CHAPTER 4

TO WHAT EXTENT IS GLOBAL AND REGIONAL JURISPRUDENCE ON THE RIGHT TO HEALTH FOR PERSONS WITH DISABILITIES REFLECTED IN KENYAN COURTS?

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Summary

The integration of international jurisprudence into the interpretation of the right to health of persons with disabilities by domestic courts is an important way of enhancing protection of the right at the national level. However, it is not always that decisions of international human rights bodies will find their way into domestic courts. This article maps the extent of engagement of Kenyan courts with international and regional jurisprudence on the right to health of persons with disabilities. It analyses the approach taken by Kenyan courts to determine whether it aligns with the principles espoused in the cases decided at the international and regional level. The article singles out two communications or cases that were decided by the Committee on the Rights of Persons with Disabilities and one case that was decided by the African Commission on Human and Peoples' Rights and assesses the extent to which Kenyan courts have given effect to its obligations under the Convention on the Rights of Persons with Disabilities. The paper concludes that global and regional jurisprudence on the right to health for persons with disabilities is rarely used by Kenyan courts to interpret persons with disabilities' rights. The paper recommends that Kenyan courts should entertain and apply a broad range of international and regional jurisprudence when interpreting the normative content of the right to health of persons with disabilities and corresponding state obligations.

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1 Introduction

Generally, the domestic effect of international human rights jurisprudence on individual countries is to limit state behaviour. The right to health of persons with disabilities has been interpreted in different ways in both the international and regional realms. The main human rights institution tasked with the protection of persons with disabilities' right to health at the global level is the United Nations Convention on the Rights of Persons with Disabilities Committee (CRPD Committee).[1] At the regional level, the main mechanisms used to guarantee the right to health of persons with disabilities are the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child.

This article analyses the extent of engagement of Kenyan courts with international and regional jurisprudence on the right to health of persons with disabilities. It begins by briefly setting out the scope of the right to health under the Convention on the Right of Persons with Disabilities (CRPD).[2] This is followed by an analysis of three global cases on the right to health of persons with disabilities. These are the CRPD Committee's views in *Munir Al Adam and ADHRB v Saudi Arabia* (*Munir*),[3] *HM v Sweden* (*HM*)[4] and the African Commission's decision in *Purohit v The Gambia* (*Purohit*).[5] The paper then considers the jurisprudence of Kenyan courts on persons with disabilities' right to health and determines to what extent they apply international jurisprudence.

2 The place of international law

International law may be linked to the Foucauldian notion of productive power. According to Michael Foucault:[6]

1 UN Human Rights: Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx#:~:text=The%20Committee%20on%20the%20Rights%20of%20Persons%20with,Committee%20on%20how%20the%20rights%20are%20being%20implemented (accessed 15 October 2021).

2 UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD), resolution/adopted by the General Assembly on 24 January 2007, A/RES/61/106 (2007).

3 *Munir Al Adam and ADHRB v Saudi Arabia,* Communication 38/2016, CRPD Committee (20 September 2018) UN Doc CRPD/C/20/D/38/2016 (2018).

4 *HM v Sweden,* Communication 3/2011, CRPD Committee (19 April 2012) U Doc CRPD/C/7/D/3/2011 (2012).

5 *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

6 TE Aalberts 'Book review: Leonard M Hammer *A Foucauldian approach to international law: Descriptive thoughts for normative issues* Aldershot: Ashgate, 2007' (2008) 19 *European Journal of International Law* 859 https://academic.oup.com/ejil/article/19/4/870/349387 (accessed 24 April 2021).

> The law [as a social phenomenon] is not solely a preventive mechanism but maintains some form of creative and productive aspect … [I]t not [only] singularly control[s] individuals but produces particular subjects and in turn is the result of these particular subjects.

It means that international law may be justified in several ways. First, it has been rationalised as a form of government; whereby legal norms and legal entities are characterised not in opposition to state power but rather as a means for government by dominant states.[7] Secondly, it highlights the significance of collective thought as a means of identifying the 'rule of law' not in opposition to politics but rather as a powerful ordering rationality and hence a means for government.[8] Lastly, it can be used to check state power and provide even-handed accountability.[9]

The Constitution of Kenya 2010 (2010 Constitution) transformed Kenya from a dualist state to a monist state. Under the monist approach, Kenya's legal system regards both international and national law as part of a single legal order. Therefore, Kenyan courts can directly apply international human rights law when interpreting domestic laws. Nevertheless, the status of international law in the hierarchy of Kenyan laws has received varying interpretations by Kenyan courts. One argument is that international law forms part of Kenyan law and where there is a conflict between statute and obligations under international law, the latter takes precedent.[10] The alternative argument, which has a significant impact on the application of international jurisprudence, is that international laws rank below the 2010 Constitution, statutes and decisions of domestic courts. This was stated in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority*[11] by the Supreme Court of Kenya. The implication of this decision is that progressive interpretations of obligations under international law by international treaty bodies may be of no consequence in the Kenyan legal system if they conflict with statutes or domestic judicial decisions.

The 2010 Constitution makes provision for persons with disabilities' right to health which is enshrined under article 43(1)(a) and provides for the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare. This paper argues that in Kenya the impact of international human rights jurisprudence in relation to health for persons with disabilities is negligible. The Kenyan

7 NM Rajkovic '"Global law" and governmentality: Reconceptualising the "rule of law" as rule "through" law' (2010) 18 *European Journal of International Relations* 29 at 32.
8 As above.
9 As above.
10 See for example, *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, where the High Court of Kenya found a statute that permitted the imprisonment of civil debtors to be in conflict with Kenya's obligations under the International Covenant on Civil and Political Rights.
11 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, paras 130-132.

legal process which is tasked with the function of interacting, interpreting and internalising international law into the domestic system has largely ignored both international and regional jurisprudence when interpreting persons with disabilities' right to health.

3 Legal framework on the right to health under the CRPD

Both outside and inside the courtroom, the CRPD has proved to be a uniquely powerful tool in advancing persons with disabilities' right to health. Kenya ratified the CRPD on 19 May 2008 and as a result is bound by its provisions. The state cannot invoke its domestic laws as a justification for a failure to meet its treaty obligations under the CRPD.[12]

The CRPD provisions call for states parties to take all appropriate measures to promote persons with disabilities' right to health. Article 25 addresses a number of the issues relevant to the jurisprudence reviewed in this study. It requires states to recognise the right of persons with disabilities to the highest attainable standards of health and further requires them to take measures to ensure that persons with disabilities have access to appropriate health services. It provides, in part, that states parties shall:

(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons….;
(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities…;
(c) Provide these health services as close as possible to people's own communities, including in rural areas;
(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent…;
(e) Prohibit discrimination against persons with disabilities in the provision of health insurance…;

Like other international law provisions, article 25 is widely viewed as having normative force independent of its embodiment in national laws.[13] States parties' national courts should invoke article 25 of the CRPD to urge the relevant states to comply with their human rights treaty commitments on persons with disabilities' right to health.[14] In Kenya, the judiciary when

12 P Apiko 'Understanding the East African Court of Justice: The hard road to independent institutions and human rights jurisdiction' European Center for Development Policy Management (2017) 12.
13 W Sandholtz 'How domestic courts use international law' (2015) 38 *Fordham International Law Journal* 595 at 606.
14 Sandholtz (n 13) 607.

engaging in rights review is legally authorised to look to international law and jurisprudence for guidance provided it is consistent with the 2010 Constitution.[15] Therefore, it is important for the courts to advance persons with disabilities' right to health within the parameters of article 25 of the CRPD.

4 Global jurisprudence on right to health of persons with disabilities

The CRPD Committee has for nearly two decades reviewed states parties' efforts to implement the CRPD, looking at whether national laws, policies and practices align with international standards. As of August 2020, the CRPD Committee had made decisions or adopted views in 34 individual communications.[16] Two of those, *Munir* and *HM* are discussed in this paper. The African Commission's decision in *Purohit* is also discussed. These decisions are useful because they promote uniformity in the application of international rules on persons with disabilities' right to health.[17]

4.1 Munir

4.1.1 Facts of the case and findings of the Committee

The author, Munir Al Adam, was a 23-year-old Saudi man with a partial hearing impairment acquired in childhood.[18] On 8 April 2012, Saudi security agents arrested him and took him to a police station where he was tortured.[19] As a result, the pre-existing hearing impairment worsened.[20] The author requested medical assistance but his requests were ignored for four months after which he was taken to a military hospital for a routine health check.[21] The doctor who examined him recommended urgent surgery on the author's affected ear in order to prevent permanent hearing loss. The author was, however, not treated for another six months, by which time his impairment had worsened so much that surgery could no longer fix the problem.[22]

In his submission to the CRPD Committee, the author claimed that the torture he went through while in detention worsened his disability.[23]

15 Art 2(4) of the 2010 Constitution.
16 OHCHR 'Jurisprudence database' https://juris.ohchr.org/search/results/1?typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0(accessed 7 November 2020).
17 Sandholtz (n 13) 613.
18 *Munir* (n 3) para 1.1.
19 *Munir* (n 3) para 2.1.
20 *Munir* (n 3) para 2.2.
21 *Munir* (n 3) para 2.3.
22 As above.

He therefore alleged a violation of his rights under articles 15, 16 and 25(b).[24] As regards the alleged violation of article 25, the Committee noted that article 25(b) of the Convention requires states parties to 'provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities'.[25] The Committee further stated that states parties have a special responsibility to uphold human rights when prison authorities exercise significant power over persons with disabilities who have been deprived of their liberty.[26] In *Munir*, the Saudi authorities did not enable him to access the surgery he needed to prevent complete loss of hearing despite having been informed by a doctor of the need for an urgent intervention. The Committee found that the state party violated article 25(b) of the CRPD.[27]

4.1.2 Analysis

The decision of the CRPD Committee in *Munir* was an affirmation of the positive obligation of states parties to the CRPD to address the health needs of persons with disabilities in a manner that not only addresses their immediate health requirements, but also prevents further disabilities. In addition to recognising the absolute prohibition of torture and ill-treatment, the CRPD Committee emphasised that in relation to persons with disabilities in custody, states have a *special* responsibility to uphold their human rights. The use of the term 'special' suggests a more compelling level of responsibility required of states. This acts as an added layer of protection for persons with disabilities. Hence, states will be held to a higher standard of accountability should a person with disabilities' disability worsen as a result of the failure of the state to intervene early enough.

While this case relates to the health needs of a person with disability in custody, similar standards would apply to persons with disabilities generally since article 25(b) contemplates early identification and intervention for all persons with disabilities to prevent further disabilities. Certainly, given the inequality of resources amongst states, a question may be raised about holding less-resourced states to a standard considered 'impossible'. One factor that would be taken into account is whether the state knew or ought to have known that a persons with disabilities' condition could worsen unless an early intervention is made. Secondly, it would be necessary to consider what reasonable steps a state took to accommodate the health needs of the person with disability to ensure that

23 *Munir* (n 3) para 3.2.
24 *Munir* (n 3) paras 3.2-3.3.
25 *Munir* (n 3) para 11.6.
26 As above.
27 As above.

their rights are realised. The duty of reasonable accommodation is expressly provided for under the CRPD as a vital factor in enabling persons with disabilities to enjoy and exercise their rights on an equal basis with others.[28] Reasonable accommodation is an incidental right which means that it is essential in realising other existing rights.[29] Policies, practices and premises should be reasonably adjusted in order to ensure the health of persons with disabilities. It is important to ask the question whether persons with disabilities have greater difficulty in accessing health services that the rest of the population can easily access. States parties to the CRPD are under the obligation to consider the particular circumstances and needs of persons with disabilities in order to identify, intervene and offer appropriate services designed to minimise and prevent further disabilities. If that is not the case, then, in accordance with the reasoning in *Munir* a state can be said to be in breach of its obligations under both articles 2 and 25(b) of the CRPD.

4.2 *HM*

4.2.1 Facts of the case and findings of the Committee

HM had Ehlers-Danlos Syndrome, a disorder that severely interfered with her mobility.[30] Due to her fragility, she could not be safely transported to hospital, and her specialists recommended hydrotherapy, which would improve the quality of her life.[31] HM applied to the local authorities for permission to extend her house in order to build an indoor pool for use during hydrotherapy but was denied permission on the ground that a part of the extension would be situated on land where building is not permitted.[32]An appeal to the County Council was rejected but a further appeal to an Administrative Court was successful, with the court finding that HM's interests should be given priority over the public interest to have the land used in accordance with the County Council's development plan.[33]

The County Council appealed to the Administrative Court of Appeal which overturned the decision of the Administrative Court.[34] An appeal by HM to the Supreme Administrative Court of Stockholm was unsuccessful.[35] The CRPD Committee had to consider whether the CRPD had priority over Sweden's Planning and Building Act, whose neutral

28 Art 2 of the CRPD.
29 D Ferri 'Reasonable accommodation as a gateway to the equal enjoyment of human rights: From New York to Strasbourg' (2018) 6 *Social Inclusion* 40 at 43.
30 *HM* (n 4) para 2.1.
31 *HM* (n 4) para 2.2.
32 *HM* (n 4) paras 2.3-2.4.
33 *HM* (n 4) paras 2.4-2.5.
34 *HM* (n 4) para 2.6.
35 *HM* (n 4) para 2.7.

application by Swedish authorities had, according to HM, infringed her right to equal opportunity for rehabilitation and improved health.[36]

The CRPD Committee noted that applying the Planning and Building Act equally to all, without having regard to the particular circumstances of some individuals with peculiar needs, could lead to discriminatory outcomes for persons with disabilities.[37] It also recalled that according to article 2(3) of the CRPD, the denial of reasonable accommodation is a form of discrimination.[38] Having regard to the meaning of reasonable accommodation under article 2(4) of the CRPD, the Committee concluded that Sweden had failed to provide reasonable accommodation to HM.[39] In relation to the claim for violation of HM's right to health, the Committee noted that Sweden failed to take into account HM's unique circumstances and her disability-related needs when the authorities denied HM the permission to deviate from the development, and that the refusal was '… disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with disability, to the health care and rehabilitation required for her specific health condition'.[40]

4.2.2 Analysis

HM is a progressive decision which demonstrates the length the Committee is prepared to go to, to give effect to the right to health of persons with disabilities. The CRPD Committee addressed how a neutral application of laws may have discriminatory consequences for certain vulnerable groups such as persons' with disabilities. It recalled that the meaning of 'discrimination on the basis of disability' under the CRPD is

> 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.[41]

Essentially, discrimination on the basis of disability may be direct or indirect. In HM's case, the discrimination was indirect since the Swedish authorities' strict interpretation of the Planning and Building Act failed to take into account the significant challenges HM had. On the face of it, and as argued by Sweden, the Planning and Building Act applied to everyone equally, whether the person has a disability or not. However, the effects of the neutral application of the law defeated the objects of the principle of reasonable accommodation as envisaged in the CRPD.

36 *HM* (n 4) paras 3.4, 5.2.
37 *HM* (n 4) para 8.2.
38 *HM* (n 4) para 8.4.
39 *HM* (n 4) paras 8.4-8.5.
40 *HM* (n 4) para 8.8.
41 *HM* (n 4) para 8.3.

This decision affirmed that equality must be substantive. According to Du Plessis and Nienaber, in relation to persons with disabilities, substantive equality means that '…the physical and social environment must be adjusted to accommodate them, so ensuring equality of outcomes'.[42] Thus, authorities must ensure that persons with disabilities suffer no disadvantage from legislative, governmental, or other action because of their disability. They should not be discriminated against on the basis of their disability. In HM's case, since her health and the quality of her life depended greatly on the construction of the hydrotherapy pool within her home, it behooved the local authorities to fully accommodate her needs, even if that meant easing the application of planning regulations. Only by doing so would HM have been in a position to enjoy her rights on an equal basis with others.

4.3 Purohit

4.3.1 Facts of the case and findings of the African Commission

The complainants were mental health advocates who submitted a complaint to the African Commission on behalf of patients of a psychiatric unit of the Royal Victoria Hospital in the Gambia.[43]Among other complaints, they alleged that the principal mental health law then in force in the Gambia, namely, the Lunatics Detention Act (LDA) did not define a 'lunatic', nor did it contain any safeguards concerning the diagnosis, certification and detention of patients.[44] Generally, 'lunatics' is a derogatory term that has been used historically to refer to persons with psychosocial disabilities. They also alleged that the psychiatric unit was overcrowded and there was no requirement of consent to treatment.[45]

On the question of the definition of a 'lunatic' and the practice of detention of mental health patients, the African Commission found the LDA to be incompatible with articles 2 and 3 of the African Charter.[46] The African Commission also considered Gambia's argument that a decision to institutionalise a patient could be reviewed and took note of the fact that legal aid could only be provided to persons charged with capital offences. The Commission observed that in practice, the right of review could only be exercised by the wealthy and therefore the LDA did not comply with articles 2 and 3 on equal protection of the law and non-discrimination.[47]

42 I Grobbelaar-du Plessis & A Nienaber 'Disability and reasonable accommodation: *HM v Sweden* Communication 3/2011 (Committee on the Rights of Persons with Disabilities)' (2014) 30 *South African Journal on Human Rights* 366 at 376.
43 *Purohit* (n 5) para1.
44 *Purohit* (n 5) para 4.
45 *Purohit* (n 5) para 5.
46 *Purohit* (n 5) paras 53-54.
47 *Purohit* (n 5) para 53.

4.3.2 Analysis

The *Purohit* decision affirmed the right to health of persons with mental disabilities. The African Commission not only recognised the torture and inhuman treatment faced by persons with mental disabilities in places of detention but it also highlighted the extent to which mental health needs were generally neglected. In relation to the question of discrimination in access to health services for persons with mental disabilities, the African Commission affirmed that the right to health

> is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and … includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.[48]

The African Commission also stated that the freedom from discrimination is a non-derogable right. The Commission further urged the Gambia

> to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.[49]

The Commission did recognise that resources may be a challenge for some African states. However, it emphasised that the utilisation of the available resources should not be done in a discriminatory manner. For example, a state should not be heard to argue that they do not have resources to ensure access to mental health services by persons with mental disabilities yet the rest of its population can easily access other health services.

5 Approaches and application of international jurisprudence on the right to health by Kenyan courts

In accordance with article 1 of the CRPD, Kenya has an obligation to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities'. This obligation is to be discharged through various organs of the state, including the judiciary. In this regard, when interpreting rights under the CRPD, Kenyan courts should adopt the interpretation that best favours the realisation of the rights of persons with disabilities. Kenya has not ratified the Optional Protocol to the CRPD, hence its citizens cannot submit individual complaints with the CRPD Committee. Therefore, the application of international jurisprudence by Kenya's courts is an

48 *Purohit* (n 5) para 80.
49 *Purohit* (n 5) para 84.

important means through which the CRPD Committee's interpretation of rights under the CRPD can be felt at the domestic level. However, a review of various cases on the right to health of persons with disabilities decided by Kenyan courts reveals that the influence of international jurisprudence is extremely limited. What follows is an examination of three approaches in which international human rights jurisprudence, and particularly on persons with disabilities' right to health, is applied in Kenya.

6 Avoidance approach

The avoidance approach refers to the use of certain judge-made doctrines in order to relieve domestic courts of the duty to enforce norms of international law in some politically sensitive situations.[50] There are different avoidance techniques used by the courts especially when dealing with economic and social rights.[51] It may take various forms, for instance when a court of law declines to entertain a matter by denying cert or dismissing a writ or refusing an appeal.[52] A matter may also be decided on other grounds while avoiding a hotly contested issue or simply choosing to deal with an apparently more straightforward legal argument.[53] The avoidance approach to international human rights jurisprudence on persons with disabilities' right to health largely manifests itself in Kenya's courts. Using the avoidance approach, national courts have rejected the application of international and regional jurisprudence on persons with disabilities' right to health as will be seen in the Kenyan cases that follows.[54] However, the main problem with the avoidance approach, particularly in Kenya's legal system is that it greatly hinders the effectiveness of article 25 of the CRPD. This approach relies solely on domestic legal concepts without reference to international jurisprudence.[55] The judgment in *Kenya Society for the Mentally Handicapped*[56] (*Kenya Society*) which was delivered on 18 December 2012 serves as an example.

In *Kenya Society,* the petitioner accused state authorities of violating the rights of persons with disabilities by discriminating against them in terms of the provision of support and services.[57] The petitioner alleged that persons with disabilities' right to health was violated by the state's failure to implement various policies under the national health programme aimed

50 E Benvenisti 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts' (1993) 4 *European Journal of International Law* 159 at 169.
51 KG Young 'The avoidance of substance in constitutional rights' (2015) 5 *Constitutional Court Review* 233 http://www.saflii.org/za/journals/CCR/2015/8.pdf (accessed 7 September 2021).
52 As above.
53 As above.
54 Benvenisti (n 50) 161.
55 Benvenisti (n 50) 162.
56 *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General* [2012] eKLR.
57 *Kenya Society* (n 56) 2.

at preventing disability and early identification of disability of persons with mental or intellectual disability.[58] Further, it was alleged that the state's failure to establish sufficient, reliable and comprehensive structures to promote adequate provision of mental healthcare in public health institutions violated persons with disabilities' right to health. The state responded by outlining in general terms the measures which it had taken to ameliorate the position of persons with disabilities. The Court dismissed the petitioner's claims with much sympathy. In doing that, the Court stated that it is not its function to prescribe certain policies but to ensure that policies followed by the state meet constitutional standards and that the state meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms of a party who comes before the Court.[59] That view fails to provide the people with any recourse in situations where state authorities decline to make the relevant policies and laws to observe, respect, promote, protect and fulfil fundamental rights and freedoms of the people.

The *Kenya Society* verdict was followed in the High Court case of *Matthew Okwanda*[60] which was delivered on 17 May 2013. Although *Matthew* was not about disability, it is relevant because the Court employed the reasoning in *Kenya Society* and failed to uphold the petitioner's right to health. In *Matthew Okwanda*, the High Court dismissed the petitioner's application to have the state provide him with reasonable care and assistance after being diagnosed with diabetes mellitus, an illness that requires proper care, diet and medication.[61]

By the time these decisions were made, the CRPD Committee had already adopted views in the *HM* and therefore the respective courts could have relied on the reasoning in *HM* to aid in its interpretation of Kenya's obligations in relation to persons with disabilities' right to health. The African Commission's decision in *Purohit* had also been made and it would have been particularly useful for the Court in the *Kenya Society* case. That the Court in *Kenya Society* argued that it was not its duty to prescribe policies is an indication of the Court's avoidance approach. The Court was in fact called upon to address a failure by the state to implement its own policies, a failure which had led to discrimination against mental health patients in the sense that they could not access healthcare services on an equal basis with others. Had the court considered the reasoning of the CRPD Committee in *HM* and the African Commission's reasoning in *Purohit*, it would possibly have made a decision that better protects the rights of persons with mental disabilities. The Court's argument was an abdication of its duty to enforce the constitutional standards it was referring to. The 2010 Constitution prohibits discrimination on the ground

58 As above.
59 *Kenya Society* (n 56) 7.
60 *Matthew Okwanda v Minister of Health and Medical Services* [2013] eKLR.
61 *Matthew Okwanda* (n 60) 7.

of disability, and it also guarantees the right to health for all. Therefore, if persons with mental disabilities cannot access health services specific to their disabilities, then it means the constitutional standards are not being met and the judiciary should intervene, as the African Commission and the CRPD Committee did. The Court in the *Matthew case* could have also paid greater attention to the particular circumstances of the petitioner in the case, as was done by the CRPD Committee in *HM*.

The *Munir* case emphasised the obligation of states to ensure that persons with disabilities have access to health services, including early identification and intervention to prevent further disabilities. This decision is also important in the context of both the *Kenya Society* case and the *Matthew* case. Persons with mental disabilities usually have varying degrees of disorders whose effects may be mitigated by early intervention. In the absence of appropriate health care services, their conditions are bound to worsen. The Court in both *Society* and *Matthew* should have followed international law to hold the Kenyan government accountable for its failure to ensure the right to health of persons with disabilities. The decisions in *Society* and *Matthew* unintentionally established the avoidance approach towards international jurisprudence on persons with disabilities right to health.

However, there are some progressive cases that have given prominence to the CRPD but not related to health. In *Juliet Mwongeli Muema v Smollan Kenya Limited*[62] the Employment Court found that the respondent had violated articles 5 and 27 of the CRPD when it failed to install or provide the claimant with a screen reader, voice command, or any other technology to help her overcome her disability. The claimant was suffering from low vision caused by a genetic condition known as retinitis pigmentosa. In this case, the court used the CRPD against a private entity in order to ensure the labour rights of a person with disability.

6.1 Lack of political goodwill

The 2010 Constitution adheres to a monist approach which requires the application of international and domestic law as part of the same legal system.[63] However, in practice the application of international law in Kenya is dualistic and requires international law to be incorporated into domestic law to be applicable.[64] Laws and policies are formulated by the state.[65] The court's duty is to ensure that the state's policies meet

62 *Juliet Mwongeli Muema v Smollan Kenya Limited* [2019] eKLR.
63 JN Maina 'Do articles 2(5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?' (2013) 13 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=251670613 (accessed 5 October 2020).
64 *Matthew* (n 60) 7.
65 *Kenya Society* (n 56) 7.

constitutional standards.[66] The court is also mandated to ensure that the state meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms of the people of Kenya.[67] Without the will of the legislature, the executive and the judiciary, opportunities for national courts to address questions of persons with disabilities' rights in accordance with international law and jurisprudence are very limited.

6.2 Lack of awareness

Better education in international law is key in ensuring persons with disabilities' right to health.[68] There is need for both state and non-state actors to study regional and international decisions on persons with disabilities' right to health.[69] Judges when interpreting Kenya's Bill of Rights should not only consider international law, but also specifically research international jurisprudence on the relevant rights. Landmark decisions such as *HM* and *Purohit* should be used to promote persons with disabilities' right to health in similar situations and identify ways to enhance their protection further through legislation and governmental action.[70]

6.3 Economic constraints

Although Kenya is one of Africa's strongest economies, it is still beleaguered with several challenges, including poverty, inequality and vulnerability of the economy to internal and external factors.[71] Applying international human rights jurisprudence may require great financial commitment which the Kenyan economy cannot sustain. Therefore, courts will not insist on the state's duty to fulfill its mandate where the state proves that it lacks adequate funds to provide for persons with disabilities' right to health.[72]

7 Alignment approach

The alignment approach uses international human rights jurisprudence to effect change in the national legal system.[73] According to Rao, national

66 *Matthew* (n 60) 7.
67 As above.
68 Benvenisti (n 50) 161.
69 UN Women 'Academic paper gender equality and women's empowerment: Constitutional jurisprudence' New York (2017) 10.
70 As above.
71 The Word Bank 'Country overview: Kenya' https://www.worldbank.org/en/country/kenya/overview(accessed 7 November 2020).
72 *Kenya Society* (n 56) 5.
73 Benvenisti (n 50) 160.

courts should 'act more as agents and instruments for the unity and integrity of international law than as sources of its fragmentation'.[74] This article argues that national legal systems should be aligned with international human rights jurisprudence. With regards to the cases of *Munir*, *HM* and *Purohit*, their invocation in Kenya's national courts will lead to the expansion of judicial constitutional review of persons with disabilities' right to health.[75] This is in line with the presumption that legislation should be construed to avoid a conflict with international law.[76] As seen in *Kenya Society* and *Matthew*, national courts in Kenya are to a very limited extent conscious of the need to align national jurisprudence on persons with disabilities' right to health with the well-established norms as developed by the CRPD committee. The decisions puts in place restraints that inhibit the full application of international law by national courts.

8 Contesting approach

The CRPD is very much a living legal instrument. In this regard, the contesting approach aims to ensure that national courts offer strong, effective means to ensure that persons with disabilities' rights progress from laudable aspirations to binding obligations.[77] The contesting approach in this instance occurs when the court departs from the decision of an international tribunal.[78] There are several factors that justify national courts departing from the international precedents on certain occasions.[79] For instance, where international jurisprudence undermines the dynamic and evolving nature of the treaty or where the particular international jurisprudence is wrong or less protective than that of a state's constitution.[80] Such an approach threatens the uniformity of interpretation of the CRPD and could seriously hinder the evolutionary process of national jurisprudence which would achieve international conformity in the interpretation of the CRPD.[81] In *Kenya Society* and *Matthew*, no reasons were given regarding why the High Court failed to apply the CRPD Committee's jurisprudence on persons with disabilities right to health which was absolutely relevant.

74 As above.
75 Sandholtz (n 13) 608.
76 P Geary 'CRC in court: The case law of the Convention on the Rights of the Child' CRIN (2012) 54.
77 Geary (n 76) 4.
78 AE Dulitzky 'An Inter-American Constitutional Court? The invention of the conventionality control by the Inter-American Court of Human Rights' (2015) 50 *Texas International Law Journal* 77.
79 As above.
80 As above.
81 CA Ford 'Judicial discretion in international jurisprudence: Article 38(1)(c) and "general principles of law"' (1994) 5 *Duke Journal of Comparative & International Law* 35 at 37.

9 Conclusion and recommendations

Kenyan courts need to become part of the 'international judiciary' when dealing with and interpreting persons with disabilities' right to health.[82] It means that Kenyan judges should consider applying international human rights jurisprudence in order to reinforce the state's obligations under article 25 of the CRPD.[83] The CRPD Committee has already made decisions which have influenced the development of persons with disabilities right to health. Therefore, the international human rights jurisprudence on article 25 of the CRPD has the potential to increase the effectiveness of the Kenyan legal system. The best use of the CRPD's jurisprudence in Kenya would be through mainstreaming it. This would be the most effectual way to incorporate international human rights jurisprudence and for this, the Kenyan legal system would fare better.

In line with the alignment approach, national courts may adopt the 'wine and bottle' method when applying international human rights jurisprudence. The wine would be the international human rights jurisprudence on persons with disabilities right to health. On the other hand, the bottles in this case would be Kenya's legal landscape or structure. It means that Kenyan courts can use global and regional jurisprudence to modify national law and to have local decisions fit the doctrines which have been established by international tribunals. International human rights jurisprudence would therefore be used to fill the spaces left by the legislature. In other words, the CRPD's jurisprudence will be used to change the 'game' rather than changing the 'players'.

According to Hedley Bull, 'order in social life is very closely connected with the conformity of human behaviour to [normative] rules of conduct, if not necessarily to [binding] rules of law'.[84] Simply put, international human rights jurisprudence should be applied by national courts not because it is binding but because it is useful.[85] Therefore, there is need for mainstreaming international human rights jurisprudence in Kenya's national legal order.[86] The mainstreaming process would involve examining the provisions of national jurisprudence (bottles) to see if they are compatible with international human rights jurisprudence. The wine would be the international human rights jurisprudence. This would involve analysing existing national provisions on the right to health and determining if it is indeed possible to adapt the doctrines of global and regional human rights jurisprudence and expect them to function accordingly.

82 Dulitzky (n 78) 81.
83 UN Women (n 69) 10.
84 T Schultz & N Ridi 'Comity and international courts and tribunals' (2018) 50 *Cornell International Law Journal* 578 at 581.
85 Sandholtz (n 13) 598.
86 Schultz & Ridi (n 84) 581.