

## **Disability Inclusion and World Bank's Kenya Urban Support Program: Analysis of Disability Inclusion in City Board**

*By: Paul Ogendi*

### **Abstract**

*Disability inclusion in urban governance is important to ensure efficient and effective service delivery for persons with disabilities. Even though the 2011 Urban Areas and Cities Act provides for the representation of persons with disabilities in the boards, that representation is weak since it is from an individual as opposed to institutional point of view. A proper representation therefore requires that disability associations be recognized under the Act and allowed to nominate a representative to sit in the boards in order to promote ownership, legitimacy and control of the person sitting in the board to represent persons with disabilities in Kenya. Section 13(2) of the 2011 Act should therefore be amended to allow an association representing persons with disability to provide representation in order to strengthen disability inclusion in Kenyan boards. The National Council for Persons With Disabilities should as a matter of strategy take up this matter and force amendments in Parliament in the near future.*

### **1. Introduction**

The World Bank (WB) has partnered with Kenya in many development projects since Kenya is one of its members since 3 February 1964.<sup>1</sup> Currently, one of the key projects being implemented through the WB is Urban Development Agenda since 26 July 2017 via the Kenya Urban Support Programme (KUSP). KUSP provides Urban Development Grants (UDG) to 45 counties in Kenya. WB's focus on cities is important because they are seen as key nodes for economic development, competitiveness and

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<sup>1</sup> <https://www.worldbank.org/en/about/leadership/members> (accessed 9 November 2019).

innovation ‘particularly in the context of increasing globalization and mobility of people, information, finance and investment.’<sup>2</sup> Cities are also necessary for the development of knowledge-based new economy by attracting and retaining key knowledge workers and creative classes.<sup>3</sup>

One of the key result indicators of KUSP is the establishment of cities and municipal boards in all the participating 59 urban and municipal areas in Kenya.<sup>4</sup> Focusing on Boards is important in order to improve the quality of governance and management of urban areas and cities, which has been hitherto weak in urban areas leading to among other things the mushrooming of slums.<sup>5</sup> In this context, the problem being addressed is that fragmentation of decision-making is undesirable in urban governance issues and a more centralized system of decision-making may be preferable and moreso in secondary cities which have weaker economies and local governments.<sup>6</sup>

This paper will analyze the issue of disability inclusion in KUSP. In relation to disability inclusion, it is increasingly becoming clear that having one or two persons with disability is not enough. A proper representation of persons with disabilities should be institutionalized and in this regard the standard to be adopted is that allowing for representation from persons with disabilities

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<sup>2</sup> Martin Boddy (ed) *Urban transformation and urban governance: Shaping the competitive city of the future* (2003) 1 The Policy Press.

<sup>3</sup> Martin Boddy (ed) *Urban transformation and urban governance: Shaping the competitive city of the future* (2003) 1 The Policy Press.

<sup>4</sup> The project was approved on 26 July 2017 by WB's Board of Directors and the Legal Agreement with the Government was signed on 14 September 2017.

<sup>5</sup> Warren Smit ‘Urban governance in Africa: An overview’ *International Development Policy/Revue internationale de politique de developpement* (October 2018), <https://journals.openedition.org/poldev/2637> (accessed 9 November 2019).

<sup>6</sup> Warren Smit ‘Urban governance in Africa: An overview’ *International Development Policy/Revue internationale de politique de developpement* (October 2018), <https://journals.openedition.org/poldev/2637> (accessed 9 November 2019). Smit argues that ‘responsibility for key urban governance issues is often fragmented amongst large numbers of government stakeholders with limited capacities and conflicting interests, and that, in order to overcome these challenges, governance stakeholders need to be brought together in collaborative processes to jointly develop and implement new strategies that are based on a broader range of interests and meet a broader range of needs. As secondary cities in Africa face particularly severe challenges—given their weaker economies and weaker local governments compared to primary cities....’

associations including but not limited to the National Council for Persons with Disabilities (NCPWD) in addition to individual appointments of persons with disabilities to serve in the boards in their own capacity.<sup>7</sup>The following is the structure of the paper: overview of the KUSP project; conceptual framework for disability inclusion; the WB and disability inclusion agenda in practice; the legal imperatives for disability inclusion in Kenya; and strategies for amendments.

## **2. Overview of the KUSP project**

The KUSP programme has several key components. In terms of amount of funding and focus of the project, the KUSP project is a US\$ 300million project aimed at addressing the inability of Kenyan urban centers to spur economic growth and development due to poor management and limited investment.<sup>8</sup> The KUSP project therefore aims at achieving effective urban management in order to harness urbanization dividends to spur sustainable growth in Kenya.<sup>9</sup> The KUSP stated Program Development Objective (PDO) therefore is to 'establish and strengthen urban institutions to deliver improved infrastructure and services in participating counties in Kenya.'<sup>10</sup> The proposed key program results indicators are also stated as follows:<sup>11</sup>

- a) Number of urban areas with approved charters, **established boards**, appointed urban managers and a budget vote.
- b) Number of urban areas that utilize 50 percent of the budget intended for their urban investments in their budget vote.
- c) Score in the APA for achievement of urban planning, infrastructure, and service delivery targets by counties/urban areas, averaged across all urban areas that qualify for the UDG.

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<sup>7</sup> <http://ncpwd.go.ke/> (accessed 24 November 2019).

<sup>8</sup> Document of the World Bank, 'Program appraisal document on a proposed credit in the amount of US\$ 300million to the Republic of Kenya for the Kenya Urban Support Program', (5 July 2017) 1, <http://documents.worldbank.org/curated/en/357091501293684377/pdf/Kenya-Urban-PAD-07072017.pdf> (accessed 5 November 2019).

<sup>9</sup> Document of the World Bank n 4 above, 2.

<sup>10</sup> Document of the World Bank n 1 above, 7.

<sup>11</sup> As above, 7-8.

The establishment of boards is therefore an important element of the project and it is in fact prioritized under the project in what promises to transform urban governance in Kenya. Indeed, access to the US\$300million KUSP fund was tied to the establishment of city and municipal boards and those counties that didn't comply risked not getting a share of the Urban Development Grant (UDG).<sup>12</sup> Consequently, as at 2019, 59 new urban Boards had been established to govern and manage the cities and Urban areas in Kenya even though there is still some challenges in establishing Citizens Forums which are both integral in strengthening the new urban governance regimes in Kenya.<sup>13</sup>

In terms of geographical scope and national development planning, the project is currently being implemented directly in 45 counties (except Nairobi and Mombasa)<sup>14</sup> and in 59 potentially eligible urban areas within those counties. The project is in line with Kenya's Vision 2030<sup>15</sup> and Second Medium Term Plan (MTP2) 2013-17 that 'aims to facilitate a sustainable urbanization process through an integrated urban and regional planning management framework of Kenya urban centers and towns.'<sup>16</sup> KUSP is also

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<sup>12</sup> 'World Bank sets tough governance conditions on sh28b grant' *Standard Digital* 9 July 2018, <https://www.standardmedia.co.ke/article/2001287267/world-bank-sets-tough-governance-conditions-on-sh28b-grant> (accessed 7 November 2019).

<sup>13</sup> Concept note Public Dialogue 'Citizens role in innovating for better quality of life for urban communities in Kenya' (24 May 2019) 2 1<sup>st</sup> UN Habitat Assembly 27-31 May 2019 Innovation for better lives, <https://unhabitat.org/wp-content/uploads/2019/05/Urban-Public-Dialogue-UoN-24-May-2019-17.05.2019.pdf> (accessed 7 November 2019).

<sup>14</sup> The reason for excluding Nairobi and Mombasa from KUSP conditional grants is because they are currently beneficiaries of other ongoing Bank supported projects; these include the Kenya Informal Settlement Improvement Project, the Nairobi Metropolitan Services Improvement Project, the National Urban Transport Improvement Project, and the Water Sanitation and Supply Improvement Project. See footnote 11 of the The World Bank Document n 1 above, 7.

<sup>15</sup> <http://vision2030.go.ke/project/other-population-urbanisation-and-housing-programmes-and-projects/> (accessed 5 November 2019). Indeed, one of the targets for Vision 2030 is '[t]echnical assistance and support to County Governments in planning, urbanization and infrastructure development.'

<sup>16</sup> <http://documents.worldbank.org/curated/en/357091501293684377/Kenya-Urban-Support-Program> (accessed 5 November 2019).

listed under the Third Medium Term Plan 2018-2022.<sup>17</sup> Through Kenya Urban Housing Programme (KenUP), the project has been allocated about KES 11.9 billion in the 2019/20 financial year to 'improve urban management, urban infrastructure, and urban service delivery.'<sup>18</sup>

In terms of the lead agency, the Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHUD) is the main implementing state agency for this project in Kenya.<sup>19</sup> Other key partners in this project include UN-HABITAT and Kenya Urban Residents Association (KURA).

### **3. Conceptual framework for disability inclusion in WB development projects**

Disability inclusion in development projects including those funded by the WB can be viewed from different paradigms. In this paper, the proper conceptual paradigm is derived by moving backwards to the time when WB decided that building institutions was important in its projects if it was to achieve the same results as private sector.<sup>20</sup> At the time, many development projects were not having the desired impact especially in the public sector and more successes were being registered in the private sector. At the time,

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<sup>17</sup> Republic of Kenya Third Medium Term Plan 2018-2022 'Transforming lives: Advancing socio-economic development through the "Big Four"' (2018) 79, <http://vision2030.go.ke/inc/uploads/2019/01/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf> (accessed 7 November 2019).

<sup>18</sup> 'Summary of Uhuru Kenyatta's major projects for FY 2019/20' *Financial Standard*, 7 May 2019, <https://www.standardmedia.co.ke/business/article/2001324266/summary-of-uhurus-major-projects-for-fy-2019-20> (accessed 5 November 2019).

<sup>19</sup> Document of the World Bank n 1 above, 3. The project is being implemented alongside other three WB funded projects, namely: the Kenya Municipal Program (KMP) (started in 2010); the Kenya Informal Settlements Improvement Project (started in 2011); and the Nairobi Metropolitan Services Improvement Project (Started in 2012).

<sup>20</sup> Jannik Linbaek, Guy Pfeffermann & Neil Gregory *The evolving role of Multilateral Development Banks: History and prospects* (1998) Vol 3(2) *EIB Papers* 71-72. The term 'institutions' refers to the 'rules of the game' - laws, regulations and how they are made and enforced (or not enforced). This includes such important aspects of economic life as enforcement of private contracts by the state, the judiciary, commercial dispute settlement, utilities and banking regulations, and of course, first and foremost the protection of life and property. As above. See footnote 27 at page 72.

the WB realized that the quality of institutions and to be specific the rule of law and corruption affect closely investment outcomes especially in developing countries.<sup>21</sup> The WB therefore continues to underscore the need to have quality institutions if investments, loans or technical assistance are to be successful.<sup>22</sup>

Since institution-building is closely associated with rule of law and corruption. In the context of this paper, the rule of law paradigm appears to be more plausible to pursue to derive a proper conceptual paradigm for disability inclusion. Accordingly, the rule of law has been theorized by classical authors like Aristotle, Montesquieu and Locke to mean, mainly, curbing executive arbitrariness.<sup>23</sup> The need to regulate the exercise of executive authority and curb excesses is critical since it has today been largely accepted that there exists a close connection between a country's legal system and economic development.<sup>24</sup>

The rule of law is therefore defined along the above premise of curbing executive arbitrariness. One author for instance defines the rule of law as 'the degree to which citizens are willing to accept established institutions to make and implement laws and adjudicate disputes, and the presence of "sound political institutions", a strong court system and provisions for orderly succession of power.'<sup>25</sup> This definition focuses mainly on legitimacy of political institutions in terms of what is and what is not acceptable to the citizens. At the centre of the definition is the desire to create 'sound political institutions' and in this regard it can be argued in the context of this paper

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<sup>21</sup> Jannik Linbaek, Guy Pfeffermann & Neil Gregory *The evolving role of Multilateral Development Banks: History and prospects* (1998) Vol 3(2) *EIB Papers* 72.

<sup>22</sup> Jannik Linbaek, Guy Pfeffermann & Neil Gregory *The evolving role of Multilateral Development Banks: History and prospects* (1998) Vol 3(2) *EIB Papers* 72.

<sup>23</sup> Alvaro Santos 'The World Bank's uses of the "Rule of Law" promise in economic development' in David M. Trubek and Alvaro Santos *The new law and economic development: A critical appraisal* (2006) 257 *Cambridge University Press*.

<sup>24</sup> Alvaro Santos 'The World Bank's uses of the "Rule of Law" promise in economic development' in David M. Trubek and Alvaro Santos *The new law and economic development: A critical appraisal* (2006) 253 *Cambridge University Press*.

<sup>25</sup> As above, fn 28, pg 72.

that sound political institutions must be inclusive of persons with disabilities otherwise they would reject any other institution put in place.

Another useful definition of rule of law in this paper is a utilitarian one. In this regard, the rule of law is defined as 'a legal order consisting of predictable, enforceable and efficient rules required for a market economy to flourish.'<sup>26</sup> This definition emphasizes on the utility of rule of law in facilitating the growth of market economy. Consequently, in order for the market economy to flourish, this definition observes that rules should possess certain qualities such as *predictability, enforceability and efficiency*. Without such qualities, it is inferred, the market would not flourish or economic growth would be difficult to achieve or sustain. It is because of this reason that the WB has focused mainly on reforming the judiciary of many developing countries. It is argued here that urban areas and cities legislation may be seen as an attempt to introduce efficiency in urban governance and management.

There are also those who are critical about using the generic term 'rule of law' to cover all projects implemented by WB in the domestic legal system of a country. Whitford for instance notes that what is often referred to as rule of law may not necessarily qualify as such and therefore there is need to use adopt other phrases in certain contexts. He particularly notes that other phrases could be used especially when the WB or other development partners are advocating for particular laws.<sup>27</sup> The adoption of urban areas and cities legislation in the country through the KUSP project could qualify to be one such area. It can therefore be argued that the push to establish urban and municipal boards through these legislation is one such area that can be termed as promoting the rule of law by the WB but also promoting law reform to be precise. What is being witnessed in Kenya today through the KUSP programme and specifically through the urban areas and cities legislation is, aptly put, a law reform agenda.

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<sup>26</sup> Alvaro Santos 'The World Bank's uses of the "Rule of Law" promise in economic development' in David M. Trubek and Alvaro Santos *The new law and economic development: A critical appraisal* (2006) 253 Cambridge University Press.

<sup>27</sup> William C. Whitford 'The rule of Law: New reflections on an old doctrine' (2000) *East African Journal of Peace & Human Rights* 171.

The WB introduced the legal and judicial reforms as a main pillar through its President, James D. Wolfenson. This was done in the context of Comprehensive Development Framework, which is mainly about the Bank's mission to achieve sustainable development or 'fighting poverty for lasting results.'<sup>28</sup> The implementation of legal reforms agenda by WB has happened mainly through sector-adjustment lending and this process usually involves disbursing a loan in tranches with the first tranche usually distributed upon signing of the agreement and fulfilment of certain intended precedent legal conditions.<sup>29</sup> Sector loans are therefore being used to reward a country 'for doing that which it ought to have done and what it probably would have done in its own best interest without receiving the loan.'<sup>30</sup> According to Levinson, '[i]f this is the case, then the borrower has not added to its productive capacity. If this is not the case, and the borrower was induced to undertake policy reforms by the temptation of external financing, rather than by conviction, the reforms probably will not last very long.'<sup>31</sup> The KUSP project fits perfectly within this model since access to the urban development money is tied to putting in place of cities and municipal boards and this cannot happen unless certain legislation is passed. In this regard, almost all counties participating in the project have put in place such legislation and are at various stages of implementation.

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<sup>28</sup> The World Bank 'Initiatives in Legal and Judicial reforms (2004 edition) 1, <http://documents.worldbank.org/curated/en/139831468778813637/pdf/250820040Edition.pdf> (accessed 12 November 2019). Accordingly, the programme recognizes that 'poverty cannot be fought and gains cannot be sustained without effective and equitable legal systems.

<sup>29</sup> Jerome Levinson 'Multilateral financing institutions: What form of accountability?' (1992) 8 *American University International Law Review* 50, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr> (accessed 12 November 2019).

<sup>30</sup> Jerome Levinson 'Multilateral financing institutions: What form of accountability?' (1992) 8 *American University International Law Review* 51, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr> (accessed 12 November 2019).

<sup>31</sup> Jerome Levinson 'Multilateral financing institutions: What form of accountability?' (1992) 8 *American University International Law Review* 51, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr> (accessed 12 November 2019).



Lastly, it is crucial to note that the WB is precluded from considering the political complexion of the borrowing member and as such it cannot consider human rights pursuant to its Articles.<sup>32</sup> As a matter of fact, the Articles of Agreement for the International Bank for Reconstruction and Development or WB, does not have the term 'human rights' appearing anywhere in its text.<sup>33</sup> This means that the disability inclusion agenda cannot be championed at the WB using human rights language. This however does not absolve the recipient state from considering human rights issues or bowing to human rights pressure when deciding on disability inclusion. Indeed, this phenomenon appears to be the default position for many multilateral development banks whose developments have not matured synonymously with international law and as such the role of human rights in multilateral lending practices is still nominal.<sup>34</sup> The WB in its vision for sustainable development has however asserted that its activities also support the realization of human rights recognized under UDHR.<sup>35</sup> Of course, this default position is different from the European Bank of Reconstruction and Development (EBRD) whose Agreement's preamble expressly commits to respecting rule of law and human rights thereby allowing the bank to

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<sup>32</sup> Jerome Levinson 'Multilateral financing institutions: What form of accountability?' (1992) 8 *American University International Law Review* 56, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr> (accessed 12 November 2019).

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<http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf> (accessed 13 November 2019).

<sup>34</sup> Geneva J. Roman 'Human rights & multilateral development banks: Evaluating recipient records & lending practices' (2008) *Semantic Scholar*, <https://pdfs.semanticscholar.org/bf2e/3765182dabf218552762e6f8283060e83cf9.pdf?ga=2.95328412.1018451603.1573631595-1210375169.1573631595> (accessed 13 November 2019).

<sup>35</sup> *The World Bank Environmental and Social Framework* (2017) 1-2, <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf#page=15&zoom=80> (accessed 13 November 2019). In this strategy, the WB Group has set out the corporate goals of ending extreme poverty and promoting shared prosperity in all its partner countries. Securing the long term future of the planet, its people and its resources, ensuring social inclusion, and limiting the economic burdens on future generations will underpin these efforts. The two goals emphasize the importance of economic growth, inclusion and sustainability-including strong concern for equity.

consider such issues in its lending practices.<sup>36</sup> It would have been much more preferable if the Bank would reconsider its stance by directly incorporating human rights in its Article as opposed to the current indirect application of the paradigm.

To conclude this part, disability inclusion in the context of WB project is not human rights but a rule of law issue and specifically a law reform issue aimed at improving efficiency. The key objective in this paradigm is achieving sustainable development. Viewed this way, a Board that has persons with disability is more likely to achieve this. As noted by prince,

A fundamental goal in the vision of an inclusive city is the prevention and reduction of discrimination that occurs when people are unfairly treated because they are viewed through the dominant culture as having a spoiled identity, because institutional practices disenfranchise them of a voice in politics and policy making, because the environment presents barriers and obstacles to their daily living and active participation in the market economy and civil society.<sup>37</sup>

#### **4. The World Bank and disability inclusion agenda in practice**

The WB estimates that about one billion people of 15% of the world's population have some form of disability with the prevalence numbers higher in developing countries.<sup>38</sup>

Whilst there is no obligation on WB to implement disability inclusion as a human right, since 2002, the WB has established a formal commitment to

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<sup>36</sup> The Agreement Establishing the European Bank of Reconstruction and Development was signed in Paris on 29 May 1990 and entered into force on 28 March 1991, <file:///C:/Users/user/Downloads/basic-documents-2013-english-agreement.pdf> (accessed 13 November 2019). The First paragraph of the Preamble states as follows: The Contracting Parties are '[c]ommitted to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.'

<sup>37</sup> Michael J. Prince 'Inclusive city life: Persons with disabilities and the politics of difference' (2008) 28(1) *Disability Studies Quarterly*, <http://dsq-sds.org/article/view/65/65> (accessed 15 November 2019).

<sup>38</sup> <https://www.worldbank.org/en/topic/disability> (accessed 13 November 2019).

addressing disability inclusion in the international development agenda through its Disability Development Team (DDT) within the Social Protection Unit (SPU) of the Bank's Vice President.<sup>39</sup> The bank therefore mainstreams disability inclusion in its projects and between 2006-2010 at least 4% of its projects had mainstreamed disability inclusion.<sup>40</sup>

The Global Partnership for Disability and Development (GPDD) was established in 2002 'to strengthen international cooperation to accelerate the integration of disability issues and considerations into mainstream social and economic development'.<sup>41</sup> The Partnership 'is unprecedented alliance of Disabled People's Organizations (DPOs), government ministries, bilateral and multilateral donors, United Nations (UN) agencies, NGOs, national and international development organizations, and other organizations, committed to promoting economic and social inclusion of people with disabilities in low-income countries.'<sup>42</sup> The activities of the GPDD is funded via the Development Grant Facility and the Multi-Donor Trust Fund administered by the WB.<sup>43</sup>

The WB has also engaged in disability issues in many other areas including: inter-agency collaboration to implement the CRPD; inter-agency partnership with WHO to produce the 2011 World Report on Disability; and the explicit reference to disability in its 2011 Global Monitoring Report.<sup>44</sup>

The WB has specifically integrated the disability inclusion in its New Urban Agenda, which 'specifically commits to promoting measures to facilitate equal access to public spaces, facilities, technology, systems, and services for persons with disabilities in urban and rural areas.'<sup>45</sup> The motivation for

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<sup>39</sup> Tobias van Reenen and Helene Combrinck 'International financial institutions and the attainment of the UN Millennium Development Goals in Africa – with specific reference to persons with disabilities' in Ilze Grobbelaar-du Plessis & Tobias van Reenen (eds) *Aspects of disability law in Africa* (2011) 216 Pretoria University Law Press.

<sup>40</sup> As above, 216-217.

<sup>41</sup> <http://bbi.syr.edu/gpdd/about.html> (accessed 7 November 2019).

<sup>42</sup> As above.

<sup>43</sup> Reenen above, 217.

<sup>44</sup> As above, 218.

<sup>45</sup> <https://www.worldbank.org/en/topic/disability> (accessed 13 November 2019).

disability inclusion is that the built environment is not accessible to persons with disabilities 'from roads and housing; to public buildings and spaces; and to basic urban services such as sanitation and water, health, education, transportation, and emergency response and resilience programmes.'<sup>46</sup> This has in turn entrenched poverty among these category of persons. The WB commitment include commitment 6 on transport and commitment 10 on disability inclusion and accountability framework.<sup>47</sup> The disability inclusion and accountability framework is critical because it is aimed at mainstreaming disability in WB activities and in particular: 'it lays out a road map for (a) including disability in the Bank's policies, operations and analytical work, and (b) building internal capacity for supporting clients in implementing disability-inclusive programs.'<sup>48</sup> Also, the Environmental and Social

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<sup>46</sup> 'Disability, accessibility and sustainable urban development', [https://www.un.org/disabilities/documents/Disability\\_and\\_Urban\\_development.pdf](https://www.un.org/disabilities/documents/Disability_and_Urban_development.pdf) (accessed 13 November 2019).

<sup>47</sup> <https://www.worldbank.org/en/topic/socialdevelopment/brief/world-bank-group-commitments-on-disability-inclusion-development> (accessed 13 November 2019). On transport, 'By 2025 all new urban mobility and rail projects supporting public transport services will be inclusive in their designs so as to incorporate key universal access features for people with disability and limited mobility. Ensuring that equity considerations, including access to persons with disabilities, continue to remain at the forefront of the Sustainable Mobility for All initiative (SuM4All). Currently under this initiative a Global Roadmap of Action is being developed by over 50+ global actors in transport. Under the Universal Access theme (one of 5 themes) the roadmap will propose actionable recommendations with regard to access for persons with disabilities.

*Advocate for enhanced road safety outcomes, given that road crashes are one of the most significant public health issues of the century, causing both death and disability.* This work will be led by the Global Road Safety Facility which provides funding, knowledge, policy guidance, and technical assistance and generates research to leverage road safety investments in transport and health operations. New funding from DfiD and DHSC (UK Health Department) has been committed to support a specific research program on disability from road crashes.'

On disability inclusion and accountability framework, the WB commits to promote that framework among its staa as a way to support the WB Group's new Environment and social framework (ESF).

<sup>48</sup> <http://documents.worldbank.org/curated/en/437451528442789278/Disability-inclusion-and-accountability-framework> (accessed 13 November 2019).

Framework (ESF) is important because of its focus on among others managing social risks projects in order to improve development outcomes.<sup>49</sup> The WB in its vision for sustainable development acknowledges that removing barriers from those who are often excluded in development process including persons with disabilities is critical.

At the UN level, urban development and management is also included as part of the UN Sustainable Development Goals (UN SDGs) under paragraph 34 of the UN resolution 70/1 on *Transforming our world: the 2030 Agenda for Sustainable Development*.<sup>50</sup> This means that urban development and management crucial in addressing poverty in the world and it is therefore likely to dominate development discourse till 2030 and therefore a long term view is needed of the same.

On 25 January 2017, the UN also adopted a Resolution 71/256 on New Urban Agenda, which has mainstreamed disability inclusion throughout its text.<sup>51</sup> Paragraph 48 provides for 'effective participation and collaboration among all relevant stakeholders' including persons with disabilities. Paragraph 148 is also important because it provides for the promotion of 'the strengthening of the capacity of national, subnational and local governments...to work with...persons with disabilities.' The two paragraphs could be used therefore as a basis to include persons with disabilities in cities and municipal boards throughout Kenya.

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<sup>49</sup> <http://documents.worldbank.org/curated/en/437451528442789278/Disability-inclusion-and-accountability-framework> (accessed 13 November 2019).

<sup>50</sup> Resolution adopted by the General Assembly on 25 September 2015 (21 October 2015), A/Res/70/1). Para 34 states: 'We recognize that sustainable urban development and management are crucial to the quality of life of our people. We will work with local authorities and communities to renew and plan our cities and human settlements so as to foster community cohesion and personal security and to stimulate innovation and employment. We will reduce the negative impacts of urban activities and of chemicals which are hazardous for human health and the environment, including through the environmentally sound management and safe use of chemicals, the reduction and recycling of waste and more efficient use of water and energy. And we will work to minimize the impact of cities on the global climate system. We will also take account of population trends and projections in our national, rural and urban development strategies and policies...'

<sup>51</sup> UN Resolution 71/256 on New Urban Agenda

Different actors are also involved in the disability inclusion in the new urban agenda. The United Nations Department of Economic and Social Affairs (UN DESA), for instance organized a forum on ways forward towards a disability inclusive and accessible new urban agenda on 14 June 2016 in New York.<sup>52</sup>

## **5. Kenyan legal imperatives for disability inclusion**

Disability inclusion is not only a legal imperative in Kenya but also critical in ensuring the success of the project since PWDs represent about 10% of the Kenyan population and are therefore a key stakeholder in development projects. Furthermore, disability inclusion is now integrated under the WB. In this regard, the legislation on cities and municipal boards in Kenya should not only integrate an aspect of disability inclusion if it is to be consistent with the international, constitutional, and legal dictates.

### **5.1 International law**

One of the general principles of the Convention on the Rights of Persons with Disabilities is the '[f]ull and effective participation and inclusion in society' of persons with disabilities.<sup>53</sup> In the context of development Boards, Article 27 of the CRPD on work and employment provides that 'State Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, **inclusive** and accessible to persons with disabilities.'<sup>54</sup> The provisions also provide for the employment of persons with disabilities in the public sector such as the 59 cities and municipal boards.<sup>55</sup> The Committee on the Rights of Persons with Disabilities has interpreted Article 27 as follows: this article recognizes the right of persons with disabilities to work and to gain a living by participation in a labour market and work environment that is open,

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<sup>52</sup> <https://www.un.org/development/desa/disabilities/forum-disability-inclusive-and-accessible-new-urban-agenda.html> (accessed 13 November 2019)

<sup>53</sup> CRPD Article 3(c).

<sup>54</sup> CRPD Article 27(1).

<sup>55</sup> CRPD Article 27(1)(g).

inclusive and accessible....<sup>56</sup> In this regard, State Parties should report on '[a]ffirmative and effective action measures for the employment of persons with disabilities in the regular labour market.'<sup>57</sup> From the above, international law recognizes the right of persons with disabilities to participate in the society, economic sector, and employment.

### **5.2 Constitution, 2010**

The definition of 'disability' under the Constitution, 2010 'includes 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[.]' Article 54(2) of the Constitution, 2010 also recognizes the progressive implementation of the 'principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.' From the above, the Constitution appears to be providing for affirmative actions to promote persons with disabilities inclusion in important sectors of the public in elective and appointive bodies.

### **5.3 Persons with Disability Act No. 14 of 2003**

Section 13 of the Act does not impose a 5% quota for the employment of persons with disabilities but it obligates the Council to negotiate with employers on the same.<sup>58</sup> Consequently, as noted by one author, '[i]n the absence of a legal compulsion, there is nothing to authoritatively counter biases that employers generally have against job-seekers with disabilities.'<sup>59</sup> This Act is therefore important because it provides for the framework for achieving the 5% quota not in public opportunities only but also in private

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<sup>56</sup> Guidelines on the treaty-specific document to be submitted by State Parties under article 35 of the Convention on the Rights of Persons with Disabilities, CRPD/C/2/3, 15.

<sup>57</sup> As above.

<sup>58</sup> Section 13 of the Persons with Disabilities Act, 2003 provides for reservation of employment as follows: 'The Council shall endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities.'

<sup>59</sup> George O. Otieno Ochich 'Bold and generous or timid faint-hearted? A panoramic assessment of Kenya's Persons with Disabilities Act, 2003' *The Law Society of Kenya* (2008) 98.

businesses and the NCPWD is expressly mandated to take leadership in this regard.

#### **5.4 The County Government Act, 2012**

The County Government Act, 2012 is important in this discourse because of devolution. The counties until recently provided for the governance and management of urban areas in Kenya. In order to promote disability inclusion, section 59(3) of the Act requires the public service board to submit a report containing details of persons appointed including persons with disabilities to the county assembly in accordance with its functions and powers under section 59(1)(d).<sup>60</sup> This section provides for the basis for the appointment of persons with disabilities at an individual basis. It does not however provide for the appointment of persons with disabilities at a representative level.

#### **5.5 Urban Areas and Cities Act, 2011**

The Urban Areas and Cities Act<sup>61</sup> is '[a]n Act of Parliament to give effect to Article 184 of the Constitution; to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes.' The 2011 Act defines the 'board' to mean the 'board of a city or municipality constituted in accordance with section 13 and 14....'<sup>62</sup> Section 3 of the 2011 Act states that the objects and purpose are to establish a legislative framework for:

- (a) classification of areas as urban areas or cities;
- (b) *governance and management of urban areas and cities*;
- (c) participation by the residents in the governance of urban areas and cities; and
- (d) other matters for the attainment of the objects provided for in paragraphs (a) to (c).

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<sup>60</sup> Section 59(1)(d) provides that 'the functions of the County Public Service Board shall be, on behalf of the county government, to prepare regular reports for submission to the county assembly on the execution of the functions of the Board.'

<sup>61</sup> No. 13 of 2011.

<sup>62</sup> Section 2.



Urban governance and management is therefore part and parcel of the purpose of the 2011 Act.

#### 5.5.1 Criteria for city, municipal, and town status under the 2011 Act

Under section 5, the criteria for classifying a city has been set out as follows. An urban area may be classified as a city under this Act if the urban area satisfies the following criteria—

- (a) has a population of at least five hundred thousand residents according to the final gazetted results of the last population census carried out by an institution authorized under any written law, preceding the application for grant of city status;
- (b) has an integrated urban area or city development plan in accordance with this Act;<sup>63</sup>
- (c) has demonstrable capacity to generate sufficient revenue to sustain its operation;
- (d) has demonstrable good system and records of prudent management;
- (e) *has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule;*
- (f) has institutionalised active participation by its residents in the management of its affairs;
- (g) has infrastructural facilities, including but not limited to roads, street lighting, markets and fire stations, and an adequate capacity for disaster management; and
- (h) has a capacity for functional and effective waste disposal. Under section 5(2), the 2011 Act provides that an area may also be conferred with the status of special purpose city if it has significant cultural, economic or political importance.

From the above, even though governance and management is not expressly stated in the criteria, the notion of ‘capacity to effectively and efficiently deliver essential services’ requires that urban centres have in place a proper management and governance system to achieve the same. Otherwise, there is no way service delivery will happen without a proper governance system. Kisumu being one of the cities in Kenya should also have the same in place.

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<sup>63</sup> This section was amended in 2019 to include “and other existing laws” after the word “Act”.

Lastly, the 2011 Act also stipulates the criteria for establishing municipal centres, towns, and markets in Kenya.<sup>64</sup>

### 5.5.2 Governance and management of urban areas and cities

Section 11 of the 2011 Act provides for the principles of governance and management of urban areas and cities as follows: The governance and management of urban areas and cities shall be based on the following principles—

- (a) recognition and respect for the constitutional status of county governments;
- (b) recognition of the principal and agency relationship between the boards of urban areas and cities and their respective county governments including—

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<sup>64</sup> Under Section 9(3) of the 2011 Act, the eligibility to be conferred municipal status to a town is as follows: (a) has a population of at least two hundred and fifty thousand residents according to the final gazetted results of the last population census carried out by an institution authorized under any written law, preceding the grant; (b) has an integrated development plan in accordance with this Act; (c) has demonstrable revenue collection or revenue collection potential; (d) has demonstrable capacity to generate sufficient revenue to sustain its operations. (e) has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; (f) has institutionalised active participation by its residents in the management of its affairs; (g) has sufficient space for expansion; (h) has infrastructural facilities, including but not limited to street lighting, markets and fire stations; and (i) has a capacity for functional and effective waste disposal.

Section 10(2), of the 2011 Act provides the criteria for granting the status of a town is as follows:

- (a) a population of at least ten thousand residents according to the final gazetted results of the latest population census carried out by an institution authorized under any written law, preceding the grant; (b) demonstrable economic, functional and financial viability; (c) the existence of an integrated development plan in accordance with this Act; (d) the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; and (e) sufficient space for expansion.

Lastly, pursuant to the Urban Areas and Cities (Amendment) Act, 2019, a new section 10A(2) provides for the eligibility criteria for grant of the status of market centre as follows:

- (a) An area shall be eligible for the grant of the status of a market centre under this Act if it has (a) a resident population of at least two thousand residents; and (b) an integrated urban area development plan in accordance with this Act and any other existing law.

- (i) the carrying out by a board of such functions as may be delegated by the county government;
- (ii) financial accountability to the county government; and
- (iii) the governance by each board for and on behalf of the county government;*
- (c) promotion of accountability to the county government and residents of the urban area or city;
- (d) institutionalised active participation by its residents in the management of the urban area and city affairs;
- (e) efficient and effective service delivery; and
- (f) clear assignment of functions.

From this section, it is clear that the Boards and County Governments have a close agency working relationship. The two are not separate and independent but something a kin to two sides of a coin. Without putting their synergies together the achievement of service delivery will be hampered. It is therefore crucial that the two sides develop a framework for proper supervision and collaboration in running the city so that competition is avoided and service delivery is emphasized. Each board should view themselves as working for the county government which means that they are subordinate to local leaders. In the past, there have been notions of hostility between the boards and members of county assemblies at the local level.<sup>65</sup> The fear by MCAs was that the boards would take over their functions and perhaps assist their rivals to gain popularity with the residence. While this may be true for a properly functioning boards and performing board members, it is important to note that the role of MCA is limited to oversight, representation and legislation. This role should not be extended to governance, which ideally should be under the executive function. The board therefore should be understood to be part of the county executive.

Following from the idea that the board is subordinate to the executive wing of the county, Section 12 of the Act deals with the management of cities and municipalities and provides as follows:

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<sup>65</sup> Interview by anonymous person, 26 May 2019.

(1) The management of a city and municipality shall be vested in the county government and administered on its behalf by—

(a) a board constituted in accordance with section 13 or 14 of this Act;  
(b) a manager appointed pursuant to section 28; and (c) such other staff or officers as a the county public service may determine.

(2) *The board of an area granted the status of a city or municipality under this Act shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—*

*(a) suing and being sued;*

*(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;*

*(c) borrowing money or making investments;*

*(d) entering into contracts; and*

*(e) doing or performing all other acts or things for the proper performance of its functions in accordance with this Act or any other written law which may lawfully be done or performed by a body corporate.*

(3) The governance and management of a city county shall be in accordance with the law relating to county governments.

From the above, the relationship of the board and the county is not of equals. The board may be understood as being subordinate to the county system and therefore controlled by it at least politically. It is also crucial to note that the board under section 12(2) has been granted autonomy in that they are established as corporate bodies enjoying certain rights and responsibilities. This is nothing new since many water and sewerage systems have also been corporatized to improve on governance.

### 5.5.3 Disability inclusion

This 2011 Act is disability friendly including in relation to the composition of the Boards and disability inclusion. Section 13 deals with boards of Cities and provides for the inclusion of persons with disabilities. Section 13(1) provides that: ‘A board of a city shall consist of not more than eleven members, six of whom shall be appointed through a competitive process by the county executive committee,<sup>66</sup> with the approval of the county assembly.’ In essence, the appointment into Boards is a competitive process

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<sup>66</sup> In 2019, the ‘county executive committee’ was replaced by ‘county governor’.

for at least six of the members. In 2019, a new subsection 13(1A) was introduced providing as follows:

(1A) The members of the Board of a city appointed under subsection (1) shall be constituted as follows —

- (a) the county executive member for the time being responsible for cities and urban areas or his representative;
- (b) six members who shall be competitively appointed by the county governor, with the approval of the county assembly;
- (c) four members who shall be nominated by the organization specified under subsection (2) and appointed by the county governor, with the approval of the county assembly;
- (d) the Secretary appointed under section 13A, who shall be an ex officio member of the Board.

The other five are nominated from the following categories pursuant to Section 13(2) of the 2011 Act:

- (a) an umbrella body representing professional associations in the area;
  - (b) an association representing the private sector in the area;
  - (c) a cluster representing registered associations of the informal sector in the area;
  - (d) a cluster representing registered neighbourhood associations in the area;
- and
- (e) an association of urban areas and cities.’

It is crucial to note that the 2011 Act did not allow for representation by a disability institution but instead focused on informal sector, residents associations, private sector and professional associations. In 2019, this section was however deleted and substituted with the following new subsection:(2) The four members of the board of a city specified under subsection (1) (c), shall be nominated by —

- (a) an umbrella body representing professional associations in the area;
- (b) an association representing the private sector in the area;
- (c) a cluster representing registered associations of the informal sector in the area; and
- (d) a cluster representing registered neighbourhood associations in the area.

Substantively, the section remained the same apart from the removal of representation of an association of urban areas and cities that existed previously. Essentially this category may perhaps be represented in the category known as 'a cluster representing registered neighbourhood associations in the area.' It appears that the two serve similar interest. Notwithstanding, it is suggested that a proper amendment would have included a disability institution representation instead.

What has happened instead is that instead of allowing for an institutionalized disability inclusion, the 2011 Act allows for individual disability inclusion. Section 13(3) provides for the representation of persons with disabilities by noting that '[t]he executive committee shall, while appointing members of the board, ensure gender equity, representation of persons with disability, youth and marginalised groups.' This type of disability inclusion is relatively weak since such persons sit on the board in their individual as opposed to their representative capacity and this may hamper the quality of contributions made by him or her especially from a disability point of view. Essentially, the problem that arises is that of ownership of the person by persons with disabilities in Kenya, legitimacy and control of that person by them.

Suffice to note, with regards to the Boards of municipalities, Section 14 of the Act adopts the provisions of section 13 as discussed above but varies the number of members of such boards from 11 to nine. Section 14 therefore provides as follows: 'The provisions of section 13 shall apply with respect to the board of a municipality except that such board shall comprise nine members of whom four shall be appointed and five elected in the prescribed manner.' Section 14 however was amended in 2019 and now expressly provides for the inclusion of persons with disabilities in the municipal board.<sup>67</sup>

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<sup>67</sup> The section provides as follows: 14. (1) A board of a municipality shall consist of nine members appointed by the county governor with the approval of the county assembly. (2) The members of the board appointed under subsection (1) shall be constituted as follows— (a) the county executive member for the time being responsible for cities and urban areas or his representative; (b) three members who shall be appointed by the county governor, with the approval of the county assembly; (c) four members who shall be nominated by an association and appointed by the county governor, with the approval of the county assembly; (d) the chief officer responsible for urban development; and (e) the municipal manager appointed under

Lastly, under a new section 13A, the Secretary to the Board of a city is appointed by the public service board. Section 15 of the Act provides that the members of the municipal and cities boards shall hold office for a term of five years, on a part-time basis.

## **6. Strategy for amending the 2011 Act**

From the previous section, it appears that a case has been built for the amendment of Section 13(2) of the 2011 Act in order to include representation of persons with disability associations in the boards in addition to the section that allows for persons with disabilities in their individual capacities to sit on the board. Both sections should indeed appear in the Act unreservedly and without doubt. The challenge at hand therefore is how to achieve the amendment for institutional representation. In this article, the proper strategy to achieve this should be led by persons with disabilities themselves. Therefore, this demands that the NCPWD, since as previously discussed it is already mandated to negotiate for 5% quota for persons with disabilities in employment, take a leadership role through its legal department<sup>68</sup> to propose the amendments to the Kenya Law Reform

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section 28 who shall be the secretary of the board and an ex officio member of the board. (3) The four members of the board of a municipality specified under subsection (2) (c), shall be nominated by — (a) an umbrella body representing professional associations in the area; (b) an association representing the private sector in the area; (c) a cluster representing registered associations of the informal sector in the area; and (d) a cluster representing registered neighbourhood associations in the area. (4) The county governor shall, while appointing the members of the board, ensure gender equity, representation of persons with disability, youth and marginalised groups.

<sup>68</sup> See <http://ncpwd.go.ke/index.php/legal-advisory-services> (accessed 24 November 2019). The Legal Service Department is an in-house service providing unit of the Council. It provides professional legal services to Persons with Disabilities, relevant Government Ministries and Departments, Stakeholders and the General Public and for connected purposes with the aim to enable the Council deliver on its statutory mandate while ensuring compliance to all legislative requirements of the Council and in doing so manages and limits the legal risks of the Council.

The Legal Department serves a number of persons with disabilities and the general public on a walk-in-walk-out basis to protect and promote the interests of Persons with Disabilities. This is in line with the Constitution 2010, Disability Act No.14 of 2003, UN CRPD and other Local, National and International Instruments. The

Commission (KLRC), which has a statutory mandate for law reforms in the country.<sup>69</sup> Since the amendment does not affect a big part of the Act, this can be done through the miscellaneous amendments Act as part of the normal review of legislation in Kenya. Having submitted the amendment to KLRC, the NCPWD should mobilise all its members to pressure Parliament to approve this amendment in Parliament. The amendment should be introduced and sponsored by a disability-friendly member of Parliament who is capable of appreciating the difference between institutional representation (which is missing in the 2011 Act) and individual representation (which is currently provided for in the Act). All in all, all stakeholders should work together to achieve the same and provide necessary support and capacities to the representative if approved and nominated in the future.

## **7. Conclusion**

The WB has integrated disability inclusion in practice in its projects even though its Articles of Agreement do not provide for human rights. In Kenya, disability inclusion has been streamlined in many legal instruments applicable in the country including the Constitution, Disability Act and even international law. In this regard, disability inclusion is expected in public and private life of the Kenyan society. However, it appears that from the above analysis, disability inclusion under the 2011 Urban Areas and Cities Act is relatively weak. Whilst the Act provides for disability inclusion the same is at an individual capacity and not at a representative capacity. This may hamper the quality of contributions made by that person in relation to the governance of cities and boards. Ultimately, it is crucial that the Act be

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department provides arbitration advices to persons with disabilities whenever need be.

<sup>69</sup> The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 (the Act). Presidential assent was given on 14 January 2013 and the Act came into force on 25th January 2013. The Commission has a statutory and ongoing role of reviewing all the law of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution of Kenya. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the Constitution. The third mandate is found in the County Governments Act, No. 17 of 2012 which requires the Commission to assist the county governments in the development of their laws. This is also a requirement found in the Act. See <http://www.klrc.go.ke/index.php/about-klrc> (accessed 24 November 2019).



amended to provide for a disability representation via their registered bodies in order to guarantee control, legitimacy and ownership. Section 13(2) of the 2011 Act should therefore be amended to allow an association representing persons with disability to provide representation in order to strengthen disability inclusion in Kenyan boards. Amending the Act, however, will not happen unless the persons with disabilities themselves champion this course and force through the amendments in Parliament.

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