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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**

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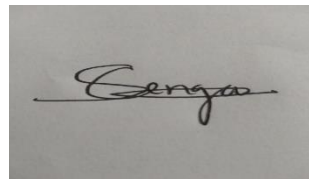
**This thesis is presented in partial fulfilment for the Degree of Doctor of
Philosophy in Law to the Faculty of Commerce, Law, and Management,
University of the Witwatersrand.**

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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

A photograph of a handwritten signature in black ink on a light-colored surface. The signature is cursive and appears to read '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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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 <i>Revision</i>
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

¹WHO 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 successfully 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 al '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 cit note 5.

¹⁷ Kaaren Mathias op cit 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 cit 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

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.za/ibid%20a/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. 6⁶⁶ 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 al '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/kenyacrpdpd>>, 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 Act⁸⁸ 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 Hélène Combrinck ‘Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa’ in Charles Ngwena et al (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.

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 Constitution¹⁰¹ 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 Disabilities¹¹² (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 October 2021

¹⁰⁶Helen 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 influential¹²⁵ 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/ survivors¹⁴⁰ 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

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 effectiveness¹⁶⁰ 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 *Beppress 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 note 155 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 model¹⁷⁶ 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 & Rantsoa 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 & Rantsoa 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 & Rantsoa 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 DISABILITY

The medical model of disability discourse began once religious leaders were replaced as the cognitive authority by doctors and scientists¹⁸⁴ in the Western Judea-Christian society.¹⁸⁵ Indeed, from the mid-1800s onwards, moral (religious) model of disability was progressively replaced by the moral model¹⁸⁶ 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 at 194.

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 note 184 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 Haeghele & 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 Haeghele & Hodge op cit 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.

approach²³³ and the North America ‘minority group’ approach.²³⁴ Others include a universality²³⁵ 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* 441 at 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 202 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 suppresses 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 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; Haegle & Hodge op cit note 183 at 129 and 197.

²⁶⁴ Burchardt op cit note 201 at 736.

²⁶⁵ Ibid.

²⁶⁶ Haegle & 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 Haegle & Hodge op cit note 183 at 197.

²⁷³ Anastasiou & Kauffman op cit note 263 at 443; Kazou op cit note 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 Haegle & 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 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 Sunghae 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 253 at 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

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

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 Wade & 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/classifications/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

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 135.

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 Harper³³⁴ 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 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 Stein³³⁸ 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 characteristic 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 persuades 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,

³⁶⁹ Ibid.

³⁷⁰ Peter Beresford ‘Thinking about ‘mental health’: Towards a social model’ (2002)11(6) *Journal of Mental Health* 581; Sara Goering op cit 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 illness³⁸² 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.

³⁹¹ Ibid.

³⁹² 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 seen as not only being socially constructed, but also as fluctuating, and as 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 of 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 of 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 impairment⁴²⁸ 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 together⁴³⁹ 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 op cit note 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 383 at 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 model 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.dsqsds.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 deep 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 Mauc̃ec '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; Mauc̃ec 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; Mauc'ec op cit note 444 at 44.

⁴⁸⁸ Mauc'ec 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 cit 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 cit note 448 at 50.

⁴⁹⁸ Bunbury op cit note 444 at 37; Gregor Mauc'ec 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 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 and 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 discrimination⁵⁷⁵ 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 principles⁵⁹⁴ and rights⁵⁹⁵ 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.'

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) 11 *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 V⁶²⁰ 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

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/adhocom.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/adhocom.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/adhocom.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 Committee⁶⁵⁷ 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 anti-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 Ngweni & 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 cit 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 Ngweni, 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 Ngweni, 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 equality⁶⁷⁴ 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 Bassar 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 and 19.

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 adequately fit with 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 at 733.

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 discrimination⁷¹⁶ 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 practice⁷²¹ that is applied to everybody⁷²² 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

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"* 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 Khaitan ‘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 Khaitan 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 Friberg 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 Friberg 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 disorders⁷³⁷ often lead to recurring of sickness absence⁷³⁸ 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

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 al ‘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 cognisance 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* equality⁷⁶³ 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 capacity⁷⁷⁴ 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

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

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 justification⁸⁵³ 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 discrimination⁸⁵⁶ 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) *The 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 treaties⁸⁶⁶ 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) states 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 treaties⁸⁷² 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.

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/kenyacrpdpd>>, 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 Mwangi ‘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 Act⁸⁷⁵ 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 parties, 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.

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 Court⁸⁸⁹ 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 in *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 Act⁹¹² 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 *ADRY 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

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 ELRC⁹²⁹ 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

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) & 3 others* [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 Act⁹⁵¹ 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 Act⁹⁵⁴ 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

⁹⁴⁸Section 15(1).

⁹⁴⁹Section 5(3)(a).

⁹⁵⁰Article 27(4).

⁹⁵¹Employment Act Section 5(3)(a).

⁹⁵²Article 260.

⁹⁵³Section 2.

⁹⁵⁴Section 2.

⁹⁵⁵Lee Ann Bassar 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;

⁹⁵⁶Chapter 3, heading 11.

⁹⁵⁷*Ibid.*

⁹⁵⁸Article 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

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 Act⁹⁶⁵ 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 Act⁹⁷⁸ 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 Mwangeli 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 Act¹⁰⁰² 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-summary>; <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,

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%20state,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 Act¹⁰⁴⁷ and Employment Act¹⁰⁴⁸ 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 Constitution¹⁰⁷¹

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 General* [2014] eKLR, Cause 2408 of 2012, Industrial Court of Kenya; *Juliet Mwangeli 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 Act¹⁰⁷² 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 recognise indirect discrimination or it adopts the school of thought that the distinction between direct and indirect discrimination is not 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 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 CRPD¹⁰⁹⁷ 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 *pretextual*, 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 facie* 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 Act¹¹¹⁸ 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,

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

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 measures 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 reinstatement¹¹⁴² 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

¹¹⁴⁹United Nations Treaty Collection ‘Convention on the Rights of Persons with Disabilities’ available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-15&chapter=4&clang=_en, accessed 17 October 2021.

¹¹⁵⁰MC Marumoagae ‘Disability Discrimination and the Right of Disabled Persons to Access the Labour Market’ (2012) 15 (1) *PER / PELJ* at 354.

¹¹⁵¹Tuovinen op city note 826 at 438.

¹¹⁵²G 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.

¹¹⁵³Tuovinen op cit note 861 at 438.

¹¹⁵⁴Section 231(3); Tuovinen op cit note 861 at 438.

¹¹⁵⁵Franziska 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.

¹¹⁵⁸Supra note para 89.

¹¹⁵⁹Section 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 equality¹¹⁸¹ 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 equality¹¹⁸³ 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 Grobelaar-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-crpdp>, 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 al '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 al 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

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 EEA¹¹⁹⁹ 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

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 than 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 Ndzeke(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 is 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 Christianson¹²³⁰ 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 In 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 Act¹²³⁸ 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 Ngwenya 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 Ngwenya & 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 medicalised 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

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 Ngweni & 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 ; Agumasi 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 Ebuanyi & D Ikenna et al ‘Employability of Persons with Mental Disability: Understanding Lived Experiences in Kenya’ (2019) 10 *Frontiers in psychiatry* at 1; I Ebuanyi & 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,

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 Rights* 510 at 511.

¹²⁷⁹ Ngwenya & 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

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 Africa* 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 al '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) 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 approach¹³¹⁴ 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: 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 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 group¹³³⁴ 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 belief¹³⁵⁰ 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 advertisements¹³⁵³ 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 psychiatrist¹³⁵⁹ 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 provide 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.

psychologist¹³⁶⁰ 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] ZACPEHC 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 Ngweni 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 Act¹³⁹⁰ 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 harm¹³⁹⁸ 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,

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 note 1271 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 note 1271 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

¹⁴²⁴ Ann Lee Bassar 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 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, Ngweni & 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 Ngweni 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 Ebuanyi & 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 Russinova ‘Workplace prejudice and discrimination toward individuals with mental illnesses’ (2011) 35 *Journal of Vocational Rehabilitation* 227 at 228.

¹⁴⁴⁶ I Ebuanyi & 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.dsqsds.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 Bassar & 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 stigmatises 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 of 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 NCWPD¹⁵⁰¹ 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 Group) ‘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-V¹⁵²⁵ 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. Ebuonyi & 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 Esidimeni 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 *See* 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 Committee¹⁵⁴⁵ 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 a 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,

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

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 traces¹⁵⁸⁶ 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 Committee¹⁵⁹⁵ 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 of 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 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 EEA¹⁶¹⁴ 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 15498 at 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 review¹⁶²⁷ 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

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

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 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 discrimination¹⁶⁸⁷

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 compliance 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 not expand on it. However, in South Africa the TAG¹⁷⁰¹ 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) report¹⁷⁰³ 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 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 Group, 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 at 78.

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 stigmatised¹⁷³⁷ 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 highlighted¹⁷⁴² 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 Ngwenya 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 Ebuanyi & 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. Ebuanyi & 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://speecon.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 unjustifiably limit the rights of employees to be free from discrimination.¹⁷⁶¹ Basically it adopts a strict approach when it comes 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 law¹⁷⁷¹ 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 heading VII(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 at 168.

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 al (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 Ebuonyi & 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 NCPWD¹⁷⁹⁹ 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 <https://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 Nalinya & 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 Kenya¹⁸²⁰ and South Africa's¹⁸²¹ 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 unjustifiably 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 is 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 not 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 employment discrimination cases were 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 be 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.

¹⁸⁵⁶Ibid.

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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