section 21(1) of the PEPUDA includes remedies such as orders restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment; orders to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question; orders for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question; and orders directing the reasonable accommodation of a group or class of persons by the respondent.
[1769] See chapter 4, heading X.
[1770] Chapter 4, heading VI(a), heading III, Chapter 5, heading IV(a)

When it comes to the application of reasonable accommodation, the case law[1771] in both Kenya and South Africa reflect the application of reasonable accommodation in a manner where the focus is on the employee's impairment or condition and not on changing workplace practices and cultures as is required by a social approach.[1772] Adopting a medical model of disability means that the starting point of an employer in the provision of reasonable accommodation is the job applicant's impairment or condition. A focus on the impairment of condition makes it easier for those who bear reasonable accommodation duties to view them as 'favours' to persons with disabilities,[1773] instead of viewing accommodation as a way in which to adapt society so that more people can participate.[1774]Further, it fails to take in account that workplaces have always been structured in ways that facilitate performance by persons without disabilities. Thus, it can be argued that choices have been made to accommodate persons without disabilities.[1775]Hence, even if a claimant (job applicant or employee) is able to successfully make a claim for reasonable accommodation, the medicalised approach to disability also affects how the duty to reasonable accommodate is applied.[1776]

In my view, the medical approach which seems to be the foundation of disability discrimination law in both jurisdictions is the biggest barrier to effective protection.

Secondly, the Committee requires states parties to establish accessible and effective redress mechanisms and ensure access to justice, on an equal basis with others, for victims of discrimination based on disability.[1777] Notably, the enforcement of legal provisions may rely on the initiative of individuals or other civil parties, enforcement agencies or other public organisations.[1778] In Kenya, South Africa and even Committee case law, enforcement mainly happens through individual complaints. It depends on the action of individuals who feel discriminated against.[1779] An employee with a psychosocial impairment or condition has to have experienced discrimination, made a complaint and worked through a complaints process before appropriate adjustments may be made to accommodate their disability and to facilitate

[1771] See chapter 4 headingVII(e); Chapter 5, heading VI(b).
[1772] Ibid.
[1773] Du Plessis op cit note 1178 at 167.
[1774] Ibid at 167 and 168.
[1775] Ibid at168.
[1776] Ibid at 166.
[1777] General Comment No. 6, para 73 (h).
[1778] Tetty Having 'The effects and limits of anti-discrimination law in The Netherlands'(2002) 30 *International Journal of the Sociology of Law* 75 at 82.
[1779] Ibid.

their participation in employment.[1780] This approach, though it has its share of advantages, is also retrospective and reactive, rather than preventative.[1781] This applies to all the different forms of discrimination. Even though indirect discrimination possesses group dimensions, they are generally enforceable only by an affected individual.[1782]

While the individual complaints approach has some advantages in that it gives individuals the opportunity to complain in their own right,[1783] it comes with its share of burdens. Firstly, it places a heavy burden on individuals.[1784] According to research carried out in the UK, challenges faced by complainants as a result of the individualised approach include: poor knowledge of rights; reluctance to go up against a large organisation; complexity of the law; a lack of specialist legal support; the high cost of legal action and very limited access to legal aid.[1785] Further, an individualised approach fails to recognise the imbalance of power between the parties in a discrimination case and the stress and complexity of bringing a claim.[1786] Correspondingly, a study done in Kenya found the cost of litigation often dissuades victims from approaching the courts.[1787] Additionally, it found that individual discrimination complaints were hampered by lack of awareness or ignorance of the law.

This individual approach limits the role of antidiscrimination law more generally as its focus is mostly individual solutions,[1788] and this generally does not prevent or reduce systemic disability discrimination.[1789]It allows particular disabled individuals to participate in employment without addressing the structural norms that led to discrimination in the first place.[1790]

[1780] Annette Van Gent & Ida Nursoo et el (Australian Human Rights Commission) 'Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability'18 December 2015 at 1 at 11.
[1781] Van Gent & Nursoo op cit note 1780 at 10.
[1782] Waddington & Lawson op cit note 1662 at 61.
[1783] Sandra Fredman 'The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life, ohchr.org' 15.
[1784] Ibid.
[1785] Women and Equalities Committee 'House of Commons 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' 30 July 2019, available in https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/147002.htm, accessed in 25 March 2021
[1786] Ibid.
[1787] Ebuenyi & Guxens op cit note 1729 at 10.
[1788] Lawson op cit note 1715 at 294.; Du Plessis op cit note 1178 at 166.
[1789] Van Gent & Nursoo op cit note 1780 at 10 and 11.
[1790] Du Plessis op cit note 44 at 166.

Further, according to the Committee, the recognition of judicial remedies of a collective nature or class actions can significantly contribute to effectively guaranteeing access to justice in situations that affect groups of persons with disabilities.[1791] This is especially true if it involves individuals or groups, this cases persons with disability, have an interest in the operations of the duty-bearer; and if they get to participate in the discharge of the production of plans.[1792]Further, Allen, Waddington and Lawson, argue that the potential of individual claims to bring about effective change is enhanced if an independent equality body plays a role in enforcing the law. [1793]

Importantly, in South Africa, the South African Human Rights Commission (SAHRC)[1794] which is mandated to establish a framework, to promote, protect and monitor the implementation of the CRPD,[1795] has powers that include investigating complaints of discrimination and assisting complainants in bringing cases to the Equality Courts.[1796] Although it has successfully assisted a number of complainants to ensure access to public and private spaces for persons with disabilities,[1797] its role in the workplace has been less apparent. [1798]

In Kenya, although the NCPWD[1799] does not specifically address violations of rights of individuals, legal services are currently provided to the public through the receipt and processing of complaints and in the process complainants are offered legal advice by the Kenya National Commission on Human Rights (KNCHR).[1800] Both the SAHRC and KNCHR are compliant with the CRPD, as they both seem to provide legal aid.[1801] The KNCHR also conducts litigation in appropriate cases involving the interpretation of the Bill of Rights.[1802] It specifically takes up cases that are either of broad public interest or that

[1791] General Comment No. 6, para 73 (h).
[1792] Waddington & Lawson op cit note 1662 at 61.
[1793] Dominique Allen 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' 2010 36(3) *Monash University Law* Review 103 at 105; Waddington & Lawson op cit note 1662 at 61.
[1794] Its enabling legislation, the South African Human Rights Act 40 of 2013.
[1795] Willene Holness 'Employment equity and elimination of discrimination: Where are women with disabilities in the hierarchy?' (2016) 30(1) *Empowering women for gender equity* 49 at 58.
[1796] Section 13(3) the South African Human Rights Act 40 of 2013 (SAHRC) Act
[1797] Holness op cit note 1795.
[1798] Ibid.
[1799] See chapter 4, heading VI (a)i.
[1800] Kenya National Commission on Human Rights Act and the Commission, Legal services, available at https://www.knchr.org/Our-Work/Legal-Services
[1801] General Comment no. 6, para 73 (h).
[1802]Kenya National Commission on Human Rights Act and the Commission, Legal services, available at ttps://www.knchr.org/Our-Work/Legal-Services, accessed on 26 April 2021.

would have a significant impact on the legal discourse of human rights in Kenya.[1803] Furthermore, the case should also have a strategic goal such as setting up legal precedents, highlight a discriminatory position in the law or one that would lend weight to legal reforms.[1804] So far, the cases the commission have helped to litigate touch on everything from surrogacy agreements,[1805] to land rights,[1806] to the constitutionality of the death penalty,[1807] to presidential benefits,[1808] but none that touches on disability discrimination in employment.[1809]

Additionally, the role of antidiscrimination law in accessing employment by persons with psychosocial conditions is limited. During the early stages of accessing employment, which includes application, recruitment and interview, persons with psychosocial conditions may find themselves at a disadvantage. This is because at this stage it is difficult to identify the reason why a potential employer has rejected one's employment, unless one has inside information. The applicant at this stage will often not have information about the other applicants for the job and thus will not really be able to deduce that they have been discriminated against unless the job positions is a public one and the information is available publicly. This is reflected by the fact that most of the discrimination cases in South Africa, and also in Kenya are for persons who are already employed and were skipped for a promotion or were unfairly dismissed. The reported cases in South Africa on reasonable accommodation of persons with disabilities have mostly arisen in the context of dismissals for incapacity or misconduct.[1810] In light of this fact, as well as the fact that reported cases do not provide an holistic picture of what happens in organisations,[1811] it is difficult to assess how antidiscrimination as a whole has impacted access to employment for persons with psychosocial conditions or impairments.

[1803]Ibid.
[1804] Ibid.
[1805] *Jonnes Ludomia Nalianya & 2 Others V The Director Of Children Services* (Surrogacy case) Petition No. 78 Of 2014
[1806] Ibid.
[1807] *Francis Karioko Muruatetu & Another Vs Republic:* Supreme Court Petition No. 15 Of 2015 (As Consolidated with Petition No 16 Of 2015 9 (Constitutionality of The Death Penalty)
[1808] KNCHR Vs. AG (Presidential Benefits Case) Petition No.132 /2013
[1809] https://www.knchr.org/Our-Work/Legal-Services, accessed on 26 April 2021.
[1810] Du Plessis op cit note 1178 at 174.
[1811] Ibid.

Then there is the challenge of the general absence of knowledge or awareness about antidiscrimination law. A study done in Kenya found obvious lack of information about legislation on inclusive employment. [1812] Fredman argues that this lack of knowledge about antidiscrimination law is not only present in claimants, but that in many countries, judges and lawyers are unfamiliar with antidiscrimination legislation.[1813] A study done in Kenya found that employers are not aware of legislation mandating employers to employ persons with mental disabilities, or have ever accessed the government tax rebates available for employers of persons with disabilities in Kenya.[1814]

Correspondingly, in South Africa a study done found that there appears to be a lack of understanding and awareness by claimants that the choice of the ground upon which the allegation of discrimination rests often determines the strategic choice to be made in litigation,[1815] and that both direct and indirect discrimination remain poorly understood concepts.[1816]

X. CONCLUSION

Kenyan and South African antidiscrimination legislation has revealed considerable progress in protecting the rights of employees with psychosocial disabilities since the adoption of the CRPD. Although countries' legal frameworks are compliant with art 27(1)(a) of the CRPD in some respects and provide adequate legal responses for employees with psychosocial disabilities who are discriminated against in employment, the laws are non-compliant in cardinal aspects and are thus limited in their capacity to protect employees with psychosocial disabilities from discrimination in employment.

Both jurisdictions could do more to facilitate the access and maintenance of employment by persons with psychosocial disabilities. The biggest limitation of both laws is the fact that they do not always protect employees with psychosocial conditions as persons with disabilities, as both states adopt definitions of disability that are not compliant with the social approach to disability, as required by the CRPD. As a result, many employees with psychosocial conditions may have to claim antidiscrimination protection on grounds other than

[1812] Ebuenyi & Van der Ham op cit note 1747 at 1694.
[1813] Sandra Fredman, Anti-discrimination laws and work in the developing world: A thematic overview (Background Paper for the World Development Report 2013) 1 at 44.
[1814]. Ebuenyi & Van der Ham op cit note 1747 at 1694.
[1815] Dupper & Garbers op cit note 1585 at 247.
[1816] Ibid at 251.

disability. This has led to a number of limitations in the antidiscrimination protection for employees with psychosocial conditions in both states.

The CRPD and the CRPD Committee could provide more clarity on aspects such as whether the CRPD allows for justification of discrimination or not, and if yes, in what circumstances and the parameters of possible justifications. Further, with regards to the reversal of the burden of proof, what facts will be sufficient to prove the casual link between the alleged discrimination and a protected ground in a manner that creates a presumption of discrimination.

The states parties' approach to international law also affects the protection afforded to claimants. In Kenya, when legislation does not comply with art 27(1(a) of the CRPD, complainants may rely on the CRPD itself, subject to certain limitations. In South Africa, employees do not have this option. However, because South has ratified the Optional Protocol to the CRPD, complainants could lodge individual complaints to the CRPD Committee.

CHAPTER 7. RECOMMENDATIONS

I. INTRODUCTION

In this final chapter I make suggestions and offer recommendations on the steps both Kenya and South Africa as States Parties to the CRPD can take to comply with article 27(1) (a) of the convention. The chapter will begin by first offering recommendations that are applicable to both jurisdictions, then it proceeds to consider recommendations specific to each country. These are intended to offer possible ways of enhancing legal protection to promote freedom from discrimination for employees with psychosocial disabilities, thereby facilitating their access and maintenance to employment on an equal basis with others.

II. RECOMMENDATIONS IN RESPECT OF THE SOUTH AFRICAN AND KENYAN ANTIDISCRIMINATION LEGAL FRAMEWORKS

a) The definitions of disability in antidiscrimination laws should be amended to reflect a social approach to disability

Firstly, as it stands the definition of disability under South African (EEA and Disability Code) and Kenyan law (PWD Act) are in breach of its obligations under the CRPD regarding elements of the definition of disability. Both States Parties should move the focus of their concept of disability from medical diagnoses to social oppression that follows in response to certain forms of psychosocial impairments or conditions. Notably, while a medical diagnosis may be prima facie proof of disability, it should not be the only indicator of whether someone is disabled or not. This is the approach taken by the CRPD.

In Kenya the definition used for social welfare purposes is also used for antidiscrimination purposes.[1817] As has already been discussed, this is not only far from ideal, but it may also limit the application of antidiscrimination law, as the definition of disability not only affects which employees with psychosocial disabilities are protected, but also the scope of discrimination law.[1818] The definition of disability should be in line with the specific purpose of the legislation.[1819]

b) Both Kenya and South Africa should reduce the standard of proof required to show a causal link between the alleged discrimination and a protected ground

The recommendation is that the antidiscrimination legal framework for both States Parties should not only provide for a shift in the burden of proof, but ensure that it is accompanied by

[1817] See chapter 4, heading VI.
[1818] Ibid
[1819] Ibid

the relaxation of the standard of proof an employee has to meet in order to show a connection between the alleged discrimination and a protected ground. This is necessary because meeting the standard is a condition precedent for a shift in the onus of proof

I suggest that an employee should only have to lead evidence to show that the employer could possibly have discriminated on the basis of the prohibited ground in order to meet the standard of proof that will shift the burden of proof to the respondent. A restrictive application of the shift of the burden of proof that fails to alleviate the standard of proof in order to lower the evidentiary burden for the complainant will act as a barrier to effective access to justice.

c) Require employees to show 'unfavourable treatment', which does not require the use of a comparator

The relevant laws should adopt the test of 'unfavourable treatment', which does not require the use of a comparator. In my view, this is preferable to the current test of 'less favourable treatment'. The use of a comparator in disability discrimination is impractical, because it is based in notions of formal equality, which requires equal treatment for people who are similarly situated. Disabled persons are very often not seeking equal treatment, because they want their difference to be respected and therefore require different treatment. Insistence on a comparator is an unnecessary barrier preventing persons with psychosocial conditions from claiming the right to access and maintain employment.

As it currently stands the definitions of 'discrimination' found in Kenya[1820] and South Africa's[1821] laws do not necessarily require the use of a comparator. [1822] However, case law in both jurisdictions seems to adopt the use of a comparator in some instances.[1823] This causes unnecessary confusion. I recommend that both countries' laws should clarify that in cases of disability discrimination the test of 'unfavourable treatment', which does not require the use of a comparator to determine the existence of discrimination, is the appropriate test.

d) Kenyan and South African law should make it clear that the unjustified denial of reasonable accommodation amounts to discrimination

Notably despite the lack of such a provision in the law, South African case law recognises the unjustified denial of reasonable accommodation as a form of discrimination. However, the

[1820] See chapter 6.
[1821] Ibid.
[1822] Ibid.
[1823]. Ibid.

EEA should be amended to make it clear that the unjustified failure to provide reasonable accommodation constitutes discrimination.

In Kenya, the denial of unjustified reasonable accommodation as a form of discrimination can be based on art 2 of the CRPD directly.[1824] However, this only applies to employees who qualify as having a disability and not those protected in terms of other protected grounds. This limits the protection available to employees with psychosocial conditions who may not qualify as disabled because of the current restrictive definition of disability. As a result, my recommendation is that Kenyan law should be amended to recognise the unjustified denial of reasonable accommodation as discrimination in relation to all protected grounds, not just disability.

e) Justifications of discrimination should be construed restrictively

However, the scope and substance of both Kenyan and South African law is subject to certain significant restraints, which limits its reach and capacity to protect employees with psychosocial disabilities in employment. These take the form of justifications or defences. This is whereby potentially discriminatory behaviour that comes within the scope of antidiscrimination law is deemed to be lawful.[1825] Basically, it is the legal authorisation for conduct which would normally qualify as unlawful discrimination. As has been shown, the CRPD itself does not seem to provide for any justifications to discrimination. Also, the General Comments only hints at justification with regard to the provision of reasonable accommodation. Nevertheless, as has been highlighted previously, the Committee recommendations seem to show an erratic use of justifications without much explanation as to why it is applicable in some cases and barely mentioned in others.[1826] Both Kenyan and South Africa's antidiscrimination law provides for a variety of justifications.

To begin with, the Kenyan legal framework seems to provide employers with a variety of opportunities to get away with discrimination in employment. The grounds for justification of discrimination are about 5 and are found in both the PWD Act and Employment Act.[1827] However, what is most alarming is that these exceptions are not only underdeveloped jurisprudentially, but they are either unclear or too broad with great potential for misuse and

[1824] Ibid.
[1825] Kimberly Liu 'Defining the limits of discrimination law in the United Kingdom: Principle and pragmatism in tension, International Journal of Discrimination and the Law' (2015) 15(1-2) 80 at 81.
[1826] See chapter 3, heading VI.
[1827] See chapter 6, heading VII.

abuse. There is still much uncertainty about the defences as their application would depend on the interpretation by the courts.

The defences available in the South African legal framework that justify discriminatory behaviour by an employer include inherent requirements of the job, affirmative action and the contentious ground of fairness which scholars cannot seem to agree on whether it makes a third exemption or not.[1828] However, unlike Kenya, the courts have had a chance to jurisprudential develop the parameters of the use of the various exceptions which act as defences to unfair discrimination. Indeed, case law suggests courts have adopted a restrictive approach when it comes to the application of the various exceptions. Example, South African labour courts have cautioned that the inherent requirements of the job defence must be interpreted strictly so that it does not unjustifiable limit the rights of employees to be free from discrimination.[1829] Interesting enough, research done in South Africa found that employers do not win discrimination cases because they are able to justify their discrimination but rather, complainants lose cases because they cannot prove discrimination.[1830] This could also be true in the Kenyan context because case law available seems to focus more on employees proving discrimination and rarely on the defences provided by employer, and as a result the defences available are not well developed, if at all.

I recommend that to begin with the CRPD should clarify whether it allows for justification of discrimination or not, this will bring clarity and make compliance by both Kenya and South Africa more attainable. Further, that if both Kenya and South Africa provide for justification or defences to discrimination both States Parties should ensure that firstly, it is applied restrictively in order to minimise the denial of antidiscrimination rights of employees with psychosocial conditions and disabilities; and secondly should ensure that it is not inconsistent or it does not undermine the purpose of the antidiscrimination legislation whose aim to reduce and eliminate discrimination.

f) Create awareness about disability antidiscrimination law and improve access to remedies

In practice both Kenya and South Africa reflect an individual complaints-based model of antidiscrimination laws. This system seeks to address discrimination and inequality by providing individual victims with the right to take legal action against the individual

[1828] Ibid
[1829] Ibid.
[1830] Dupper & Garbers op cit note 1585 at 251.

discriminator for compensation.[1831] Importantly, this is in line with the CRPD as the Committee provides that nonetheless , because enforcement of antidiscrimination protection relies on the activity of individuals deprived of their rights, [1832] enforcement of legislation is therefore only as effective as the specific awareness among involved parties about their rights and duties.[1833] However, the law does not exist in a vacuum, if the law is there and the people who are supposed to benefit from it do not know or understand it then they will not be able to claim their rights. Firstly, both Kenya and South Africa should create platforms that encourage people with psychosocial conditions to share their experiences to help educate the public and raise awareness about psychosocial disabilities. They should adopt initiatives that also increase health providers' awareness and promote diagnosis and treatment of psychosocial conditions. Apart from this, it further essential that steps are taken to inform people with psychosocial impairments and conditions of their legal entitlements (for example, to reasonable accommodation in the workplace) and that they are encouraged to think positively about their skills and potential. This lack of awareness can result in individuals nor making any claims in court. This is particularly evident in Kenya where despite the fact that the Employment Act, and PWD Act came into force in 2007, no discrimination claim has been brought before the courts by an employee with a psychosocial disability. Also, as has been highlighted, another study done in South Africa found that the reason so many employments discrimination case was unsuccessful is because antidiscrimination law was poorly understood.[1834]

In addition, employees need to be aware of more than their rights and duties, but also their capacity and ability to access remedies. So, although awareness matters, the capacity to do something about that awareness is just as important. This is because many people know that they're being treated wrongly, but they may not know how to vindicate their rights and/or the forums they're supposed to use are not accessible. Lawsuits can expensive, time-consuming, technical, terrifying, and even humiliating, and so it is no surprise, then, that complainants may prefer other forms of dispute resolution, which are cheaper, quicker, and less public.[1835] Both Kenya and South Africa need to make their courts or relevant forums accessible for

[1831] Isabelle Chopin and Catharina Germaine (European network of legal experts in gender equality and non-discrimination) 'A comparative analysis of non-discrimination law in Europe 2020 The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom compared' (December 2020) 95.
[1832] Having op cit note 1778 at 82.
[1833] Honholt & Villotti op cit note 1709 at 47.
[1834] Dupper & Garbers op cit note 1585 at 251.
[1835] Carmen Morris Twyman 'Finding Justice in South African Labour Law: The Use of Arbitration to Evaluate Affirmative Action' (2001) 33(2) *Case W. Res. J. Int'l L. Case Western Reserve Journal of International* (2001) 307 at 330.

employees with psychosocial disabilities. Hence, States Parties, both Kenya and South Africa, should make it quicker and easier for a claimant to resolve a legal problem. This includes everything from decreasing or abolishing the financial burden for conducting proceedings or providing guarantees against further discrimination or even against retaliation, to alternatives to courts. [1836] Example, in South Africa, it's not just about lack of awareness, it's also about how easy or difficult the law makes it to access a remedy, both in terms of getting to a court or tribunal, and in terms of what they must show in order to access a remedy.[1837] One way of making remedies more accessible is to set up specialist tribunals, like the Commission for Conciliation, Mediation and Arbitration (the CCMA) in South Africa, which are specifically constituted to be cheap, quick and procedurally straightforward.[1838] Since its opening in November 1996, the CCMA has proved to be an inexpensive, accessible, and easy-to-use system for all workers.[1839] However, the biggest challenges facing it include : overburdened docket and lack of resources; and the quantity of cases being referred to the CCMA and the statistics demonstrate a reliance on the CCMA for dispute resolution and indicate that the Labour Court is being precluded from considering a sufficient sample of employment equity disputes.[1840] As a result the case management staff and the CCMA Commissioners are under extraordinary pressure. CCMA staff members are often too busy and under-skilled to properly and efficiently manage the disputes, resulting in delay, wasteful duplication, and mistakes.[1841] Also, the Commissioners are overworked and this burden has directly affected the quality of arbitration. The scarcity of resources has also caused Commissioners to receive only very basic training.[1842] Kenya does not have a similar forum, and a recommendation is that Kenya can learn from the CCMA in South Africa and come up with a similar forum, and ensure they counteract the limitations and challenges of the CCMA mentioned above. Also, a recommendation for South Africa is to hire more Commissioners and Staff and to increase funding to the court to help facilitate its functions.

Furthermore, there is also a need for organisations to help employees to litigate and mitigate costs of litigation. So, awareness matters, yes, but the capacity to do something about

[1836] Sandra Fredman 'The Role of Equality and Non-Discrimination Laws in Women's Economic Participation, Formal and Informal Background Paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): Economic and Social Life, ohchr.org' 71.
[1837] See chapter 6, heading IX.
[1838] Fredman op cit note 1836.
[1839] Twyman op cit note 1835.
[1840] Ibid at 331.
[1841] Ibid.
[1842] Ibid at 331 and 332.

that awareness is just as important. All the above are issues that impact on enforcement. Another recommendation is that both Kenya and South Africa should grant statutory equality or human rights commission with powers to investigate and determine discrimination cases. [1843] in order to help reduce litigation costs. However, because Kenya have done this through KNCHR and SAHC,[1844] but to date both human rights bodies have not had much impact or participated in the litigation of any case concerning disability discrimination in employment,[1845] I recommend future research to identify the reason why this is. Nonetheless, it is important to recognise the socio-economic contexts in both countries, where resources may be allocated to the most vulnerable, who may not have employment discrimination as their most pressing challenges. These includes access to food, water, health, housing, education etc, which would probably be more urgent from that perspective.

g) Raise awareness about psychosocial disabilities not just in employment but in the community

Part of the cure for prejudice, stigma and resulting misconceptions about the work ability of applicants or employees with psychosocial conditions in employment lies in lack of adequate awareness. Individualised, medicalised approaches to mental health fuel misconceptions and resulting negative attitudes of employers and co-workers, which may be significant barriers to the employment of person with psychosocial disabilities and conditions. Thus, awareness raising efforts should be targeted not only at persons with psychosocial disabilities themselves, but at all sectors of society, including employers, co-workers, health providers, government and communities, in line with article 8 of the CRPD.[1846] Attitudes of employers and co-workers are shaped in various settings and will necessarily affect workplace attitudes and willingness to change. Proposed measures to achieve change may include: more intensive national awareness campaigns in both Kenya and South Africa to sensitise families and communities, employers, employees and even government about the capabilities of persons with disabilities and the need to support them to participate in social and economic activities on an equal basis as others.[1847] The positive experiences of employers who have employed persons with psychosocial disabilities or conditions need to be shared to help overcome myths about the work capability of such persons. Steps should be taken to inform people with psychosocial impairments and conditions of their legal entitlements (for example, to reasonable

[1843] Fredman op cit note 1836.
[1844] Its enabling legislation, the South African Human Rights Act 40 of 2013
[1845] Chapter 6, heading IX.
[1846] Lawson op cit note 1715 at 79.
[1847] Opoku & Mprah op cit note 1741 at 11.

accommodation in the workplace) and that they are encouraged to think positively about their skills and potential.[1848]Also, there is need for assistance to help vindicate rights – NGOs, National Human Rights Institutions for example. There aren't many organisations that work in the employment context, and that requires attention and even further investigation.

h) Employers should create a work environment that facilitates disclosure of psychosocial conditions

Employers are in charge of establishing a trusting workplace climate that facilitates disclosure of a disability, and should be able to maintain contact with health agencies in order to receive support from specialists if needed. [1849] While bearing in mind the privacy and bodily integrity rights of affected employees, of course. Employers should create an environment free from stigma, where employees can be confident that sharing their mental health challenges will not have adverse consequences for them. Employers may need to consider adopting a specific policy on supporting workers who experience mental health problems and take steps to publicise this to their workforce.[1850]

i) Accurate data on the number of persons with psychosocial conditions and disabilities in employment and in general

Accurate information is crucial to policy making and implementation.[1851]Such measurements serve as bridges between broadly stated entitlements and the details of what must be provided to whom and at what time. This reality is recognised in the CRPD.[1852] According to the CRPD state parties are required to undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.[1853]The information collected in accordance is required to be disaggregated, as appropriate, and used to help assess the implementation of states parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.[1854] As it stands no such data is available in both Kenya and South Africa.[1855]Hence, I recommend that both Kenya and South Africa should collect data on the number of persons with psychosocial conditions and disabilities in general

[1848] Lawson op cit note 1715 at 79.
[1849] Vornholt & Villotti op cit note 1709 at 47.
[1850] Bell and Waddington op cit note 1736 at 86.
[1851] Du Plessis op cit note 1178 at 206.
[1852]Ibid.
[1853] CRPD 31(1).
[1854] CRPD 31(2).
[1855] See chapter 3, heading IV.

population, and also data on the with psychosocial conditions and disabilities who are employed. Without this information it is difficult to examine and analyse the impact of current laws or even what steps can be taken to improve the current law.

III. RECOMMENDATIONS FOR SOUTH AFRICAN LAW

a) Amend the law to recognise perceived or presumed disability

In order for employment antidiscrimination law to provide effective protection it must recognise presumed or perceived discrimination. It is possible to interpret South African antidiscrimination provisions in ways that recognised perceived disabilities, but it could be framed more clearly. The Disability Code, which is meant to guide interpretation of the EEA, is silent on perceived or presumed disability.

In my view, South African law and the relevant Codes of Good Practice should be amended to recognise perceived disability expressly, as this goes a long way in protecting the anti-discrimination rights of employees with psychosocial disabilities. They are often discriminated against in the workplace not because of their condition, illness or impairment, but because of misconceptions and misguided perceptions about their ability to work.[1856]

IV. RECOMMENDATIONS FOR KENYAN LAW

a) Explicit recognition of intersectional and multiple discrimination

At present Kenyan law (the Constitution, Employment Act, PWD Act) only prohibits discrimination based on one ground. This limits the scope of anti-discrimination protection as it ignores the lived realities of employees with psychosocial disabilities who also belong to other protected grounds, and as a result experience magnified levels of discrimination. Hence, in order for Kenya to be fully compliant with the CRPD, Kenyan anti-discrimination law should more clearly prohibit intersectional and multiple discrimination.

b) Explicit protection against discrimination on the basis of past and future disability

Kenyan law fails to recognise past and future disability. According to the CRPD discrimination "on the basis of disability" can be against persons who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future. I recommend that Kenyan law should specifically recognise past and future disability in order to be compliant with the CRPD.

[1856] Ibid.

c) Include harassment as a form of discrimination

Kenyan legislation does not recognise harassment on any protected ground as a form of discrimination. Again, Kenya's monist orientation means that employees with psychosocial conditions may still claim antidiscrimination protection for harassment in the workplace. However, the CRPD application is limited to employees with psychosocial conditions who qualify as persons with disabilities.

d) Utilise expertise to help in the implementation of reasonable accommodation measures

Kenya should consider adopting Codes of Good Practice or similar guiding documents that encourage employers to involve experts on occupational health in consultations with employees in order to develop effective reasonable accommodation measures. A study done in Kenya found that employers stated that they needed detailed insights into their employee's capabilities in order to be able to adjust tasks to that person's abilities.[1857] Experts may be able to advise on matters such as how to accommodate, for example, the side effects of medication in order to prevent treatment drop out.[1858] Also, psychotherapists may be able to provide guidance on the adjustment of the working environment and work practices to make them more suitable for persons psychosocial disabilities or conditions.[1859]

e) Amend the PWD Act to introduce an individual complaint mechanism

The Committee requires states parties to provide 'accessible and effective redress mechanisms and to ensure access to justice, on an equal basis with others, for victims of discrimination.[1860] This encompasses access by all persons with disabilities to effective judicial and/or administrative procedures.'[1861] The PWD Act, at present, does not provide for an individual complaint mechanism.[1862] In practice the courts allow individual complaint, but the legislation, in my view, ought to allow individual complaints as of right.

V. RECOMMENDATIONS FOR CRPD LAW

a) Amplify the requirements relating to harassment as a form of discrimination

The Committee has, until now, only provided that harassment is a form of discrimination and has defined it. The potential for compliance by states parties may be enhanced if the Committee

[1857] Ebuenyi & Van der Ham op cit note 1747 at 1694.
[1858] Chapter 6, heading III; Chapter 3 heading IV (a)
[1859] Vornholt & Villotti op cit note 1709 at 50.
[1860] General Comment 6 Para 73(h).
[1861] Ibid.
[1862] See chapter 4, heading V.

were to issue a General Comment addressing harassment, perhaps within the context of an overall General Comment on art 27.

b) *Clarify that the 'unfavourable treatment' approach which does not require the use of a comparator, is preferred*

The CRPD's definition of discrimination adopts the 'less favourable' treatment approach, which technically implies the use of a comparator. The CRPD Committee's jurisprudence shows support for the 'unfavourable treatment' approach, which does not require complainants to identify comparators. In my view, the Committee could be clearer in its preference for the 'unfavourable treatment' approach.

c) *Clarify the position on justifications of discrimination*

Currently the CRPD and the CRPD Committee decisions and guiding documents are not clear on the approach to justifications of discrimination. Committee decisions on this aspect does not seem to be consistent – in some cases justifications are considered, while in others they are not.

d) *Clarify what the requirement that complainants must provide "facts from which it may be presumed" that there has been discrimination*

It would assist states parties and affected persons greatly to have a better understanding of the standard of proof that applies when the CRPD requires that complaints must show 'facts from which it may be presumed' that there has been discrimination. Employees' cases often fail in the early stages because they are unable to prove a causal link between alleged discrimination and protected grounds. It is therefore imperative that there is clarification of the relevant standard of proof, which I submit should at least be set lower than the ordinary standard of proof in civil cases.

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