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Ensuring the Right to Equal Employment Opportunities of Persons with Disabilities: Critical Examination of the Ethiopian Legal Framework.

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Ensuring the Right to Equal Employment Opportunities of Persons with Disabilities: Critical Examination of the Ethiopian Legal Framework.

A Thesis Submitted in Partial Fulfillment of the Degree of Master of Laws (LLM in Human Rights law) to the School of Law.

Addis Ababa University

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June 2012

Declaration

I **Yohannes Teressa Geleta** do hereby declare that the work presented in this thesis is original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or any other university.

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Acronyms

AAU	Addis Ababa University
ACHPR	African Charter on Human and People's Rights
ADA	Americans with Disabilities Act
ADAAA	Americans with Disabilities Amendment Act
CBR	Community based Rehabilitation
CEDAW	Convention on the Elimination of Discrimination against Women
CESCR	Committee on Economic Social and Cultural Rights
CPOA	Continental Plan of Action
CRC	Convention on the Rights of the Child
DDA	Disability Discrimination Act
EEA	Employment Equity Act
FDRE	Federal Democratic Republic of Ethiopia
GOE	Government of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organization
IYDP	International Year for Disabled People
MCS	Ministry of Civil Service
MoLSA	Ministry of Labour and Social Affairs
PANE	Poverty Action Network Ethiopia
PWDs	Person (People) with Disability

SR	Standard Rules on Equalization of Opportunities for People with Disabilities
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
USA	United States of America
VR	Vocational Rehabilitation
VT	Vocational Training
WHO	World Health Organization
WPA	World Programme of Action Concerning the Disabled
VAT	Value Added Tax

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Abstract

In spite of being numerically a significant portion of the Ethiopian society, PWDs are the most poverty stricken. There are many factors that directly or indirectly contribute toward this state of affairs. But one factor that stands out, above all the others is their lack of equal employment opportunities. It is evident that, employment empowers individuals economically, gives them the mandate to define their own course of life, enhance their sense of self-worth and gives them the chance to contribute to the society.

The legislative framework in place is one critical element that makes difference to the attainment of equal employment opportunities of PWDs. In principle, employment should be based on the competence of the person with disability and the business needs of the employer. Persons with disabilities should not be employed on grounds of mere compassion or corporate social responsibility.

Within this general framework, the contention of this thesis is that the legislative measures taken in Ethiopia should provide for alternative employment measures that widen the access to equal employment opportunities and at the same time took into account the heterogeneous nature of People with disabilities. As such, options such as supported employment, sheltered employment, job retention and return to work that are repackaged into business approach in contradistinction to the welfare approach should be promoted side by side with the open labour market option. It is from this point of view that the thesis examines the relevant laws and policies in Ethiopia.

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Chapter 1

Introduction

1.1 Background of the Research

Around 650 million people or nearly 10 per cent of the world population is believed to live with a mental, sensorial or physical disability of some sort. Statistics indicate that approximately one in five are born with some kind of disability, while most acquire disability after age 16 mainly during their working lives.[1] The vast majority of the world's People with disabilities, that is, about 80 per cent, live in developing countries and about 470 million of them are of working age.[2] When we look at the Ethiopian situation, figures indicate that the problem is very serious. Due to the presence of diversified pre and post natal disabling factors like infectious diseases, under nutrition, mal-nutrition, famine, harmful cultural practices , and intermittent conflicts the number of disabled people[3] is assumed to be larger than the case of other countries. Based on this, it is estimated that there are five to eight million disabled people in Ethiopia. This implies that some 7-10 percent of the population lives with a certain type of disability.[4] Sixty percent of the disabled people of working age are unemployed.[5]

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[1] Disabled Employees: Labour Standards an Employers Forum on Disability briefing CSP Practitioners. Available at www.csreurope.org/csrinfo/csrdisability/disabledemployees accessed on 12-4-2012.

[2] Ibid

[3] At different times in history terms like "idiots", "the retarded" and "the feeble minded" were used to describe people with mental impairments and "cripples", and "the handicapped" to describe those with physical and or mental impairments. The coming into use of the term "people with disabilities" was meant to counter this usage of physical or mental condition to describe individuals. However, many disability movements particularly those in England, oppose to the usage of the term PWDs saying that it misleads about the social construction of disability. It seems to assign disability to the affected individual than to society (Medical or individual impairment model discussed in this paper, this model is said to have been out dated and no more acceptable) It is as if disability is a private matter of the affected individual alone. It appears to deny the role of social environment in disability discourse. It is also important to raise here that the CESCR in General Comment NO 5 paragraph 4 has this to say "...this general comment uses the term "Persons with Disabilities rather than the older term "disabled persons". It has been suggested that the latter term might misinterpreted to imply that the ability of the individual to function as a person has been disabled." According to the prevailing thinking in our time the cause of disability is societal failure and not individual impairment (Social model of disability also discussed in this paper at length) If the cause of disability is societal and not personal then arguably the term "disabled people" seem more appropriate than the term People with Disabilities (PWDs). But the term PWDs being the one that enjoys wider acceptance by disability rights advocates and the UN itself (as in the CRPD, the adoption of the Standard Rules on Equalization of Opportunities for PWDs 1993 and ESCRC General comment No 5 on PWDs 1994), is more frequently used in this paper. Nevertheless, the term "disabled people" is also used where the writer thinks is appropriate.

[4] UNICEF Ethiopia Disability Program, Fact Sheet Disability Fact Sheet Nov 06.

[5] ILO, 2004 Ethiopia Country Profile, Employment of PWDs: The Impact of Legislation East Africa p.3

Hence, disabled people as a group do face disproportionate and severe unemployment. And even when employed they are more likely to be underemployed, to earn less money and to have less chance for professional advancement than the non disabled. That is, they are often times condemned to perform uninspiring, low paid and low skilled jobs, offering little or no opportunities for job promotion or other forms of career progression.

This fact leaves a good proportion of the population in abject poverty as they do not have an income of their own. When disability is coupled with lack of access to education and therefore to employment, the inevitable outcome is that such people will have very little or no income at all. Hence in a developing nation like Ethiopia where there is no adequate welfare provision they are condemned to lead a miserable life. Although it is difficult to come up with a reliable figure due to factors like the unwillingness of families to disclose their member with a disability for reasons such as culture and illiteracy, it is believed a great number of population lives in this vicious circle of disability and poverty.[6]

The income constraints being as they are, disability in its own adds significantly to the cost of living. Depending on the nature of the disability there could be constant medical expenses to cover. When the disability is of the type that limits mobility, for example, such a person has to incur additional costs in adapting the home to their need, to access appropriate transport facility and personal care.[7] When this need for additional income is coupled with the lack of or inadequate access to employment and income, it leaves the disabled people as the major socially disadvantaged class that are affected by poverty as a result of having little or no income at all. It is, therefore, mandatory to ensure and promote that they enjoy their human rights and fundamental freedoms particularly those related to employment on the basis of equality and non discrimination.[8] The disabled people have the right to independence, social integration and participation in the life of the community. To make this a reality they need to access employment on equal terms with their able bodied counterparts. It should be remembered that this research does not argue that the disabled people have always an absolute right to employment rather it is that they should not be excluded from employment due to their disabilities or for reasons not relevant to the requirements to perform the job at hand.

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[6] The Federation of Ethiopian National Associations for Persons with Disabilities (FENAPD) Disability and the situation of PWD in Ethiopia. Retrieved on 04-06-2012 from http://ethiodisabilitiesfederation.org/pwds.html

[7] S. Mitra 'Disability and Safety Nets in developing Countries 2005 P. 10

[8] Article 4(1) CRPD, European Social Charter 1996 Part 1(15).

There is a consensus that discrimination in employment is a violation of human rights that entails a waste of human talents, with detrimental effect on productivity and economic growth, and generates socio-economic inequalities that undermine social cohesion and solidarity and act as a break on the effort of reducing poverty. It also contradicts the core human rights principle which is set in the concept of human dignity and the right to live a full and decent life. There is also agreement that promoting equality of opportunity and equality of treatment is necessary in order to move towards the elimination of discrimination in law or in practice.[9] Thus, states are duty bound to protect and promote the human rights of the disabled people through enacting and enforcing general and specially designed laws, policies and program.

The type of employment that people are engaged in and where they are employed determines their standard of living, prestige, social status and self image.[10] The fact that somebody is employed implies his/her independence and empowerment to achieve their goal in life. Work or Employment, thus, has economic, social and personal value. Work is central to a person's wellbeing. On top of being a source of income work can pave the way for advancement in all aspects of life.

As a certain commentator has rightly put it "the meaningfulness of a person's life is largely determined by the measure in which that person deploys his/her talents in society particularly in a wok situation. This is particularly so in the case of the disabled people. The person with a disability not only values work highly, but perhaps values it more highly than the able bodied person.[11]

As modern societies are centrally organized around productive entities, work provides one with a sense of inclusion in the society. It provides an important opportunity for the development of social networks and space of creativity. Highlighting the workplace as an important social institution for the disabled people. On this point an author has the following to say:

> "...employment is a hallmark of true citizenship
> because it enables individuals to participate meaningfully
> in society....The workplace is the one social forum that brings
> diverse communities together. It is where meaningful con-
> versations occur, where meaningful relationships form....

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[9] ILO: Time for Equality at Work Global Report under the Follow up to the ILO Declaration on Fundamental Principles and Rights at Work, Report. I (B), International Labour Conference,91st Session, Geneva 2003.

[10] Schneider and Ferritor The meaning of Work, in Vocational Adjustment of Disabled Persons edited by Bolton1982 p.33

[11] Supra Note 7.

> Being part of this community is a crucial way for people with disabilities to be full members of society, and to be deemed as such."[12]

From the above, one can easily infer how crucial the right to employment is for a PWDs. This thesis as indicated in the title, tries to look into three concepts, namely, disability, equality and employment that have distinct but inter-related historical and contemporary perspectives in the entire human rights discourse. PWDs as mentioned above represent a significant proportion of any society this holds true for the Ethiopian society as well. These portions of the society, in a clear violation of their human rights to equality and adequate standard of living, are marginalized and discriminated against and, hence, condemned to lead miserable lives by being denied equal access to employment opportunities and therefore income of their own.

If they are to be extricated from the quagmire of poverty they are trapped in, then a host of measures must be taken by the duty bearers particularly the state among them is the conspicuous measure of putting appropriate legislations and policies in place that promote their quest for substantive equality (equal employment opportunities). To enact appropriate legislations the law makers and other stake holders must be kept abreast the contemporary concepts of the subject matter. Toward the achievement of this goal a research of this kind is believed to have some contribution.

1.2 Objectives of the Research

Realizing the right to equal employment opportunities is something that cannot be put off for the future when it comes to the case of disabled people. It has an important role to play in ensuring that the society gives due regard for their needs and that resources are allocated toward this goal. Allocating resources for the effort of leveling the playing field to make the employment sector more inclusive of the disabled people should not depend on the goodwill of the political establishment. It should rather be a matter of the protection of human rights and as such be translated into juridical obligations.

The focus on equal employment opportunities, thus, serves to affirm the right that disabled people have historically been denied as well as to highlight the urgency of eliminating unfair discrimination. Discrimination in employment based on disability has been and continues to be a major impediment to the realization of equal employment opportunities of PWDs. An important source of exclusion and disadvantage of disabled people is the fact that they are wrongly perceived by many as unproductive or unable to perform a job or too costly to employ. Hence, the state is

[12] ME Waterstone & MA Stein, "Disabling Prejudice" (2008) 102 North Western University Law Review p.1369.

duty bound to ensure the right to equal employment opportunities and of disabled people by taking appropriate legal, institutional and policy measures.

There are a number of factors that contribute directly or indirectly to the wrong perception prevalent in the society toward the disabled people. The causes being multiple, the solution also must be a multi faceted one. However, this writer believes that putting pertinent legislations in place has a major if not exclusive role to play in the long process of correcting the unfounded discriminations and materializing the right to equal employment opportunities of the disabled people.

Change in laws and policies with a focus on employment and work play a significant role in creating opportunities for people with disabilities. The major international legal instruments and standards that are intended to help the achievement of this goal include but not limited to the ILO Conventions and the UNCRPD. Ethiopia in addition to ratifying these Conventions has come a long distance to adopt its own law that provides for the right to employment of persons with disability (Proclamation No 568/2008) and directives (Directives on the Right to Employment of PWDs 2011) that guide the implementation of the Proclamation particularly with regard to the employment relationship based on the Labour Proclamation (Proclamation 377/2004). These are part of its effort to materialize the equal employment opportunities standards set by international human rights norms.

In its development endeavor Ethiopia needs the contribution and equal participation of all segments of the society regardless of personal differences such as disability. The active participation of this part of the population is valued very dearly. PWDs have an important role to play in making positive contribution in the workplace. Ensuring equality and non discrimination of PWDs in employment, thus, has a double thronged advantage for the individual citizen himself and for the country as a whole.

In today's world there are significant technological advancements that made inclusion of the disabled people in employment a simple possibility as opposed to its difficulty in the past. The disabled can be as fit as able bodied persons in any workplace setting with the proper use of these technological innovations. Hence most of the physical barriers that used to hamper them from following their aspirations to get access to employment are removed. One formidable impediment that remains though is the impediment that pertains to widespread ignorance and stereotypes. Thus, important laws and policies have an irreplaceable role to play in breaking this impediment and pave the way for the people with disabilities to become useful members of the nation's workforce.

The main objectives of this thesis are, therefore, to look into the existing Ethiopian legal framework to find out if and whether they are in par with the international norms and legislations of some countries this writer thinks have travelled long enough distance in this respect so that Ethiopia can positively benefit from their experiences. As has been mentioned earlier, Ethiopia has from time to time been enacting various legislations in this regard. Thus, this thesis will also try to see the strides Ethiopia has taken in changing the laws and as to what benefits, if any, accrued to the disabled as a result of these changes. It is, therefore, hoped that this thesis will give some high lights to the reader as it tries to juxtapose the current laws with the past ones to see progresses attained so far and with international norms to see what the country lacks and propose how it might make up for in the future.

1.3 Statement of the Problem

As mentioned above, Ethiopia has a large number of PWDs. This section of the society is victimized by discriminatory practices in every aspect of their life but when it comes to their right to equality in employment it gets worse. This is so because of backward outlooks that are rampant in the society coupled with a socio-economic environment that is indifferent to their needs. This exclusion and victimization in turn exposes them to the situation in which they are excluded from participating in economic activities. Failure to address this problem of victimization and exclusion and going without them being accommodated means that they will remain without reliable income of their own and, thus, trapped in poverty forever.

Poverty and inadequate socio-economic participation is a distinctive feature of the people with disabilities in Ethiopia.[13] Studies showed that poverty, disability and discrimination are closely interwoven.[14] According to the World Bank one in five of the world's poorest persons has some form of disability. In a similar vein the UN indicates that 82 percent of the disabled persons in developing countries live below the absolute poverty line.[15]

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[13] The Ethiopian National Association of Ex-leprosy patients. Strategic Plan and management 2005-2009: 'Socio Economic Analysis' Addis Ababa ;2004

[14] Commission for Social Development. Maintaining Disability in the Development Agenda: Follow up to the World Summit for Social Development and the Twenty Fourth Special session of the General Assembly [Note by the Secretariat].United Nations; February 2008.

[15] Ibid

The truth contained in these figures is very apparent in the case of Ethiopia[16] than in any other country. Thus, Ethiopia cannot leave behind its PWDs. Their socio-economic rights in general and their right to employment in particular need to be addressed. If their equal employment opportunity is assured they will be self sufficient citizens who could manage their and their families' affairs by themselves without looking for charity from others. One major, easily observable, social problem Ethiopia is now facing particularly in urban centers is the growing number of beggars that crowed the streets asking for handouts. The majority of the beggars that we see in the streets are people with some form of disability. Therefore, the country has to do something as a matter of urgency to tackle this problem that is getting worse by every single day. Although the measures could, understandably, take various forms having the appropriate legal framework in place is not only the beginning but also is by far the most important one.

If this section of the society is to come out of poverty and fully participate in the nation's socio economic life and be accommodated, then their right to equality in employment has to be guaranteed. Such a guarantee on the one hand, helps to tackle the socio economic problems of the PWDs and on the other, gives the country the opportunity to benefit from the skills and efforts of all its citizens.[17] This will be made possible first and foremost by taking pertinent legislative measures. Therefore, it is worth research to see whether the legislative measures thus far been taken in this regard in Ethiopia are in par with relevant international human rights conventions and practices and if they are adequate to effectively deal with the mounting socio-economic problems of the PWDs.

1.4 Research Questions

The following are the questions that the research tries to address.

- What legislative measures have so far been taken in Ethiopia to guarantee the right to equal employment opportunities of the persons with disabilities?
- To what extent are they in harmony with the principles contained in pertinent international conventions and practices?

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[16] The United Nations Development Program (UNDP). The real wealth of Nations: Pathways to Human Development .UNDP; 4 Nov.2010 available at http://hdr.undp.org/en/reports/global/hdr2010/ accessed on 27-3-2012

[17] A research conducted by the ILO in 2009 in Ethiopia indicated that the economic loss to Ethiopia in relation to the exclusion of PWDs from work (employment) totals to be US$ 667 million per annum. This is about 5% of the GDP. For details look Buckup Sebastian, The Price of Exclusion : The Economic Consequence of Excluding People with Disabilities from the World of Work, 2009, ILO, Geneva.

- To what extent are they ensuring the right to equal employment opportunities of the disabled persons?
- Are the existing legislations enough in kind and clarity to address the non employment and/or under employment of the disabled people in the country and break the disability- poverty nexus that flowed from it?
- If not what clarifications and additional legislations are needed to materialize the equal employment opportunity of the disabled people who admittedly have a lot to offer to the country's economy as an indispensable workforce?

1.5 Literature Review

The philosophical foundations of the right of the disabled people, as an emerging subject, is discussed by many authors and the concept of the right to equality and non discrimination being a fundamental human rights issue that pervades major human rights instruments such as the UDHR, ICCPR, and ICESCR is also a subject dealt with at length by various authors. Hence, in doing the theoretical and conceptual part of this research materials were abundantly found. Particularly, Albertyn C, Goldblatt B and Roederer(ed) *Introduction to Promotion of Equality and Prevention of Unfair Discrimination Act Johannesburg (2001),* Barnes C *Theories of Disability and the Origin of the Operation of Disabled People in Western Society,* O'Reilly: *The Right to Decent Work of Persons with disabilities* (2003), Christianson, M. *Disability Discrimination in the workplace, in Essential Employment Discrimination Law, edited by* E.Strydown, 2004, Buckup Sebastian, *The Price of Exclusion: The Economic Consequence of excluding People with Disabilities from the world of work, 2009 ILO Geneva* are just some of the materials read.

Materials written on the situation of the disabled people from the Ethiopian perspective are also referred. Particularly, *Towards Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/2008 on the Employment of Persons with Disabilities.* By Seyoum Yohannes Journal of Ethiopian Law v.24 No.1, Dagnachew Bogale *Employment Discrimination on the Basis of Disability: The Current Legal regime in Ethiopia and its Implementation* Unpublished, Faculty of Law AAU 2006, Silashi Zeleke, *Disability and Development: The Need to Develop Disability Inclusive PASDEP in Ethiopia* Addis Ababa University: Poverty Action Network (PANE) 2009, Tirusew Tefera (Dr) *Disability in Ethiopia: Issues, Insights and Implications 2005,* A Report on the Review of the Ethiopian Legal System from disability Perspective: Prepared by the Federation of the Ethiopian National Associations of Persons with Disabilities 2008 are some of the materials reviewed.

Although these works have examined the issue of disability from various perspectives including employment which is the theme of this thesis, there are two compelling reasons to do this research in the area.

Firstly, significant legislative strides have been taken both locally and internationally since most of these researches were conducted. One is the ratification and coming into force in 2008 of the CRPD which is a disability specific universal convention, the other is the enactment of Proclamation No 568/2008 a Proclamation to provide for the Right to Employment of Persons with Disability and the issuance of Directives 2011 for the proper implementation of the Proclamation.

Secondly, it is apparent that none of them have dealt specifically with the legal instruments (laws, regulations, policies, directives etc) from the view of the various approaches (alternative models) available for the employment and vocational training and rehabilitation of PWDs widely practiced in the world and are also supported by various international conventions that Ethiopia is a party to. This fact left a literature gap in the area. It is with the intention of filling this gap that this research was conducted.

In this regard, it is hoped that this research will shade some light on alternative employment strategies of PWDs, like access to new employment, retention of current employment or return to employment after onset of disability etc so that, concerned government organs can apply the option(s) that best fit the country's socio-economic realities and the specific need of the person with disability.

The main theme of the paper being analysis of Ethiopian laws in light of international conventions and policy alternatives, the pertinent Ethiopian laws and other legal instruments are examined. Some are: The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) Proclamation No 1/1997, Right to Employment of persons with disabilities proclamation No 568/2008, Labour Proclamation No 377/2003, The Civil Servants Proclamation No 515/2007, Directives for the Employment of PWDs 2011 (MoLSA), National Plan of Action for rehabilitation of persons with disabilities, 1999 and the like. However, the problem of discrimination the disabled people daily face in their lives being a universal one, the materials written from the perspective of the USA, some European countries and South Africa were of great use for the research.

1.6 Methodology

In order to achieve the objectives of the research the qualitative research approach is used to collect data from primary and secondary sources. Thus, methods used include

referring books and other materials and reviewing international conventions relevant to the issue at hand and domestic laws, regulations, policies strategies programs and other relevant documents.

The theoretical backgrounds to the issue and historical analysis of the various legislations with regard to the issue of the disabled people in general and their equality right to employment in particular is made so that all areas of the subject are touched upon. To that end, Works written on the subject will be explored and compared with the Ethiopian experience.

The Ethiopian laws on the subject are juxtaposed with international conventions and legislations of other countries to see their strong and weak sides.

1.7 Significance of the Study

If the old paradigms of inequality PWDs were subjected to is to be changed and their full participation in the socio-economic sphere is to materialize, then exploring existing legislations to evaluate how far they assist the attainment of this goal is a must. As such, this thesis gives an in depth analysis of the legislative framework of Ethiopia on the issue of equality of the disabled people particularly in the context of workplace. As this research will have a contribution in narrowing down the literature gap that exists in the subject matter, and at the same time gives recommendations composed from experiences of other countries for future improvements, it is hoped to play a meaningful role in the nationwide effort of materializing the right to equal employment opportunities of PWDs which is one of their fundamental human rights. Hence, this research will be of some use to Government organs that deal with the issue of disability, associations of the disabled people, and others working in the area.

On the other hand, employers, human resource management professionals and people involved in labour relations affairs will benefit from this research as it will help them to understand the legislative and policy frameworks relevant to the employment of the people with disabilities and how to implement them in the workplace settings in Ethiopia.

1.8 Limitations of the study

As with any research this thesis also has its own limitations. First, there is time and space constraint, Secondly, it does not deal with any specific disability type but rather deals with disability in general and as such one can say there is limitation in focus. Thirdly, the subject being an emerging one, there are various schools of thought promoting opposing views given the limitations in time and space all of these could not be adequately touched upon. Fourthly, exhaustive examination of all disability related laws, regulations and policies in the country is not possible given the time and space limitations. Finally, the research does not evaluate the extent to which the various legislations are implemented.

1.9 Overview of Chapters

The thesis has five chapters. The first chapter is the introduction part. The second chapter, deals with the basic concepts that are relevant to the understanding of the thesis. Consequently, the various approaches to the issue of disability, the right to employment and its legislative approaches, the philosophical concepts of equality and non discrimination and their place in the human rights discourse in general are discussed. In fact, the whole essence of the thesis revolves around the theoretical background given under this chapter.

The third chapter is wherein the international and regional conventions relevant to the issue are explored. For the benefit of discussion, the chapter is divided into four sections. First, the implication of the international conventions that have general applicability to all regardless of disability status on the right to employment of PWDs is seen. In this part of the chapter international conventions like the UDHR, the ICESCR, and the ICCPR are discussed. Secondly those international conventions that are meant to apply only to PWDs are examined. In this part effort has been made to look into the impact of instruments such as the Standard Rules on Equalization of Opportunities for People with Disabilities, the UNCRPD and other pertinent instruments are reviewed. Thirdly, the ILO instruments that have bearing on the right to employment of PWDs are discussed for their relevance to the right to employment of PWDs. Fourthly, the place the right to employment of PWDs is given under the African regional human rights system will be touched upon. Chapter Four discusses the subject matter from the perspective of Ethiopian laws. The Ethiopian laws on the subject will be seen in light of the theoretical backgrounds and international conventions discussed in the previous chapters and the strong and weak sides will be discussed. Finally in chapter five conclusions recommendations will be given.

Chapter 2

Theoretical and Conceptual Framework

In order to clearly understand the subject matter of this thesis, it is essential to begin by exploring and interrogating the meaning of concepts like disability, equality, reasonable accommodation and the like. We also have to see the socio economic impact people with disabilities are exposed to and what juridical obligations must the state and private individuals undertake to realize the equal employment opportunity of PWDs. Thus, these are some of the core points this chapter strives to address.

2.1 Approaches in Defining Disability

Most of the time people think they know what a person with disability is either because the disability is apparent or because they know a certain medical condition that lends itself to be called disability. However defining disability may not be as simple as that as its definition can vary from one piece of legislation to the other.

Defining "disability" is necessary to enact appropriate laws depending on the raison d'être the laws are necessitated and to effectively enforcing them. So it is difficult to define the term disability in one specific way. Its definitions vary depending on the purpose for which a given piece of legislation is enacted. The definition so given being determinant of the persons to be considered as disabled and hence protected by the legislation, law makers usually follow either of the two widely known approaches.[18]

The first approach is to use wordings that aim at a narrow, identifiable beneficiary group. This approach is especially instrumental in crafting laws that are meant to give financial or material support to the disabled or their employers. A limited impairment related definition that follows the medical model is more useful as it helps to ensure that the neediest ones are actually benefiting from the intended support.[19] From this one can see that, as resources are always scarce, the narrow approach of defining disability is used in legislations that are meant to give a certain form of preference or benefit to a limited group of people. It narrows down the scope of disability to make sure that only

[18] International Labour Office, Achieving Equal Employment Opportunities for People with Disabilities Through Legislation Guidelines (2004) P16

[19] Ibid

the neediest ones are covered to benefit from the services or regulations the legislation offered.[20]

The second approach is the wider approach of defining disability. In this approach the legislators use broad and inclusive words that serve the purpose of protecting the disabled persons from being discriminated against on the basis of their disability. This wider approach uses the social model of disability. Its purpose being protecting people from discriminatory practices it should be as comprehensive as possible covering people with minor disabilities, people who are associated with them and those who wrongly are perceived as the disabled and thus, made subjects of discrimination.[21]

Thus, put in general terms, in defining disability it is mandatory to take into account the purpose a given law is made for or the goal the said piece of legislation is meant to achieve. Consequently, many different definitions may coexist side by side or at different times within a country. We have good examples of both types of disability definitions in Ethiopia.

As will be discussed at length in chapter four of this thesis, the definitions given to disability or PWDs in the Rehabilitation Agency for the Disabled Order 70/71, Proclamation Concerning the Right of Disabled Persons to Employment Proclamation 101/1994 and the Proclamation to Provide for the Right to Employment of Persons with Disability No 568/2008 clearly show how the scope of the definition of disability changes depending on the purpose a given piece of legislation is set to achieve.

If disability is not appropriately defined, it could lead to misconceptions and makes it difficult to determine the beneficiaries and duty bearers of a given disability focused legislation. Even having considered that disability can be defined in either of the two approaches discussed above, the boundaries between ability and disability are usually porous than rigid.[22] Sometimes, the word disability is indiscriminately used to refer to the actual limitation or impairment in bodily or mental function as well as the impact or

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[20] Countries such as Germany and France which have introduced regulations including quotas or the levying of fines in order to assure people with disabilities access to employment opportunities. With the introduction of such legislations the number of workers with disabilities increased drastically as a result of the fact that employees who would never have designated themselves as disabled registered as such to benefit from the regulations. Look note 18 above.

[21] Ibid

[22] CJ Kudlic ''Disability History: Why We need Another 'Other" (2003)108 The American Historical Review 763. As cited in Charles Gideon Ngwena, 'Disabled People' and the Search for Equality in the Workplace: an Appraisal of Equality Models from a Comparative Perspective, Unpublished Doctoral Thesis, The University of Free State 2010 p 216(Hereinafter referred to as Negwena)

outcome of such limitation or impairment[23] leading to further confusion of the concept. Hence, we see that the existence of various definitions of disability within a country is one of the reasons why it is increasingly difficult to establish the exact number of persons with disabilities in many countries.

2.2 Models of Disability Definition

Disability as a field of research has evolved over many years. Through these years as a researchable subject, different schools of thought that are articulated in different models have emerged as a basis for understanding it. Though, there have been various approaches (models) used by researchers at different stages in the development of the concept, the three models that are discussed in this paper in the following section, are the ones most legislations have adhered to and tried to apply.

They show how through time the outlook of the society changed with regard to disability. And how Legislations also gradually followed these changes in societal outlook.

Legislations followed one or the other model (approach), depending on the prevailing societal outlook, in defining disability and determining the status and role of PWDs in the society as the concept evolved in time. Hence, before we proceed to see how disability is defined in various legislations, it would be important to consider the prominent theoretical models essential in this connection. That is the "Medical Model" also known as the "Individual Impairment Model, "the "Social Model" and the "Human Rights Model"

The ones discussed herein are only those that were very important in the whole discourse of the subject. It should, therefore, be borne in mind that there are models[24] not discussed hereunder.

2.2.1 The Medical Model of Disability

This model of disability is an outcome of the attribution of the whole idea of disability to the medical problem of individuals. The assumption this model follows is that when the existence of disability is a determined fact by medical professionals it will be apolitical and morally neutral as it can be scientifically and clinically verified.[25] This model casts the source of disability into purely physical and mental factors. Medical

[23] Ibid

[24] In this connection one can mention the charity model and the functional/environmental/economic model etc.

[25] EA Pendo "Disability Doctors and Dollars Distinguishing the three faces of Reasonable Accommodation 2002 as cited in Ngwena P.219

care is viewed as the main solution to this medical problem. And the duty bearers (primarily the State) response should be one of modifying or reforming health policy.

This model emerged as the dominant school of thought with the development of modern medical science in the 19th century and as a consequence, the enhancement of the medical professionals' role in society. Since many disabilities have medical explanations persons with disabilities have to come under the attention of the medical facilities and get treatment in order to be reintegrated into the mainstream society such as the workplace.

The essence of the medical approach is that disability resides in the individual with the physical or mental limitation constituting not only the locus of but also the explanation for, the failure to fully participate in society.[26] Once medically established, disability must be cured or rehabilitated in order to assimilate the affected person into society. A commentator described this model of disability in the following words.

> "The defining characteristic of the medical model is its view of disability as a personal trait of the Person in whom it inheres. The individual is the locus of the disability and thus the individual is properly understood as needing aid and assistance in remedying the disability. Under this view, while the cause of impairments may vary, the disabled individual is viewed as innately biologically different and inferior. The physical difference of the individual is often apparent and the non-disabled see the individual's inferiority and resulting social disadvantage as flowing from that physical difference." [27]

As clearly put by the comment, the medical model fails to take into account the fact that the society that we live in is heterogeneous in various aspects. There are differences in the society based on personal traits such as gender, nationality, color and the like and disability is only one of these differences. This model, nevertheless, takes disability as the medical problem of the individual and sought the solution to the problem from medical treatment only. It ignores the larger cultural context and does not implicate the society to have any role in the construction of disability.

Accordingly, it advocates that the society did not have a role in the making of disability and likewise cannot help PWDs who cannot be medically cured. It does not look into

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[26] LL Rovner 'disability Equality and Identity' (2004) Alabama Law Review 1047As Cited in Ngwena P.219
[27] M Crossley " the Disability Kaleidoscope" (1999) Notre Dame Law Review p 627

how the society is structured, how it creates barriers to inclusion, and how it shares in the responsibility to eliminate the legal, attitudinal and physical barriers that exclude PWDs from the public sphere such as the workplace. This approach is not only incompatible with modern day human rights standards but also contradicts the solid fact of the heterogeneous nature of the society. Hence, legislations have nowadays abandoned it.

2.2. 2 The Social Model of Disability

The social model of disability is founded on the thinking that disability is a socially constituted phenomenon.[28] Ultimately, disability is not an intrinsic bodily impairment confined within the individual person. Rather it is a social restriction or denial of equal socio-economic participation orchestrated by the manner in which the socio-economic environment intersects with bodily impairments in an adverse and unaccommodating manner.[29] The salient feature of this model is not the bodily impairment or perceived bodily impairment of the individual but rather the systematically created socio economic order that hampers the realization of equal participation of the disabled.

Eliminating disability as a source of systematic exclusion requires the society to focus not so much on health care interventions to treat individual bodily impairments, though such interventions are important in their own way, it is crucially important to bring the disabled into the manifold of the society by dismantling of the socio economic barriers and create in their place an environment that accommodates the needs of those with bodily impairments or perceived impairments.

One leading exponent of the social model summarized it in the following words.

> ...disability is all the things that impose restrictions on the disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport system, from segregated education to excluding work arrangements, and so on..., the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalized throughout society.[30]

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[28] V Finkelstein, Attitudes and Disabled People, (1930) As cited in Negwena P 134

[29] Negwena Supra note 22 p.171

[30] M Oliver Understanding Disability: From theory to practice (1996) P 33 as cited in Negwena

From this, one can infer that for the social model, disability implicates social oppression rather than individual physical or mental impairments as the cause of disability. This model is a significant shift from the traditional understanding of disability as an individual bodily impairment, and looking on the disabled as helpless and subjects of charity, to a new paradigm of understanding that implicates society and social organization in the creation and sustenance of disability.[31] The social model being the contemporary theory in the disability discourse and also being very much in line with the principles of human rights law, to be as inclusive as possible; many legislations in the world are being made harmoniously with this principles.[32]

For obvious reasons, the "social model" has many strong sides this, however, does not in any way imply that it goes without criticisms.

Critics of the model make two important points. The first is that impairment in itself may be barrier to full societal participation regardless of social attitudes and lack of appropriate accommodations. For example, the experience of going blind requires major psychological adjustments in the person affected which are not related to social attitudes or appropriate accommodation.[33] Secondly, PWDs are, owing to their impairments, vulnerable social groups they need help and social protection on top of dismantling the various socio economic barriers.[34]

2.2.3 The Human Rights Model of Disability

This model puts disability as one aspect of human diversity. All human beings, irrespective of their differences including disability, have certain inviolable rights. The Human Rights model is normatively based on International Human Rights Standards.[35] The disabled are also equally entitled to these rights as reflected in the UDHR, 1948, as "all human beings are born free and equal in rights and dignity." It conceptualizes that PWDs, as one part of the society, must be given equal opportunities for achieving full economic potential and realizing their human rights.[36]

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[31] M Oliver, The Politics of Disablement (1990) Cited in Negwena P 235

[32] Ibid

[33] John Hull On Sight and Insight, A Journey to the World of Blindness, One World Publications (1997)

[34] Ibid

[35] International Human Rights Standards Refer to the fundamental human rights conventions of :Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights(ICCPR), International Convention on Economic Social and Cultural Rights(ICESCR), Convention on Elimination of Racial Discrimination(CERD), Convention on the elimination of all forms of Discrimination against Women(CEDAW), Convention Against Torture (CAT), and Convention on the Right of the Child (CRC)

[36] Edmonds, Lorna Jean, Disabled People and Development. Asian Development Bank Poverty and Social Development Papers No 12

The human Rights model developed as a result of two main factors. First, calls by the disability movement for the recognition that disabled people like non disabled people are entitled to the full enjoyment of human rights and second, despite the growth of international conventions on human rights in recent decades, the recognition that PWDs were not adequately visible within these treaties.[37] As will be discussed in detail in the next chapter, these two factors culminated into the adoption of disability specific conventions of which the adoption of the CRPD is the latest and major development.

Sometimes disability is a direct consequence of violation of human rights. Torture and abuse can cause permanent injuries; undernourishment entails serious disability, lack of access to basic health care such as vaccination can also result in disability. So, the proponents of this model contend that the State is duty bound to tackle both the human rights violations that lead to disability and the socially created barriers (obstacles) in order to ensure the full respect of human rights and the full participation of PWDs in all aspects of social life employment included.

The human rights approach, being founded on the spirit of freedom and equality of all human beings, it has as its essence the respect of diversity and that people are same concerning their rights and dignity irrespective of their differences which also means they have the right to equality and non discrimination, accessibility, and inclusion and full participation.[38]

From this we can infer that each model of disability has its own strong and weak aspects. Legislations adopt either one of these models depending on the objectives they seek to serve. The medical model can be useful for rehabilitation, medicine or social security law while the social model can be instrumental in tackling exclusion, disadvantage and discriminatory practices.[39]

This being the case, however, from the 1970s onward and particularly, following the adoption of the ADA by the US in the 1990s there is a tremendous global shift of disability legislations from one of medical (individual impairment) model to the social and human rights model of disability mainly due to the reasons elaborated in the following section.

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[37] Ibid
[38] Ibid
[39] Supra note 18 P. 15

2.3 A Paradigm Shift in Legislative Policy: From Welfare to Rights Approach

At this juncture one might ask as to what reasons necessitated the change from the medical to the social and human rights approaches of disability. As indicated above, the medical model of disability attributes disability to the medical condition of the person. The "unfortunate" person with disability has to either be treated and cured in order to take part in the exercise of his social rights such as employment or be object of periodical handout and assistance from the public purse. Therefore prior to the development of the social model of disability in the 1970s, disability was nothing more than an issue of social welfare. PWDs were given rehabilitation services, cash benefits and medical care.[40]

In the 1970s disability rights activists sought to change this state of affairs on a number of counts.

First, they urged that the medical model that viewed PWDs as a group with medical problem that inheres in the person and as unfortunate group that deserves charity, was not correct as disability is a social condition caused by the interaction between a person's impairment and social institutions that are structured in a way that makes them inaccessible to people with these impairments. Thus, the proper response to disability should come from a civil rights legislation that outlaws discrimination and obligates the accommodation of PWDs.[41]

Secondly, being a recipient of benefits makes the PWDs dependent on the dictates of the rehabilitation councilors who have all the say regarding the benefits to be given and who the recipients should be. This in turn denied the PWDs the right to decide on their own future. Jacobus expressed this unhappy condition in the following words:

> "It is the agency of welfare, not the recipient, who decides what life goals are to be followed what ambitions may be entertained, what services are appropriate, what wants are to be recognized, what needs may be budgeted and what funds to allocate to each. In short the recipient is told what he wants as well as how much he is wanting."[42]

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[40] Samuel R Bagenstos, The Future of Disability Law, The Yale Law Journal Vol.114:1 p 12

[41] Ibid

[42] Jacobus Ten Broek &Floyd W.Matson, The Disabled and the law of welfare,54 CAL.L Rev. P 831

Thirdly, disability benefits perpetuate dependency and discouraged initiative.[43] Many rights advocates believed that disability benefits program makes disability a favored status in society by exempting PWDs from the ordinary obligation of working to earn a living and by encouraging them to be idle. They urged that PWDs like all the other citizens should undertake responsibilities and exercise rights. The fact of exempting them from duties can also lead into denying them the enjoyment of their rights as citizens.[44]

These interconnected criticisms on the medical model of disability and the social welfare programmes which were consequences of the former led disability rights activists to urge a fundamental shift in legislations toward the social and human rights approaches that were discussed under section 2.2.2 and section 2.2.3 above.

Having said this, now, it would be important to look how the social model of disability is incorporated into and shaped the definitions of disability in some legislations.

2.4 Legislative Experiences in the Definition of Disability

In this section effort will be made to closely look at how disability is defined under two legislations. This writer is opined that this would be important in two ways. First, one can clearly see the increasing influence of the social model of disability in crafting definitions of disability in various legislations. Secondly, it will be of use for the analysis of the definition of disability under the Ethiopian laws which will be undertaken in chapter four of this thesis.

In selecting the legislations the writer used two obvious criteria: First, the comprehensiveness of the legislations in question. Second, availability of research material with regard to the legislations. Based on these criteria the writer picked the Americans with Disabilities Act (ADA) of the US and the Employment Equity Act (EEA) of South Africa which will be discussed successively in the following section.

2.4.1 The Concept of Disability under the Americans with Disabilities Act (ADA)

The ADA adopted the definition of disability given by the Rehabilitation Act of 1973. Hence, for the benefit of clarifications it would be important to see some points in relation to the instrument to begin with.

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[43] Supra Note 36
[44] Ibid

The Rehabilitation Act of 1973 was the first "rights" legislation to prohibit discrimination against people with disabilities in programs conducted by federal agencies, in federal employment, in the employment practices of federal contractors and in programs receiving federal financial assistance, including state and local governments and private entities.[45]It contains five sections that address different aspects of equal opportunity for PWDs.[46]

The ADA, on the other hand, was a legislation enacted by Congress in 1990 with the aim of expanding the civil rights of PWDs. Hence, it was more sweeping in its coverage than the Rehabilitation Act.[47] The ADA prohibited discrimination on the basis of disability in employment. It requires all employers federally funded organizations and private sector entities with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment related opportunities available to others.[48]

The ADA (1990) is essentially an anti discrimination law. As such it adopted the three pronged definition of disability (which is wider in scope) given under the Rehabilitation Act of (1973). Under section 505 of the Rehabilitation Act it is prohibited to discriminate against an "individual with disability" who was defined as any person:

> "1) who has a physical and mental impairment which substantially limits one or more of the major life activities of such an individual. 2) Has a record of such an impairment or 3) is regarded as having such an impairment."

As can be seen from the definition of disability above, a person must meet the requirements of at least one of these three criteria to be an individual with disability under the Act. The first part of the definition covers persons who actually have physical or mental impairments[49] that substantially limit one or more major life activities. The focus of the first part of the definition is the medical condition of the individual. He

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[45] Legal Overview: the ADA and the Rehabilitation Act, Available at www.nea.gov Last accessed on 13-04-2012.

[46] Sections 501 and 503, the most relevant sections to our topic, prohibit employment discrimination against PWDs by federal government and by federal contractors. It provides that federal government agencies as a whole and contractors in excess of $10,000 to have an affirmative action plan for hiring PWDs. See Id at p. 17

[47] Ibid

[48] Look Title I of the ADA. Note that the ADA has five Titles that address different aspects of equal opportunity for PWDs.

[49] Despite its heavy usage of the word "impairment" the ADA does not provide definition for it. But the employment regulations issued by the Equal Employment Opportunity Commission (EEOC is a federal law enforcement agency that enforces laws against workplace discrimination) clarify the meaning of the term as it is used in the ADA. It defined impairment as a concept based on organic pathology or disorder. Thus, under the ADA impairment is related to functional limitation or disorder of substantial degree.

must have a substantially limiting impairment to fall within the scope of the Act. To fall under the first part of the definition, a person must establish three elements: 1) that he/she has a physical or mental impairment 2) that substantially limits 3) one or more major life activities.

This part of the definition is, therefore, more inclined to the medical (individual impairment) model of disability than the social or human rights models.

The second and third parts of the definition cover persons who may not have an impairment that substantially limits a major life activity but who have a history of, or have been misclassified as having such a substantially limiting impairment. The focus of the second and third parts of the definition is not the individual as was the case in the first part. Here the focus is rather the outlook of the society. The disabling factor is not the medical impairment of the individual but rather the misguided assumption of the society that lead to the exclusion and denial of accommodation of the PWDs. As such this part of the definition adopts the social or human rights approach of disability in contradistinction with the first part.

It can, therefore, be safely subsumed that the definition of "disability" under the ADA has some aspects of both the medical and social models of disability. However, this writer is of opinion that it adheres more to the social model than to the medical model. The legislation lays the duty to provide reasonable accommodation on employers to enable the PWD to participate in the mainstream labour market. Additionally, it also provides for the right of PWDs to equal enjoyment of all civil and socio economic rights and held appropriate bodies accountable to create conducive environment for PWDs.[50] In doing so the Act has unequivocally established that the problem of disability is societal than individual.

It has to be remembered that the ADA was intended to give legal protection to the disabled people against discriminatory practices in all spheres of life employment included. However, in a move that seems to be contradictory to this notion of anti discrimination the ADA was initially intended to attain, there have been a few US Supreme Court decisions that narrowed down the definition of disability considerably resulting in the erosion of the protections initially intended.[51] Thus, the ADA

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[50] See Titles I- V of the ADA

[51] There are a number of cases decided by the supreme court to this effect. It suffices to just look at one of these here: Toyota Motor Mfg v. Williams. In this case Toyota terminated Ella Williams citing her poor attendance record and claiming that she was disabled from performing her automobile assembly line job by carpal tunnel syndrome. Williams sued Toyota for failing to provide her with a reasonable accommodation as required by the ADA. The Supreme court in a unanimous opinion held that Williams' impairments did not prevented or restricted her from

Amendment Act (ADAAA) was made to restore the original intention of the ADA by rejecting strict interpretation of the definition and embrace a wider definition to provide broad coverage to protect from discrimination anyone who has or regarded to have a disability.

2.4.2 The Concept of Disability under the South African Law (EEA)

In South Africa there is a law known as the Employment Equity Act No 55 of 1998 or the EEA for short. The EEA, unlike the ADA is not disability specific anti discrimination law. The EEA recognizes that a certain group of people like women, blacks and people with disabilities are victims of unfair treatment and discrimination in the history of the nation. They are, therefore, worthy of benefiting from non-discrimination and affirmative action measures. The EEA defines PWDs as follows:

> "People who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment."[52]

The definition has three distinct criteria that need to be fulfilled for one to be beneficiary of the Act and that all the three basic criteria it contains need to be cumulatively met. The criteria can be identified as:

First, the person must have an impairment, the impairment must either be physical or mental or a combination of both. A Physical impairment means as defined in paragraph 5 of the code of Good Practice of the EEA,[53] "a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired or visually impaired."

A mental impairment is a clinically recognized condition or illness that affects a person's thought processes judgment or emotions. This includes conditions such as intellectual, emotional and learning disabilities.[54]

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tasks that are of central importance to most people's daily lives. The court also reasoned that for the purpose of the ADA the impact of impairment must also be permanent or long term. Given large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual's diagnosis, on its own does not indicate whether the individual has a disability within the meaning of the ADA. This judgment which was handed down on January 8-2002 was victory for employers as it substantially narrowed down the scope of disability under the ADA.

[52] The Employment Equity Act, Section 1.

[53] The code of Good Practice was issued by the Minister of Labour based on section 54 of the EEA. Its objective being to provide guidelines of good practice in line with the requirements of the EEA.

[54] Technical Assistance Guidelines on the Employment of People with Disabilities, Department of Labour, Pretoria South Africa

Second, the impairment must be a long term and recurring one. Long term refers to a condition wherein the impairment has lasted or is likely to persist at least for a period of 12 months.[55] Recurring means the impairment is one that is likely to happen again and to substantially limiting function of the body. The condition may not constantly persist. Time may lapse between its occurrences but it never totally cured. It includes a constant chronic condition even when its effects on a person fluctuate, such as some forms of multiple sclerosis.[56]

Third, the impairment must be a "substantially" limiting one. Impairment is substantially limiting if its nature, duration or effects substantially limit a person's ability to carry out the essential functions of the job for which he/she is being considered. Hence, a physical and/or mental impairment that is long term or recurring does not fall under the ambits of the EEA unless they substantially limiting.

The existence of the word "substantial" in the definition is indicative of the adoption of the social model of disability by the EEA. The employer cannot deny employing a person for his impairment alone which is the case in the medical model of disability. Under the EEA, in addition to being impaired the impairment must be one that substantially limits the performance of the inherent requirement of the job. As will be discussed below in the section that deals with the anti discrimination legislations, the PWD has the right to reasonable accommodation before he is considered to be unable to do the inherent requirements of the job.

This also applies for persons with progressive conditions. By progressive conditions are meant to be those impairments that are likely to develop, change or recur through time. People living with progressive conditions or illnesses are considered as the disabled once their impairments began to be substantially limiting of their working capacity. People with progressive or recurring conditions that have not attained the substantially limiting status are not considered as cases of disabilities. A person with cancer, tuberculosis or HIV AIDS would not be covered by the EEA until the symptoms are substantially limiting the person's capacity to effectively perform his/her job.[57]

The status of being substantially limiting or not is something left to be decided on a case by case basis. The lack of common and tangible standard of substantially limiting impairment inescapably opens the door for disagreements and legal suits between the employer and the job applicant or employee. Under such circumstances, the employer

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[55] Ibid
[56] Ibid
[57] Ibid

can use qualified experts to determine whether the impairment is a substantially limiting one or the employer can ask the applicant to give him sufficient information to determine the condition for himself.[58]

As discussed above, one of the three criteria under the EEA that qualify one to fall within the scope of the Act is the existence of physical or mental impairment. But all impairments are not to be covered by the act. The EEA excludes the following specific categories of impairments.

The first exclusions are those related to impairments that are easily controlled, corrected or lessened that they do not have limiting effects. A person with visual impairment that can easily be corrected by wearing spectacles cannot be considered disabled unless even with the spectacles the person's vision is substantially limited.[59]

The second categories excluded are those referred to as public policy exclusions. For reasons of public policy certain impairments are not considered to be disabilities though they can be limiting. Some of these are: sexual behavior disorders that are against public policy, disorders that affect a person's physical or mental condition caused by illegal use of drugs or alcohol (unless the person is being treated for his/her condition), deviations related to normal height, weight and strength etc.[60]

2.5 The Dilemma in Defining Disability

The diversity of historical, legal and cultural situations renders the discovery of a unitary concept of disability equally applicable to all countries and situations, virtually impossible.[61]The problem involving the definition of disability is not limited to the difficulty of capturing the concept exactly; the very idea of choosing one of the two approaches (wider and narrower) in itself is a hotly controversial subject.

The disability rights community generally favors a broad definition, one that is distinctly inclusive in nature.[62] Part of the impetus for a broad definition appears to stem from a desire to destigmatize the concept of disability. Which means, if more and more people are labeled as disabled the existing norms of stereotyping and exclusion

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[58] Ibid
[59] Ibid
[60] Ibid
[61] Jeanne Mager Stellman, Encyclopedia of Occupational Health and Safety Vol. 1 ILO p.213
[62] Martha Minow; Making all the Difference: Inclusion, Exclusion, American Law 29-31In Michael Selmi: Interpreting the ADA: Why the Supreme Court Rewrote the Statute, and Why Congress did Not Care, The George Washington Law Review Vol. 76.

that are prevalent in the society will change.[63] That is why the anti discrimination legislations opt for this wider approach. This assumption though very sound from rights perspective, it can implicate difficult legal issues.

A broad definition can, for instance, render the whole concept of disability meaningless if virtually any one can be defined as disabled. This can also instigate individuals to file frivolous claims (legal suits) to take advantage of the loopholes and become beneficiaries of the equalizing measures such as affirmative action and/or reasonable accommodations. This is not the only problem that comes along a broad definition; it also gives opportunity for workers to raise excuses of disability for their workplace behaviors.[64] Lazy and underperforming workers who want to gain an unearned advantage in the workplace are not acceptable to employers. Hence, courts should take heed when interpreting broad definitions lest it might become an escape route for such workers. If legislations are interpreted in their widest sense, it might bring about a backfire effect as it drains public support for disability rights as the cost related to accommodation might sore.[65]

This being as it may, owing to developments in international human rights law and technological advancements, traditional concepts of disability that led to situations of protected exclusion and segregation are losing ground and disability is increasingly become a concept of social inclusion and participation which demands giving equal access rather than passive measures of income support. Many commentators also agree that the support for broad and inclusive definition is still stronger which ultimately push this approach to prevail over the approach for a narrower definition.

2.6. Legislative Approaches for the Employment of PWDs

The nature of national legislations with regard to the vocational rehabilitation and employment of PWD varies from one country to the other depending on the legal philosophy the country adheres to, the level of industrial development and the socio-economic situations and so on.[66] From this perspective, the current legislation on vocational rehabilitation and employment of PWDs can be divided into various types.[67] However, two types of legislations namely, quota or levy legislation and anti

[63] Id at 37-38
[64] Ibid
[65] Jacqueline Vaughn witzer, Disabled rights: American Disability Policyand the Fight for Equality(2003) in Michael Selmi P.534
[66] Supra Note 61 P 231
[67] Ibid

discrimination legislation, seem to emerge as the two main legislative models.[68] Nevertheless, all the legislative models, arguably, have certain strong aspects that make them preferable over the other models under a given situation. Thus, it would be necessary to look into each one of them to find out their merits and demerits.

2.6.1. Sheltered Employment Approach

Sheltered employment refers to the condition of employment under special condition (in a special workshop) for disabled persons who due to the nature and severity of their disability are either totally unable to carry out a job under ordinary competitive working conditions or able to do so only for a very short period of time.[69]

Sheltered employment can be classified into two types, namely, transitional employment programs which are intended to provide training and experience to individuals in segregated settings so that they will be able to acquire the skills necessary to succeed in subsequent competitive employment[70] and extended employment programs which are designed to be long term or permanent placements for individuals that will allow to use their existing abilities to earn wages in the segregated workshop setting.[71]

These systems of employment of PWDs require establishment of public entities that are meant and suited for the employment of PWDs. In such types of public entities the whole or larger proportion of the employees are PWDs. Conditions under which the works are undertaken, the necessary accommodations and production types and other workplace settings are organized in a way that serves the situations of the PWDs. The entities are specifically established for the employment of PWDs. And usually they run on the special funding they receive from the State.[72]

Regardless of its obvious problems, sheltered employment is believed to give better employment opportunities for PWDs. Particularly, people whose disability is so severe that they cannot access open or supported employment can benefit from this approach of employment. It is also assumed to be useful in preparing people with minor

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[68] Ibid

[69] Laurent Viser, Sheltered Employment for PWDs, International Labour Review, Vol. 137 (1998) No 3 P.351

[70] John Kregel and David H. Dean, Sheltered vs. Supported Employment: A Direct Comparison of Long-Term Earnings Outcomes of Individuals with Cognitive Disabilities p.64 Available at www.worksupport.com last accessed on 12-03-2012.

[71] Ibid

[72] Employment Challenges for the Millennium. Report of the NACTE Steering Group on Sheltered and supported work and employment NRB 1997

disabilities to access open employment.[73] Which means it can be used as a mechanism for vocational rehabilitation or training.

It is generally accepted that for some PWDs open employment systems such as quota systems and anti discrimination systems may not be workable options on various grounds such as in cases of severe disability. In connection with this the ILO has recommended that governments should take measures to establish various types of sheltered employment for disabled persons for whom access to open employment is not a practicable option.[74]

The UN Standard Rules on the Equalization of Opportunities for PWDs states that while the aim should always be for PWDs to obtain employment in the open labour market, for PWDs whose needs cannot be met in open employment small units of sheltered or supported employment may be an alternative.[75]

Sheltered employment though has obvious benefits for PWDs it has also been subject of criticisms in many countries. The criticisms come from its failure to provide proper working conditions. In many countries the PWDs who are employed in such entities are paid less than the minimum wage and in others they receive only periodical pocket money. Additionally, the entities usually do not observe employment safety and health regulations and the employees' right to unionize are denied.

2.6.2 Supported Employment Approach

Supported employment is an employment model that is based on the assumption that all individuals regardless of the nature or extent of their disabilities should have the opportunity and support in the community for employment.[76] Hence, prerequisite skills are not necessity for the PWDs to be successful in employment. The task here is not to find and place PWDs who have the necessary training and are, therefore, qualified for employment. But rather to locate and/or modify suitable jobs in the community and provide training and support at the place where the job is done. In supported employment the support that is given for the PWDs should be individualized that fits

[73] Council of Europe; A Coherent policy for the Rehabilitation of PWDs, 1992.
[74] Vocational Rehabilitation and Employment (disabled Persons) Recommendation (No 168),1983.
[75] See Rule 7(7)
[76] Anne O'Briyan, A Framework for Supported Employment, Joseph Rowntree Foundation, York Publishing Services Ltd. P2

the needs of a specific person, a multifaceted one[77] and be available for as long as the person needs them.[78]

Supported employment gives the PWDs the opportunity to be integrated into the open and competitive labour market. It provides employment coaching, specialized on job training, close supervision, transportation and assistive technology all to enable PWDs to learn and effectively perform better in their jobs. [79]This model of employment has some features that are distinct from the sheltered employment model that was discussed above. The first is that unlike with the case of sheltered employment, supported employment, permits employees with disabilities to work alongside the other employees who are without disabilities.[80] Thereby it facilitates the integration into mainstream society of the PWDs. Sheltered employment is undertaken in a workplace that is segregated and specifically designed for PWDs as such it hinders effective integration of PWDs in the regular workplace setting.

Secondly, unlike in the case of sheltered employment wherein employees do not get adequate salary and other work related benefits in the case of supported employment employees are not only entitled to equal payment with the other employees but are also beneficiaries of all legally recognized work related rights and benefits.[81] Thirdly it is after the person is placed in employment that he gets trained by the support given through coaches. This is more in line with the principle of normalization, independent living and integration than the segregated sheltered model.[82]

Based on these strong sides of the supported model, some writers argue that all countries should shift from sheltered to supported employment model.[83] On the other hand, commentators whose view this writer also shares argue that a country should not necessarily opt for one specific option for all cases and better use all the options alternatively depending on the nature of the case at hand. Leichensenring and Strumpel have the following to say in this regard.

> "...since people with disabilities are very heterogeneous group it is necessary to provide a wide variety of service to allow for choices....that

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[77] Multifaceted mean that it could be given at finding employment options applying for jobs, employment coaching, providing specialized on job training, providing close supervision, providing transportation and assistive technology.
[78] Supra Note 76
[79] Ibid
[80] Ibid
[81] Ibid
[82] Ibid
[83] Thornton, Patricia, and Neil Lunt , Employment Policies for Disabled People in Eighteen Countries, ILO, 1997

means the aim of sheltered workshops and supported employment need be explicitly formulated in order to explore their compatibility with these aims. Thus, when opting to adopt a certain value it is not necessary to abolish the other completely."[84]

This as it may, as indicated above, it should always be remembered that the ultimate aim of employing PWDs being to integrate them with the mainstream society and to ensure their economic self sufficiency, sheltered employment could only be used as a staging post to train PWDs for eventual supported or open employment opportunities.

2.6.3 Quota Employment Approach

Quota employment system is a form of affirmative action that aims at increasing the number of PWDs in the world of work. It encourages employers to extend opportunity to a qualified individual who otherwise be disregarded on the grounds of disability alone.[85] There are different forms of quota systems. They vary from country to country in points like the category of PWDs to whom the system is applied, the category of employers that are duty bound to employ (for example size of the enterprise or only public sectors) and the employment rate.[86]

To encourage employment of PWDs in most countries the quota system legislations are accompanied by grant or levy systems. Levies and grants are meant to balance the financial inequalities that might ensue between employers who do employ PWDs and those who do not.[87] Grants are given to those employers who employ PWDs so that they can finance vocational rehabilitations. The levies that are collected from those employers who do not employ PWDs usually go to the grant scheme. As has been practically proved in many countries that have properly enforced these types of legislations, they could considerably improve the employment opportunities of PWDs in the open labour market.[88]

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[84] Leichsenring, Kai, and Strumpel, Charlotte, Mandatory Employment or Equal Opportunity? Employment Policies for Persons with Disabilitiesin the UN-European Region, Vienna 1994 p.231

[85] Patricia Thornton, Employment Quotas, levies and National Rehabilitation Funds for Persons with Disabilities: Pointers of Policy and Practice 1998 Gladnet Collection, paper 84 p.7

[86] Ibid

[87] Ibid

[88] The precise function of the levy varies from country to country: In Germany it is an equalization mechanism, the levy paid by employers who do not employ adequate numbers of PWDs is redistributed to those who do, to cover the extra costs they cover. In France, the policy recognizes the economic constraints facing some enterprises and allows employment of PWDs to discharge their obligations by contributing to a fund to aid integration of disabled individuals in enterprises which are able to support those aim. See Supra note 85 P.8

The quota system legislations, however, are not without their own problems. One problem is that they require clear definition of "disability", which is as discussed elsewhere in this paper, is an evolving and at times elusive concept, so that the beneficiaries are clearly known and registered. This in turn needs strict procedural rules that might lead to the problem of stigma.[89]

On the other hand, it might create tension and discomfort the PWDs being at the place of employment where he is not welcome on his personal merit but merely tolerated by the employer to avoid legal sanctions and levies.[90] It also needs a well organized enforcement mechanism, which in many countries is hard to come by, for the quota system to come to fruition.

2.6.4 Anti Discrimination Approaches

These types of legislations are based on the principle of giving PWDs equal opportunities by removing barriers and improving accessibility[91] to employment. This approach was believed that by giving the PWDs the opportunity to earn their living makes them active members of the society and empowers them to decide on the course of their lives. Additionally, it was also believed to promote initiatives of the employers to make PWDs part of the diversity of their workforce and improve social consciousness.

In anti discrimination legislations one problem that comes in the process of their implementation is the difficulty of proving whether there is "discrimination" or not.[92] The complainants often find it difficult to prove to courts of law that there is a clear case of discrimination so that most often than not such claims either fail or the remedy takes a long time. That is why in recent times amendments are made to anti discrimination legislations in shifting the burden of proof from the complainant in our case the PWDs who has applied for an employment position or who is actively in employment and seeking promotion etc to the employer which is a private or public entity.[93] This concept has already been included in the Ethiopian anti discrimination proclamation No 568/2008 as will be discussed at length in due course of time.[94]Anti discrimination legislations being relatively new legislative practices, particularly in developing

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[89] Id p. 5
[90] Ibid
[91] See section 2.6.4.1 (3) of this thesis for the discussion of accessibility.
[92] Supra Note 18 p. 33
[93] Ibid
[94] See Article 7 of Proclamation No 568/2008.

countries like Ethiopia are yet to be tested to see if they are more effective in placing large number of PWDs in employment than the other legislation types discussed above.

Anti discrimination legislations put the requirement for reasonable accommodation, which is discussed below, as a means of increasing access of PWDs to the workplace, and change the wrong assumption that they are less productive than the other workers. There are various approaches being pursued by different national legislations with regard to the provision of reasonable accommodation.[95] Under certain legislations it is voluntary as in the case of Denmark[96] and it could also be mandatory to the employer as in the case of the US.[97] The cost of reasonable accommodation can be borne by the employers, the employees or both.[98] If employers bear the cost they may be discouraged to hire PWDs as the provision of reasonable accommodation incurs them additional costs of labour. If the employees are made to bear the cost, their mobility in the market may be reduced because of the risk of incurring further accommodation related costs in a new employment setting. The state can take some measures to counter these obstacles. One of these measures could be giving tax incentives for employers that provide accommodations.[99] Or it could be giving advice and funding for employment related accommodations as with the case in Boston.[100]

Anti discrimination legislations like the other legislative models assumes that specific measures are needed to promote the employment of disabled people. However, in the case of anti discrimination legislations the specific measures to be taken are focused only on leveling the playing field and no more. For example, unlike quotas that impose

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[95] WHO, World Report on Disability, 2011. P.241 Available on: www.whqlibdoc.who.org. Accessed on April 5, 2012.

[96] In Denmark employers have extensive freedom to dismiss employees due to reduced working capacity. Thus the concept of anti discrimination on the ground of disability does not seem to fit well with existing law in relation to labour market. Hence, Danish courts interpret both "disability" and "reasonable Accommodation" pretty narrowly. The Supreme Court of Denmark decided in May 2010 to refer questions regarding "disability" and the duty to provide "Reasonable Accommodation" to the European Court of Justice for preliminary rulings. This might change the current situation there.

[97] Under the ADA (the ADA has five sections covering employment, public services, public accommodations, telecommunications and miscellaneous provisions each has a provision on reasonable accommodation our focus herein is section 1) employers are duty bound to provide reasonable accommodation if such a provision does not cause undue hardship (burden) which means significant difficulty or expense for the employer and if the employee can perform the essential functions of the job at issue with the provision of reasonable accommodation. Nevertheless, under the ADA employers are not required to provide disabled employees with personal use items such as eyeglasses, wheelchairs or hearing aids that are used by employees both on and off the job. Look Section 504 of the Rehabilitation Act of 1973 and Title 1 of the ADA.

[98] Supra Note 95.

[99] Tax incentives .Job Accommodation Network, ADA Library(online) http://www.jan.wvu.edu/media/tax,html accessed on 12-03-2012

[100] Funding Assistive Technology and Accommodations, National Centre on Workforce and Disability, Boston 2008

the duty of reserving employment positions, they are based on the assumption that PWDs are able to compete for jobs on their merits, provided the environment in which they compete does not discriminate against them due to their disability.

The success of anti discrimination legislations in getting more PWDs employed is a controversial subject. On the whole there are agreements that they are successful in preventing discrimination among those who are already employed. On the side of enabling more PWDs come to employment, the opposite seems to be true. In fact, early research on the ADA, one of the earliest anti discrimination legislations, suggest that implementation of the act caused a decline in the employment of PWDs in significant proportions that is, 28% among men and 14% among women.[101] In a study conducted in England with regard to the impact of the DDA on the employment of PWDs, similar findings were made.[102] There are different arguments forwarded as possible reasons for the decline in employment rate but one most commentators accept as the principal cause is the added cost of employing PWDs to comply with the reasonable accommodation mandate of the ADA and the DDA made PWDs less attractive to employers. It seems to go by the economic principle that says if a commodity's price is raised then less of it will be bought.

Any disability legislation is made to achieve either of two distinct goals. One is ensuring income security for the PWDs by giving cash and in kind benefits. For the reasons expounded on above, legislations that are designed to provide income security only are not acceptable for the PWDs themselves and for the society at large. This has been clearly demonstrated by the opposition disability rights activists posed to this approach. The other goal is full integration of PWDs into the economic and social life of the

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[101] David C. Stapleton, Richard V.Burkhauser, The Decline in Employment of People with Disabilities: A policy Puzzle, Industrial and Labour Relations Review Cornell University ILR school 2004 p. 629. As Outlined in this review five hypotheses were forwarded as the cause for the decline in employment: 1) mismeasurement of the disabled population led to spurious trends in disabled employment; 2) Changing job characteristics, such as rising cognitive or physical skill demands or declining provision of health insurance reduced job options for the disabled: 3) the underlying health of the adult population abruptly deteriorated: 4) the ADA raised the cost of hiring disabled workers, thereby pricing them out of the labour market: 5) screening for social security Disability Insurance (SSDI)benefits were liberalized as the value of SSDI benefits was rising, leading the working age disabled to withdraw from the labour force. Among these hypothetical causes for the decline the review writers after having evaluated all of them independently came to the conclusion that the ADA harmed its intended beneficiaries. Mainly for two reasons: the unspecified and sometimes expensive accommodation requirement and the possibility of civil rights litigation if disabled workers are terminated.

[102] A research conducted by the Durham university to investigate whether the disparity in employment rates between PWDs and those without has decreased since the DDA in the UK. The finding was that the employment rate of people defined as "disabled" was slightly higher for the period 1990-1996, seven years before the DDA and were at their lowest following the implementation of the DDA in 1996. Available on http://dx.doi.org/101080/09638280500075626 Accessed on 25/03/12.

community they live in. This goal the writer believes can be attained by using the various legislation models discussed under this section.

If more and more PWDs are to be brought to employment and improve their socio economic conditions, given the heterogeneity that exists among the PWDs depending on the severity of their impairments and other access related issues this writer is of the opinion that no one particular model of legislation suffices in tackling this paramount social problem. Each legislative model discussed above has its own pros and cons so that it pays to give a closer look in to the various approaches and use all or some of them depending on the nature of the disability and other facts on the ground where they can serve best the interest of PWDs. This will be further made clear in due course in this thesis. What complicates choosing one form of disability legislation over the other is the heterogeneous nature of the population they are meant to serve (the PWDs). Disability conditions are quite varied ranging from the simple to the severe forms. They also consist conditions like physical, sensory, and mental impairments. Each one of the conditions pose their own peculiar challenges that need a distinct policy approach.

2.6.4.1 The Underlying Concepts of Anti-Discrimination Legislations

In order to eliminate workplace discrimination, almost all anti discrimination legislations make use of the application of the following fundamental concepts.

2.6.4.1.1 Reasonable Accommodation

Reasonable accommodation is a fundamental concept in the effort to achieve full employment of PWDs. Its main theme is that in spite of all the barriers PWDs face in their struggle to secure their right to equal employment opportunity, they can be employed like the non-disabled persons if they are provided with appropriate accommodations. Hence, under the anti discrimination legislations, failure to provide reasonable accommodation amounts to discrimination unless otherwise justified.[103]

Reasonable accommodation has been defined in various ways. In South Africa the EEA defines the concept as "a modification or adjustment to a job or working environment that will enable PWDs to access or participate and advance in employment."[104] In a similar vein the ILO defined the concept as "... is adaptation of the including adjustment or modification of machinery and equipment or job content work organization and work environment to provide access to place of work and working

[103] This is one of the fundamental concepts in anti discrimination legislations, Like the ADA, EEA, DDA etc, See for example Article 5(3) of the Proclamation to Provide for the Right to Employment of PWD No 568/2008

[104] The EEA paragraph 1

time to facilitate the employment of PWDs."[105] D. Gibson on his part has this to say about reasonable accommodation:

> "...the duty of reasonable accommodation comprises of positive measures that ought to be taken to meet the special more accurately, different needs of those who by reason of a protected characteristic such as disability, religious affiliation, sex or gender etc. cannot be adequately served by arrangements that are suitable for people who do not share such a characteristic."[106]

All the definitions have one common element. It is the assumption that the employer is expected to make reasonable adjustments to his work environment, work organization etc to enable the PWD adequately perform the job. The controversial element of the definition is the absence of clear demarcation point between the reasonable and unreasonable accommodations that can be invariably applied for all cases.

There are some reasons as to why employers are required to provide reasonable accommodation. The first is that the law requires them to do so.[107] In this case whether or not the employer agrees he has to provide accommodations for PWDs as this is what the law dictates. The other reason might be a moral issue.[108] It would be morally right for the employer to provide accommodations for PWDs so that they will get equal opportunity to compete. The other reason might be business and economic considerations.[109] The employer by providing accommodations for best capable employees he gets their trust by increasing their job satisfaction. This gives the employer the negotiating power to demand workers stay on their job for longer periods.[110] This is particularly useful in cases of high turnover employment positions. Although all the reasons mentioned herein could be subjects of longer discussion our focus in this thesis will be the reason of legal requirement which will be seen at length under chapter four below.

Reasonable accommodations can be of various types and could also be provided at various levels of the employment process. The first is that which is provided at the

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[105] ILO Tripartite meeting of experts on management of disability at the workplace. 2001 Code of Good Practice **on** managing disability in the workplace Oct 2001 Geneva.
[106] D. Gibson, The Law of the Charter: Equality Rights (1990) P.133
[107] Stewart J. Schwab and Steven L. Willborn, Reasonable Accommodation of workplace disabilities, 44 Wm.& Mary L. Rev.1197 (2003) p.1204
[108] Jeanette N Cleveland, Janet L Barnes and Joan M Ratz, Accommodation in the Workplace, Human Resource Management Review Volume 7, Number1,1997 P 81
[109] Supra note 107 P.1207
[110] Ibid

recruitment and selection stage of employment.[111] At this stage vacancy announcements should be made in such a way that persons with different types of disabilities can access so that they will be able to apply.[112] And when they seat for entrance exam or interview their particular needs should be taken into account and accommodations be made available. A job applicant with vision impairment, who takes an entrance examination for example, could either be permitted to use Braille or alternatively a reader might be assigned for him.

Once the PWD passes the recruitment and selection stage and employed, various types of accommodations could be arranged for him so that he can discharge the inherent requirement of his/her job effectively. Failure to provide reasonable accommodation amounts to discrimination unless justified otherwise as indicated above.[113] Hence, the physical access need should be addressed. Physical access refers to accommodations such as transport to workplace, access to facilities like cafes, toilets etc and ergonomics like accessibility to switches, devices, lighting, manual handling, and safety hazards, emergency exits and evacuation. The other accommodation type includes measures such as job restructuring and work activity modifications, task reassignment, re-evaluation, of tasks to update methods of work, flexible working hours etc.[114] Lastly accommodations related with assistive technology should be provided these include but not limited to brail displays for the blind, speech packages for the deaf, special computer programmes and hearing loop. [115] Given the diversity of disability and differing nature of work environment one cannot come up with an exhaustive list of the kinds of reasonable accommodations that are to be provided. It is something that is to be decided on a case by case basis.

2.6.4.1.2 Affirmative Action

Affirmative action provisions stipulate that positive measures be taken to promote equal opportunity of PWDs be ensured proactively. Affirmative action has as its goal the elimination of disadvantages for which those who have been subjected to unfair and illegitimate discriminatory practices.[116] Affirmative action, in relation to our topic is a legal and political approach which allows for positive steps to be taken to promote equal employment opportunity for PWDs. Affirmative actions are in some respects

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[111] Supra note 108 at 85
[112] Ibid
[113] Pamela S. Karlan and George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, Duke Law Journal No.1 (1996-97) P. 47
[114] Ibid
[115] Ibid
[116] Ronalds, affirmative action and sex discrimination, a handbook on legal rights for women, 1987, Sydney P 19

similar with reasonable accommodations. One ground of their similarity is the fact that both depart from the formal equality model and strive to bring about substantive equality.[117] They opt for positive measures to be taken to stop the systemic discrimination the protected groups were exposed to.

The two concepts differ on many grounds. Affirmative action does not give rise to an enforceable right. Affirmative action duties are primarily monitored through administrative procedures of monitoring. [118]The duties of reasonable accommodation on the other hand, are personalized issues and thus, the right holder can bring a law suit against the duty bearer and have his right to non discrimination effectively enforced. [119]As indicated above even the burden of proof of showing that discrimination has not been committed is on the employer that is alleged to have committed discrimination. Affirmative action legislations are meant to import the preferment of a certain group over the other by conferring advantage of some sort to the group.[120] Reasonable accommodation is mainly focused on overcoming barriers that impede the right to equal opportunity of the protected group rather than conferring advantage.[121] This is why reasonable accommodation requires individualized assessment of disadvantage and need in order to establish eligibility of the demand for and the type of accommodation that should be provided.

Affirmative action does not need individualized assessment. Somebody's membership to the preferred group entitles him/her to be employed or get other benefits laid in the legislation. Hence, affirmative action legislations aim at improving or equalizing representation of the group in employment as such they are put in place for a certain specified period of time until the said target of representation is attained. Reasonable accommodation measures, being based on individual needs are not time framed.

Affirmative action legislations are criticized from many angles. One criticism is the on e that comes from those who argue that it benefits some PWDs by securing them employment (as under the quota systems) but leaves intact the underpinning structural and societal arrangements that created and nurtured the inequality in the first place. The genuine substantive equality that serves the lasting benefits of PWDs in employment does not and cannot come true by such measures as correcting their

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[117] Stephen F. Befort and Tracy Holms Donesky, Reassignment under the Americans with disabilities Act: Reasonable Accommodation, Affirmative Action or Both? 57 Wash. and Lee L. Rev. 1045 (2000) P. 1081.
[118] Ibid
[119] Ibid
[120] Ibid
[121] Ibid

numerical representativeness in the workplace but rather by changing the socio economic arrangements in such a way that they accommodate all the PWDs.[122]

The second point of criticism is that affirmative action by preferring a certain group over the other, contradicts the equality values, the very value it seeks to promote. There is all the possibility that it upsets the representation balance of the subordinated group as it privileges the one at the expense of the other. The special treatment that is accorded to PWDs in this respect is not transformative as it privileges them without their personal merit. As a result it can have a stigmatizing effect on the preferred group.[123]

This writer is opined that in spite of all its weaknesses mentioned above, affirmative action has a very important role to play in dressing past disadvantages of PWDs. Particularly, affirmative action being a policy with a clear numerical goal and a time framed one its benefits at least in the short term will be monumental. But efforts should not be interrupted to correct the socio economic barriers so that PWDs who are otherwise competent and qualified will get employment opportunities on merit based recruitment procedures.

2.6.4.1.3 Accessibility

One big issue that anti-discrimination legislations touch upon is the issue of accessibility. If PWDs are to enjoy the right to employment on equal basis with the non disabled, then their right to access should be guaranteed. As clearly depicted in the preamble of the CRPD, the basic feature of disability itself is the lack of access. It runs:

> "Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and environmental barriers that hinders their full and effective participation in society in an equal basis with others."[124]

There are various types of barriers that impede accessibility to employment of PWDs.[125] These include, physical barriers,[126] informational barriers,[127] institutional barriers[128] and attitudinal barriers.[129]

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[122] Ngwenw See Supra Note 22

[123] Ibid

[124] United Nations Convention on the Rights of Persons With Disabilities, Preamble (e)

[125] Janet E. Lord, Katherine N. Guernsey, Joelle M. Balfe and Valerie L.Karr (eds.), Human rights Yes: Action and Advocacy on the Rights of Persons with Disabilities, University of Minnesota (2007) p. 38

Accessibility is of crucial importance in the process of ensuring the right to equality of PWDs in all aspects of socio-economic life in general and more so in the right to employment. Lack of access can prevent PWDs enjoy their right. Thus, accessibility is pivotal for the inclusion and participation of PWDs as full and equal members of the society.

There are two approaches of materializing accessibility for PWDs. The first is the application of what is referred to as universal design[130] which is not used everywhere and may not always succeed in providing access. The second approach is the application (the provision) of reasonable accommodation. For a detailed discussion of reasonable accommodation look section 2.6.4.1.1 above. Universal design applies for all aspects of life and is not just limited to workplace setting alone though it also has significant implication for the workplace and unlike reasonable accommodation its provision is not the duty of the employer. It is something that is expected from designers and manufacturers.

There are two types of legislative approaches being widely practiced by various countries with regard to the issue of accessibility.[131] Some countries enact disability access specific legislations that instruct various sectors of the government such as the construction sector, the communications sector etc to improve accessibility of the services they render to PWDs. In this regard the UK[132] and India[133] can be named as good examples.

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[126] Physical barriers refer to the barriers that that exist in the built infrastructure such as ramps for wheelchair access to buildings with stairs or curb cuts to facilitate street level access

[127] These refer to the modes in which relevant information for employment of PWDs is communicated. For example vacancy announcements should be made through various types of media such as radio, TV, Press and websites so that people with various types of disabilities can access them and once the PWDs are employed workplace communications should be made through appropriate media and in plain languages.

[128] Institutional barriers refer to those related with laws, policies and the like that negatively affect the employment of PWDs.

[129] Attitudinal barriers are the barriers which various service providers such as hotels unconsciously create or maintain without recognizing their existence and the detrimental effect they have on the lives of PWDs.

[130] As indicated in CRPD article 2 Universal Design refers to an approach whereby when a new product, service or program is created or when a new building, work environment (offices, cafes. toilets etc.) are designed and constructed certain principles be followed so that the need of as many potential users as possible is taken into account so that everyone can use it at ease without the need for adaptation or application of reasonable accommodation.

[131] C,Venter Enhanced accessibility for People with Disabilities Living in Urban Areas, Unpublished research, Department of International Development (UK) 2002 p 13

[132] In the UK there is a disability specific act known as the Disability Discrimination Act 1995 (the DDA) which created statutory rights for PWDs for access to employment and other socio economic rights. The DDA is also supported by access regulations to facilitate its implementation.

Countries that follow the other legislative approach provide for the issue of access (removal of barriers) in a general anti discrimination legislation rather than enacting access specific legislation. South Africa[134] is one case in point. Regardless of the approach followed, in most of the countries, shortages have been observed in laying down detailed regulatory frameworks that support and guide specific stakeholders on the implementation and enforcement of the legislations.[135]

The right to accessibility being a crucial issue for improving the employment opportunities of PWDs, this writer thinks access specific legislations have obvious advantages over the general ones both in creating better social understanding of the issue and for the better implementation and enforcement of same. As all the provisions relevant to the issue are found in one piece of legislation, it also makes non-compliance litigation simple for the parties involved and manageable for the courts of law at the same time.

2.6.5 Job Retention and Return to work Approach

These policies are coined to address the problems of workers whose chance of continued employment is at risk due to illness or occupational disability. Accordingly under this title we have two distinct but interrelated concepts. The first is "job retention" which refers to the possibility of the employee to stay with the same employer with the same or different duties or conditions of employment, during illness, hospitalization or other treatments and includes return after a period of paid or unpaid absence.[136]

"Return to work" refers to the resumption of employment by a worker who has crossed the threshold from continued employment relationship into non-employed status.[137] Return to work efforts need an early intervention as much as possible. The longer the worker with disabilities stays out of the work environment the lesser is the possibility for him to come back. Because long absence from the workplace due to disability, can

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[133] In India, the Equal Opportunities, protection of Rights and Full Participation Act 1995 is the fundamental legislation that protects the right to accessibility of PWDs. The legislation has set up committees at both the Federal and State levels that monitor its proper implementation.

[134] In South Africa we do not have access specific legislation. The concept of accessibility, nevertheless , is found in other legislations interspersed with other issues. For example the 1996 Constitution outlaws disability discrimination, similarly the Promotion of Equality and Prevention of unfair Discrimination Act, 2000 does the same and also the Integrated National Disability Strategy touches upon accessibility matters.

[135] Supra Note 86

[136] Paul O'leary and David Dean, International Research Project on Job Retention and Return to Work Strategies for disabled Workers Study Report USA

[137] Ibid

lead to a disability mindset that makes him/her think that they will not be able to return to work and lose the motivation to try.

As indicated in a certain study[138]if intervention has to bear some concrete results, it should not be a question of months, but of days or even hours after a disabling event occurs.[139] Therefore, policies should be put in place that facilitate the resumption of employment by workers to whom the onset of disability occurred during employment. Not only from the employee side but also from the side of the employer job retention and return to work are preferred options as the worker who acquires a disabling condition is already known to the employer and knows the nature of the work and work environment. Replacing that worker would entail, to the employer, hiring and training costs, as well as the uncertainty associated with any new employee.

Countries follow two policy options when onset of disability is the result of work related illness or injury. The first policy approach is using workers' compensation programs.[140] In which the workers are entitled to cash payments to partially replace earnings lost while away from work as well as rehabilitation benefits where by the employer is required to reinstate and accommodate the worker.[141]The second approach is using the general disability program without need for additional protective measures.[142] In countries that follow the second approach the worker who suffered work related sickness or injury get compensation which is similar with disability benefits or statutory sickness benefits that a person with a non-work related disability or sickness gets. [143]In the second case not only is the cash payment less in amount than in the case of the former but also the rehabilitation and reinstatement duties are also nonexistent.

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[138] In a survey conducted in USA respondents who were interviewed said that good return to work practices apply to all types of disabilities. The effectiveness of any given practice is independent of whether disabilities arise from work related or non-work-related injuries or illness. The faster the intervention, the better is the possibility of success. See SSA (Social Security Administration) Return to Work Strategies from other Systems may Improve Federal Programs (July 1996) p. 29

[139] Ibid

[140] Thornton, P., "International Research Project on job Retention and Return to work: Strategies for Disabled Workers," ILO 1998 p.29

[141] In Canada, for example, the employer is required to re instate and accommodate the injured worker if the worker can return to the job within two years.

[142] Daniel Mont, Social Protection Discussion Paper Series: Disability Employment Policy 2004 p.29 and also Thornton, P., "International Research Project on Job Retention and return to work: Strategies for Disabled Workers," ILO, 1998 P.31

[143] Supra Note 140 p 31

Job retention and return to work are distinct strategies to keep disabled workers employed. Thus, given the large number of workers that get a certain type of disability on employment every year[144] and also taking into account the very low representation of PWDs in the workforce,[145] this writer is of the opinion that they require special legislation, policy and program. There are arguments to the contrary, however, saying that there is no need for specific legislative measures as they can be taken care of by the anti discrimination or quota levy policies where these are available.[146] To validate their argument the proponents of this argument refer to the legislative experiences of some countries where there are no specific legislations and the issues of job retention and return to work are governed by the other more general legislations such as the anti-discrimination legislations and quota levy schemes which mainly are aimed at increasing entering of PWD into employment but also have the unexpected or unintended for effect in keeping in employment people who become disabled in employment.[147]

2.6.6 Vocational Rehabilitation (VR) and Vocational Training (VT) Approach

VR has been defined in various ways by different writers. Waddel describes it as "whatever helps (given to) someone with a health problem to stay at, return to, and remain in work"[148] Another scholar on the subject defines it as "Medical, psychological, social and occupational activities aiming to reestablish among sick or injured people with previous work history their working capacity and prerequisites for returning to the labour market."[149] Similarly, the College of Occupational Therapists' (COT)[150] VR

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[144] Every year some two million men and women lose their lives through accidents and diseases linked to their work. In addition workers suffer 270 million occupational accidents and 160 million occupational diseases each year. Unfortunately, most of these accidents and sicknesses that lead to disability occur in developing countries for lack of adequate legal and technical precautions put in place. Look: www.ilo.org/public/english/protection/safework/accidents/index.htm last accessed on 27-03-12

[145] As indicated in the beginning PWDs represent an estimated 10% of the world population of this about 470 million are working age. If we take the just the case of EU and US usually said better employers of PWDs we get the following gruesome figure in EU in 2008 40% of PWDs were employed compared to 64% of persons without disabilities. In the US the only 3 in 10 which is 30%. There is little doubt that the figure gets more worrying for developing nations, Look: www.ilo.int/wcmsp5/groups/public/@dgreports/@docmm/documents/publication/wcms last accessed on 26-03-12

[146] Supra note 101 P.23

[147] The Americans with Disabilities Act (ADA) was mainly introduced to encourage access to work although job retention has been the major outcome. In Germany the consequence of the quota system is internal recruitment for the quota calculation of employees who become disabled and minimal new recruits of PWDs.

[148] Waddell G, Burton AK, Kendall NAS, Vocational Rehabilitation: What works for whom, and when? 2008, London as cited in College of Occupational Therapists, Working for Health: Occupational therapy and how it can benefit your organization 2010 London. Hereafter: COT.

[149] Charles Goblet and Franco Frnchignoni, Vocational Rehabilitation, Springer-Verlag 2006 p. 5

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[148] Waddell G, Burton AK, Kendall NAS, Vocational Rehabilitation: What works for whom, and when? 2008, London as cited in College of Occupational Therapists, Working for Health: Occupational therapy and how it can benefit your organization 2010 London. Hereafter: COT.

[149] Charles Goblet and Franco Frnchignoni, Vocational Rehabilitation, Springer-Verlag 2006 p. 5

strategy explains the concept as: "a process to overcome the barriers[151] an individual faces as a result of injury, illness or impairment when accessing, remaining in or returning to employment...."

As one can gather from the foregoing, the primary objective of VR is to help people retain or regain (return to) work. From this view point we can say that VR is an implementation mechanism of the job retention and return to work policies. Vocational training programmes on the other hand, largely refers to the vocational training of PWDs without earlier employment history. However, different writers use the words interchangeably. Thus, it does not seem consensus exists on the exact meaning and scope of the concepts. In this paper, they are applied to PWDs with former work experience and to those without respectively. Unlike the approaches discussed above (quota schemes and anti discrimination legislations) that impose duties on the demand side of the labour market, VR and VT schemes operate on the supply side by trying to increase the productivity and employability of the PWDs.

The success of VR program very much depends on two factors, one is appropriate healthcare that focuses on work and the other is workplaces that are accommodating and supportive of disabled or injured employees in returning to or remaining in work.[152] The fact that work or employment is a vital ingredient of a person's life goes without saying. Consequently, VR and VT strategies are instrumental in placing PWDs in meaningful work[153] which is vital for their sense of independence, self esteem and social acceptance. There are controversial points that emanate from the mode of conducting the VR and VT programs. That is how and under what circumstances they can be best conducted. There are a host of policy approaches one can choose from to conduct effective VR and VT strategies.[154]

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[150] The COT is a wholly owned subsidiary of the British Association of Occupational Therapists (BAOT) and operates as a registered charity.

[151] The document lists barriers including but not limited to health conditions and associated impairments, economic conditions such as variation in labour demand, failure of social institutions to adapt to individual impairments and employers' lack of confidence when dealing with employees with disabilities.

[152] Supra Note 100 at 5

[153] Ross in COT identified four types of work: Paid work such as employment, Unpaid work such as volunteering, Hidden work which may be illegal, including morally questionable activities such as prostitution and drug trading and substitute work such as sheltered workshops. In our case, when we say "work" it refers to employment in open workplaces or sheltered workshops that does not jeopardize the person's social acceptance.

[154] Seven major types Of policy approaches have been identified. These are: a) mainstream model, government, private sectors or NGOs run vocational centers that provide training for PWDs who are interested. The physical infrastructures, their rules and regulations, curriculums and evaluation processes are designed in such a way that they are friendly to the needs of PWDS. b) Community based rehabilitation model aka CBR model: under this approach PWDs are given different types of VT based on the need of local labour market. Upon completing the

Although numerous approaches of vocational training are available as stated above (look note 154) the application of sheltered workshops and also supported employment as mechanism for VR schemes standout a particularly controversial issue.[155] On the one hand, there are those who argue that the disabled person (worker) should be benefited from prevocational training program before entering ordinary working life.[156] The main thinking behind this approach is that to improve the person's working ability, skills and competence s/he has to be trained in segregated institutions or workshops especially designed for the particular task. Segregated workshops refer to sheltered workshops (employment) discussed above in this paper. This approach is also known as the "train-then-place" model. Its proponents argue that the person who suffered disability need to adjust both psychologically and physically to once again be fit and competent enough to join ordinary working life. Sheltered workshops are ideal for such adjustments to bear fruit.[157]

The argument on the other side favors supported employment than sheltered employment as the best mode of rehabilitating the individual. This approach is also known as the "place-then-train" approach. Its effective implementation demands finding job in the open labour market and then appointing of the PWD with a job coach.[158] The proponents of this approach argue that using sheltered workshops as mode of VR involves both dangers and difficulties. Sheltered workshops are incompatible with the purpose and goal of modern VR which is bringing about the disabled into social mainstream. They also have the negative effect of losing confidence that can happen to the disabled worker as result of working in a segregated environment secluded from the mainstream society. Thus, they argue that sheltered workshops should never be used as an alternative mode of VR.[159]

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training they are given financial and technical support to enable them to self employment or get an employment in the local market. c) Apprenticeship Model: is a VT model where by the PWDs are trained by working with experienced and skilled person in his/her workshop or workplace. d) Peer Training Model: in this VT model PWDs are given the chance to be trained by another person who has similar disability. So that they see how he does the job and believe they can also do it. e) Group Training Model: is VT model where by People with similar disabilities learn skills within the group so that they will be able to work in unison. The other two models, namely the sheltered and supported models are primarily employment models but they can also be used as training models on various occasions.

[155] Kjetil Froyland Supported Employment or Segregated Rehabilitation: Vocational Rehabilitation and the Idea of Rapid job Placement A Literature Review 2006 p 21

[156] Id P.26

[157] Ibid

[158] Id p 23

[159] Jacobus tenBroek, The Character and Function of Sheltered Workshops 1995 p 3

In spite of these controversies, however, the two opposing approaches are being used by various countries separately and in combination.[160] Each one has advantage over the other in certain ways and depending on the type and severity of disability under consideration. For example, the sheltered workshop approach is preferable in terms of the lesser amount of money it needs and its fast turnover effect in rehabilitating large number of people in short space of time. PWDs are a heterogeneous social group as all segments of the society are. They differ from one another on personal situations, identities, gender, age, location, education, ethnicity, religion etc. Simply put, PWDs are part of human diversity. Therefore, one specific model cannot be taken as a panacea for all their problems and needs. As such, this writer is opined that both policy approaches can be used on a case by case basis by evaluating the prevailing circumstances and by determining which approach best serves the purpose of VR under the given circumstances.

2.7 The Concept of Equality

Equality underlies all major legislative policies that are relevant to the issue of the employment of PWDs. Human beings are subjects of rights because each and every individual matters and matters equally. Equality has been described as a "treacherously simple concept"[161] yet a diverse spectrum of approaches exist as to the exact meaning of equality and what societies should do to incorporate and promote this universal value. In the following section we will see some of these approaches.

2.7.1 Formal Equality

The founding principle of market economy is the free play of market forces. Individuals are one among many factors of production. Individuals looking for jobs in the employment marketplace are autonomous and make their own choices. The fact that they secured an employment or not purely depends on their individual competitiveness. Inequality of efficiency, capacity, and bargaining power among employees justifies inequality of treatment. Formal equality is a thinking that emanates from the above argument. It does not recognize the differences that prevail in societies. Its sole concern and deciding factor is the personal qualities of the competing individuals and their respective bargaining power which help them win a position in

[160] Supra Note 109

[161] Holtmaat, Rikki " the Concept of Discrimination", Academy of European Law Conference Paper, 2004, p 2

employment. Able and disabled persons compete on equal grounds regardless of the differences that situate them in varying circumstances are taken into account.[162]

This does not mean, however, that personal differences do not completely have a place under the theory of formal equality. It is accepted that personal differences justify a difference in their treatment. In practice, formal equality allows and requires unequal treatment of unequal subjects of law. Consequently, it disregards and contradicts the central principle of equality of all human beings despite their differences as an inalienable human rights issue firmly grounded on the idea that all persons are of equal value and importance. [163]

The proponents of the approach maintain that if "merit" is to be given its right place in society, and if arbitrary decisions are to be prevented then the application of formal equality is a must.[164] According to this aspect of equality, each person is entitled to and should be afforded equal concern and respect or, as stated in the UDHR (1948): "all human beings are born free and equal in dignity and rights...."[165]

Its critics on the other hand, set out its failure to respond to the reality in society. By treating everyone equally it hinders inclusion. [166]So there is no violation of this principle if the employer treats the disabled and non disabled employees equally. In this sense, denying both a certain benefit or conferring on them equally a certain benefit justifies the quest for equality.[167] They argue that formal equality does nothing to dismantle the obstacles faced by those like PWDs who are subject to discrimination, since the social standards are left untouched.[168]

As discussed above, the formal equality approach ignores the plurality and diversity of modern society. It fails to take into consideration individual differences altogether. Though it cannot be denied that this approach has some role to play in society, its failure to address diversities and the need to accommodate them made it subject to various criticisms.[169]

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[162] S Fredman, "Equality a New Genwration?" (2001) 30 ILJ, p.145 at 151-152 as citedin Zoe Apostolopoulou p 3

[163] L Waddington, A Hendriks "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination.(2002)18/3/IJCLLIR p403

[164] Ibid

[165] Ibid

[166] Zoe Apostolopoulou, Equal Treatment of People with Disabilities in the EC: what does "Equal" mean? New York University School of Law (2004) p.4

[167] C Barnard, B Hepple, "Substantive Equality" (2000) 59/3 CLJ. P 563.

[168] Supra note 166

[169] The limitation of the formal approach to equality are acknowledged in the interpretation of the idea of non discrimination provided by the committee on the elimination of discrimination against women, where the

2.7.2 Substantive Equality

The limitations that ensue the principle of formal equality led to the coming into being of the substantive approach to equality. Substantive equality begins from the thinking that unlike cases should be dealt with in a manner that reflects their unlikeness. When identifying unlikeness, substantive equality takes a closer look to the realities in the society with a view to point out the factors that determine the position of persons in their social environment.[170] Substantive equality unlike formal equality requires that the state not only fulfill its obligation of conduct, but also the obligation of result in ensuring the human rights of everyone on equal ground.[171] Sandra Fredman has proposed four specific goals of substantive equality a) breaking the cycle of disadvantage associated with marginalized groups b) promoting respect for equal dignity as a strategy for remedying stereotyping, stigma and violence associated with marginalized status c) positive affirmation and recognition of marginalized identity d) facilitation of full participation in society.[172] Substantive equality has the following two aspects.

2.7.2.1 Equality of Result

This aspect of substantive equality argues that genuine equality should always be sensitive to the result. The fact that whether there was equal or unequal treatment in the process depends on the ultimate result so achieved. According to this thinking a treatment infringes the goal of substantive equality if it fails to attain social redistribution of benefits.[173] Redistribution is all about realizing the full participation in all aspects of social life including employment by the disadvantaged groups (In our case the disabled people). Realizing full participation of the disadvantaged requires though the application of some special measures such as affirmative action.

2.7.2.2 Equality of Opportunity

This aspect of substantive equality has as a point of departure the notion that asserts true equality cannot be achieved if individuals begin the race from different starting

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committee stated that Articles 1-5 and 24 together indicate that State Parties under CEDAW are required to go beyond a formal interpretation of equal treatment between men and women to counter and improve the defacto situation of women and to address prevailing gender relations and the persistence of gendr based stereotypes that affect women. See General Comment No 25 on Article 1 of CEDAW.

[170] Supra note 166

[171] Alston P and Quinn, G the Nature and Scope of State Parties Obligation under ESCR: Human Rights Quarterly at p 185.

[172] Sandra Fredman, Providing Equality: Substantive Equality and the Positive Duty to Provide. South African Journal Of Human Rights 21(2) at p. 167

[173] Ibid

points. Thus it aims at equalizing the starting point by taking a range of special measures to compensate for disadvantages or by removing individual or environmental barriers that render impossible equal and full societal participation.[174]

Both aspects of substantive equality recognize the truth of societal differences. [175] They, therefore, suggest as a solution that mechanisms should be designed to accommodate the differences (plurality) of the society. The solutions forwarded by them though differ in focus the former in the end (result), the latter in the means (equal Chance). To put this in different words, equality of result has as a primary objective the attainment of a certain numerical goal. The mechanism it uses to achieve the numerical representation is affirmative measures such as the quota systems. Equality of opportunity on the other hand, is focused on leveling the playing field so that everyone can freely compete. It uses opportunity equalizing mechanisms like the anti discrimination legislations to come to fruition.

This writer has the opinion that, although, it can be said that substantive equality has treated the shortcomings of the formal equality approach, as outlined above. However, it does not follow that it is without problems of its own. The problems mainly emanate from two sources. The first is from the way the disadvantaged groups, in our case the people with disabilities, are differentiated. It needs answering questions like "who is the disabled?" or "what is disability?" The second comes from the question "how (to what extent) should the differences be accommodated?" If we are to treat the needs of all the groups that need it this will leave the accommodation required without a clearly defined and commonly accepted boundaries. Hence, it will be a rancorous subject of debate.

2.8 Conclusions

Under this chapter concepts that underlie the subject matter of the thesis are discussed. Thus, the models and concepts of disability, Legislative approaches that have been in use in different occasions and under different circumstances to achieve the equal employment opportunities of PWDs, such as the sheltered employment, supported employment, job retention and return to work approaches, and anti discrimination legislations etc were discussed at length. The main theme of the thesis being evaluation of various laws, in Ethiopia, for their significance in ensuring the rights of PWDs to equal employment opportunities, the theoretical concepts discussed in the present chapter will be critically important to the end of the thesis.

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[174] Supra note 166 P.6
[175] Supra Note 29 p 407

On the other hand, the concepts that anti discrimination legislations, are founded upon reasonable accommodation, the right to accessibility, and affirmative action are discussed. Moreover, the concept of equality which is one of the central themes of the thesis is also discussed. The discussion of these concepts lays the ground for our analysis of the pertinent international human rights instruments in the next chapter and in due course for the critical examination of the Ethiopian laws that will be undertaken under chapter four of the thesis.

Chapter 3

The Right to Equal Employment Opportunities of Persons with Disabilities under International Instruments.

In this chapter a close examination of the provisions of some international conventions relevant to employment of PWDs will be made. To put the examination in perspectives the conventions are put under four major sections: the United Nations Human Rights Instruments of General Application (the International Bill of Human Rights); The UN Instruments Specific to the Rights of PWDs; the African Regional Human Rights Instruments Relevant to the Rights of PWDs and finally the ILO Conventions Pertinent to our topic will be successively discussed.

3.1 Disability in the International Bill of Human Rights

Under this section we will see human rights conventions that are meant to apply for all in contradistinction to instruments that apply for a specific group of people as in the case of the CEDAW, which applies to women, the CRC, which applies to children and the like. In this regard this section will be limited to the discussion of the international bill of rights, namely the UDHR, the ICCPR and the ICESCR for their inclusion of PWDs in their provisions.

3.1.1 The Invisibility of PWDs in the International Bill of Human Rights

The "international bill of human rights" is an informal name given to the three instruments mentioned above. Hence, we will try to see them in turn hereunder.

3.1.1.1The UDHR

The UDHR is an international human rights instrument that has a unique place in the entire human rights discourse. It was proclaimed by the UN General Assembly as "a common standard of achievement for all peoples and all nations."[176] It served as a yardstick to measure the degree of compliance of nations to the principles of human rights. Its provisions are indicative of the common aspirations of the member states of the UN. Due to the fact that it is a mere declaration and not a binding covenant, however, it is also depicted as a symbolic document.[177] Nevertheless, due to its moral

[176] Cronin-Furman, Kathleen Renee, "60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect." American University International Law Review 25, No. 1 (2009) p.180

[177] Cooper, J and Whittle, R, Enforcing Rights and Freedoms of Disabled People the Role of Transnational Law (Part 1) p 54

and legal significance it is now widely recognized as part of the international customary law and, therefore, possesses legal force.[178] In a general sense, the UDHR has become a highly visible and highly recognized articulation of moral and political standards, and a measure by which respect for and compliance with, international human rights principles can be judged.[179]

The concept of equality pervades the provisions of the UDHR. Equality and non discrimination can be taken as its core foundation. Article 1 provides that "*all* human beings are born free and *equal* in dignity and rights" [emphasis added] Article 2 takes this principle one step ahead (it states in a negative way what Article 1 states in positive terms) by giving an open ended list of the prohibited grounds of distinctions (discriminations). Thus it provides:

> "*Everyone* is entitled to all rights and freedoms set forth in the Universal Declaration without distinction of any kind *such as* race color sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*."[180][Emphasis added]

This list begins by an all inclusive word "everyone" as does article 1 which begins with the word "all" However, the list failed to address what was intended at the beginning by omitting grounds such as disability.[181] The general consensus, however, is that though disability is not specifically mentioned herein as a prohibited ground of discrimination the cumulative reading of the two articles plus taking into consideration the word "*such as*" that comes immediately before the list and the phrase "other status" that is put at the end of the provision, there is no doubt that the equality and non

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[178] William K Smith, Sarah M Hughes (eds.) The International Disability Rights Compendium 2003, Center for Rehabilitation, Chicago P 55

[179] It should be noted that the Vienna Declaration emphasized that "the Universal Declaration of Human Rights, which constituted a common standard of achievement for all people and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing human rights instruments..." see preamble of the Vienna Declaration and Programme of Action United Nations General Assembly (A/CONF157/23), issued on July 12,1993, by the UN World Conference on Human Rights, Vienna, Austria, June 14-25, 1993.

[180] UDHR Article 2

[181] In addressing grounds on which discrimination is prohibited legislations follow three different models: The first is to frame a broad open- textured equality guarantee stating that all persons are equal before the law, without specifying any particular grounds. This option gives wide discretion to the judges to decide. In this regard the US constitution (fourteenth amendment) can be a good example. The second approach is the legislation contains an exhaustive list of grounds. In contrast to the first, this option does not leave room for the discretion of the judges. This can be found in the UK anti-discrimination legislation and the law of the EU. The third, approach lists the grounds of discrimination and indicates that the list is not exhaustive. This approach is primarily adopted by the international human rights conventions like the UDHR, ICCPR and ICESCR.

discrimination norm of the declaration applies for PWDs as well.[182] Thus, PWDs are beneficiaries of the equality rights and the other rights enshrined in the declaration[183] the right to employment being included under article 23 of the declaration there is little doubt that the PWDs are equally beneficiaries of the various elements[184] the right to employment (work) includes in the declaration. The main elements of the right to work are discussed in the successive sections.

3.1.1.2The ICCPR

The ICCPR is primarily an instrument on civil and political rights also known as first generation rights. As such it does not have much to say on the right to employment which is basically a socio-economic right also known as second generation rights. The ICCPR is very important in relation to the right to equality and non discrimination. One provision important in this regard is Article 26 which runs:

> "*All* persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to *all* persons equal and effective protection against discrimination on any ground such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or *other status.*"[Emphasis added]

Once again, here as is the case under the UDHR, disability is omitted from the list of grounds on which discrimination may not be based. However, it is important to note that this provision is both a free standing and an open ended equality norm. By free standing is meant that the provision is not limited to the rights and freedoms enshrined within the covenant and may also extend to social and economic considerations.[185] This writer is of opinion that the inclusion of property as one of the prohibited grounds of discrimination is particularly a pertinent protection for the majority of PWDs who are

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[182] The principle of "equality" is implicit in the concept of human rights as belongs to all human beings, and therefore to all equally. Equality in the enjoyment of rights occupies a central place in modern international human rights law, as well as in the constitutional law of many states. Look Peter Danchin: Universal Declaration of Human Rights available at: www.ccnmtl.colombia.edu Last accessed 20 -03-2012

[183] Note that the first line of Article 2 of the UDHR provides that "Everyone is entitled to all the rights and freedoms set forth In this declaration..." This part of the provision is indicative of the fact that the provision is "dependent" (applies to only the rights in the declaration and no more.)

[184] Article 23establishes four principles: The right to work principle, the right to equal pay principle; the just remuneration principle; and the freedom of association principle. The right to work in turn has various elements: the right to get access to the labour market: the right to choose employment without interference; the right to protection from unemployment. The right to work can be regarded as a prerequisite for the protection against discrimination, the freedom of association and other socio-economic rights of the employees.

[185] General Comment CCPR/C/21/Rev. 1/Add 1, adopted by the human Rights Committee under Article 40(4) of the ICCPR at its meeting 21 Nov.1989 at paragraph 12

subjected to abject poverty and do not have much in terms of financial means and property due to the pervasive discriminatory practices they daily face in areas such as their right to employment.

As pointed out earlier, this provision is not only free standing but also open ended. This is gestured by the "other status" phrase at the end of the provision. Which means the list provided therein can by no means be considered as an exhaustive one. Thus, disability, is imported in to the provision through the usage of the familiar phrase "or other status" though not specifically put in the list. It can, therefore, be safely argued that disability is one of the grounds with regard to which one cannot be discriminated against unless a reasonable and objective justification can be established by the state signatory to the covenant.[186]

One apparent limitation of Article 26 though is that its protection, prima facie, stands short of substantive equality. While the prohibition of all forms of discrimination is a valid objective, it should be noted that the demand of "formal equality" alone does not best serve the interest of PWDs. By not adequately addressing the concept of "indirect discrimination"[187] the convention will fall woefully short of achieving any full notion of equality.[188] On this point a commentator has this to say: "Active promotion of equality thus goes further than mere prohibition of less favorable treatment of individuals and groups."[189]

Thus, the promotion of substantive equality of social groups such as PWDs requires the introduction of measures like affirmative actions beyond the mere recognition of their formal right to equality. The process of materializing substantive equality necessitates the elimination of discrimination in all its forms and types. Direct discrimination can be eliminated by the creation and enforcement of appropriate legislations. Indirect discrimination on the other hand, needs long term social and educational programs such as affirmative actions to solve the problem progressively. Although Article 26 has

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[186] See communication No 180/1984 L.G Danning v. the Netherlands, communication No. 516/1992 even though these communications do not particularly refer to discrimination based on disability, they nevertheless indicate that the state cannot discriminate between citizens unless it has objective reason that suffices to decide otherwise. Available on www.umn.edu/humanrts/undocs/session29-index.html last accessed on 02/04/2012

[187] Look notes 195 and 196 below.

[188] Supra note 166 p. 12

[189] A Hendricks, "Disabled Persons and Their Right to Equal Treatment", 1 European Journal of Health Law, 1995 p153

not clearly spelt it out, arguably it does not prohibit positive distinctions[190]that help the promotion of substantive equality.

3.1.1.3 The ICESCR

The ICESCR covers socio-economic rights that are also informally referred to as "second generation rights" of which the right to employment is one. Therefore, the significance of this convention to PWDs in relation to our topic is twofold. One is its equality and non discrimination norms and the other is its provisions relevant to the right to employment.

Article 2(2) of the ICESCR like Article 26 of ICCPR (above) lists a number of prohibited grounds of discrimination and concludes with the words "or other status" Thus it runs: "all such rights will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or *other status.*" [191] [Emphasis added]

Two points stand out when we compare article 26 of ICCPR and Article 2(2) of ICESCR. First, Article 2(2) of the ICESCR is a dependent provision which means that it cannot be pleaded in isolation from the other provisions of the convention. It only prohibits discrimination in respect of one or more of the other rights enumerated within the covenant. Second Article 26 ICCPR uses the words "such as" whereas Article 2(2) uses the words "as to" before the lists. Some argue that Article 2(2) of ICESCR is not open ended due to its use of "as to" instead of "such as". "As to" refers only to the lists that follow while "such as" indicates that the list contains only some examples of the prohibited grounds. Therefore, in the case of the ICESCR inclusion of additional grounds into the list is prohibited.[192] Nevertheless, the usage of the words "or other status" at the end of the list is a clear indication of the fact that the list is not exhaustive and hence, the possible inclusion of further grounds remains open. The CESCR in its General Comment No 20 has made this clear.[193]

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[190] The Human Rights Committee has stated in General Comment No 18 that differentiation of treatment is permissible if:1) The goal is to achieve a legitimate objective, 2) the criteria for such differentiation are reasonable and objective.

[191] Article 2(2) of the ICESCR

[192] Supra note 177 p 15

[193] General Comment No 20 para.27 runs: The Nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in Article 2(2). These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization....

The question as to whether disability can be included within the definition by virtue of the "other status" phraseology is affirmatively answered by General Comment No 5 of the Committee on Economic Social and Cultural Rights.[194] The General Comment defines disability based discrimination as:

> "... any distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic social and cultural rights...."

As has been clearly stated above, PWDs have the right to be free from both direct[195] and indirect [196] forms of discrimination in the exercise of their economic social and cultural rights in general and their right to work (employment) in particular as provided for under Article 2(2) of the ICESCR.

Article 2(2) of the ICESCR being a dependent as opposed to free standing anti discrimination provision, it naturally follows that PWDs have the privilege to equality in exercising the socio-economic rights provided in the Convention in general and those related to employment in particular.[197] From the foregoing, therefore, it follows that PWDs like any member of the human society are beneficiaries of the right to work and to the work that is decent in its nature as made clear by the General Comment No 18.

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[194] General Comment No 5 paragraph 5 states that the requirement contained in Article2(2) of the covenant that the rights "enunciated...will be exercised without discrimination of any kind" based on certain specific grounds "or other status" clearly applies to discrimination on the grounds of disability.

[195] Direct discrimination refers to a situation when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground : e.g. where employment in educational or cultural institutions or membership of a trade union is based on political opinion of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation. Available at:www2.ohchr.org/English/bodies/cescr/comments.htm Last accessed on April 25-2012

[196] Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. General Comment No 20 Para 10(b) available at: www2ohchr.org/English/bodies/cescr/comments.htm Last accessed April 25-2012.

[197] The rights related with employment are mainly those found under Articles 6, 7 and 8 of the Covenant. These three provisions are in the words of General Comment No 18 "interdependent" Their core element is the right to "decent work" Decent work as specified in paragraph 7 of the General Comment is work which respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration, and which provides an income allowing workers to earn a living for themselves and their family. These fundamental rights include respect for the physical and mental integrity of the worker in the exercise of employment. Look General Comment No 18 available at: sim.law.uu.nl/SIM/caselaw/Gen_Com.nsf Last Accessed 27-03-2012

3.2 Instruments Specific to the Rights of PWDs

The relative invisibility of disability in the international human rights covenants led to the adoption of disability specific instruments of which some are discussed here under. The adoption of these instruments since from the 1970s, ushered in policy change, in relation to PWDs, in the international arena from one of welfare to rights based approach.

3.2.1The Declaration on Mentally Retarded Persons

As made clear in the preamble of the declaration[198] one of its objectives is to assist the mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life. Regarding their right to employment Article 3 provides:

> "The mentally retarded person has a right to economic security and to a decent standard of living. He/she has the right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities."

As one can see from the above, this declaration could be considered as one step ahead in terms of promoting the right to equal employment opportunity of PWDs. It created awareness about the human rights of PWDs. The declaration, however, was not without its weaknesses and criticisms. The fiercest criticism was that came from the disability community saying that the declaration in addition to being without any binding force is also based on the outmoded medical and charity models of disability. For these they indicate provisions of the declaration that qualify the scope of the rights of people with intellectual disabilities by providing that "the mentally retarded person has to the *maximum degree of feasibility*, the same right as other human beings."[199] And the goal the declaration set for society which is to promote "their integration as far as possible in normal life."[200]The presence in the declaration of these and other similar provisions indicates that the rights recognized therein are not fully fledged and mandatory rights but qualified and diluted types that imply that the rights are implemented only where and if their implementation is possible. These weaknesses made the declaration susceptible to criticisms. These criticisms necessitated the existence of an instrument inclusive of all PWDs and which does not subject the rights of PWDs to mere convenience.

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[198] Declaration on the Rights of the Mentally Retarded Persons, UNGA Resolution 2856(XXIV) of 20 Dec. 1971.
[199] Ibid Article 1
[200]Ibid preamble of the declaration paragraph 4.

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[198] Declaration on the Rights of the Mentally Retarded Persons, UNGA Resolution 2856(XXIV) of 20 Dec. 1971.
[199] Ibid Article 1
[200]Ibid preamble of the declaration paragraph 4.

3.2.2 The Declaration on the Rights of Disabled Persons

This Declaration[201] was an improvement of the Declaration on Mentally Retarded Persons, discussed above, in the sense that its scope was broadened to cover all persons with disabilities in contradistinction to only the mentally retarded. And also it tried to address the criticisms launched against the Declaration on the Mentally Retarded Persons by making the rights as comprehensive and mandatory as possible rather than qualified ones. Regarding the right to employment of PWDs it provides:

> "Disabled persons have the right to economic and social security and to a decent level of living. They have the right according to their capabilities, to secure and retain employment or to engage in a useful productive and remunerative occupation and to join trade unions."[202]

This declaration though without a binding effect as all declarations do, it, nevertheless, paved the way for the proclaiming of the year 1981 as the international year of disabled persons[203] by the United Nations General Assembly. The major outcome of the International Year of Disabled Persons (IYDP) was the formulation of the World Programme of Action (WPA)[204] concerning disabled persons adopted by the General Assembly in 1982.

Giving equal opportunity to PWDs in employment is one of the most stressed issues of the WPA. Accordingly, it encourages various programmes that help in creating employment opportunities (Jobs) for PWDs. These include sheltered and production workshops, designated positions, quota schemes, subsidies for employers who train and subsequently employ PWDs, co-operatives of and for PWDs etc. It also sets out that the wider application of ergonomic principles leads to adaptation of the workplace,

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[201] UN General Assembly Resolution 3447(XXX) of 9 December 1975.

[202] Article 7 of the Declaration on the Rights of Disabled Persons

[203] In 1976 the General Assembly proclaimed 1981 as the International Year of Disabled Persons (IYDP) General Assembly Resolution 31/123. It called for a plan of action at the national, regional and international levels, with emphasis on equalization of opportunities, rehabilitation, and prevention of disabilities. The theme of the IYDP was "full participation and equality" defined as the right of PWDs to take part fully in the life and development of their societies, enjoy living conditions equal to those of other citizens and have an equal share in improved conditions resulting from socio-economic development. A major lesson of the year was that the image of PWDs depends to an important extent on social attitudes. These were a major barrier to the realization of the goal of full participation and equality in society by PWDs. Available on: www.un.org/esa/socdev/enable/disiydp.htm. Last accessed on 17 -04 2012

[204] The World Programme of Action (WPA) was adopted by the General assembly on 3 Dec. 1982 by resolution no 37/52. It is a three chapter programme that provides an analysis of principles, concepts and definitions relating to disabilities; an overview of the world situation regarding PWDs; and set out recommendations for action at the national, regional and international levels. "Equalization of Opportunities" is a central theme of the WPA and its guiding Philosophy for the achievement of full participation of PWDs in all aspects of social and economic life. Available on: www.un.org/disabilities/default.asp?id=23 Last Accessed on 17/04/2012

tools, machinery at relatively little cost and helps widen employment opportunities for PWDs.

To the effective implementation of the activities recommended in the WPA by governments and organizations it was necessary to have a time framework. Hence, the General Assembly proclaimed the years 1983-1992 the United Nations Decade of Disabled Persons. [205] Regarding employment and education of PWDs in particular the General Assembly adopted the "Tallinn Guidelines for Action on Human Resources Development in the Field of Disability" in 1989.[206]

These guidelines among others provided a framework for promotion, participation, training and employment of PWDs in all government ministries and private enterprises. They further provided that disabled persons have the right to be trained for and to work on equal terms in the regular labour force. Community based rehabilitation programmes should be encouraged to provide better job opportunities.[207] They also provide for preference (affirmative action) to be given to the disabled candidate when he/she is as qualified as the candidate without disability.[208]

To mark the end of the decade December 3 was proclaimed international day of the disabled.

3.2.3 The Standard Rules (SR) on the Equalization of Opportunities for Persons with Disabilities

The rules are not legally binding. Nevertheless, they represent a strong moral and political commitment of governments to take action to attain the equality of opportunity goal. One of the target areas for the equal participation of PWDs is employment. Regarding employment it provides:

> "States should actively support the integration of PWDs into open employment. This active support could occur through a variety of measures, such as vocational training, incentive oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises

[205] General Assembly Resolution No 37/52.
[206] General Assembly Resolution 44/70, 78th plenary Meeting of 8 December 1989.
[207] Id Article (E) 33
[208] Id Article (E) 35

employing workers with disabilities. States should also encourage employers to make reasonable adjustments to accommodate PWDs." [209]

This provision makes it clear that the primary aim of the rules is for PWDs to obtain employment in the open labour market. For those PWDs whose needs cannot be met in open employment other alternatives like sheltered or supported employment options are forwarded.

There are critics who say that the Standard Rules concentrated on physical integration of the disabled than on the social integration.[210] It is as if the equalization of opportunities in the Standard Rules could lead PWDs to live in parallel to the other community members instead of among and together with them. Nowhere in the rules do we find the other members of the community clearly mentioned.[211] On the other hand criticisms also come for the rules scanty cover of civil and political rights such as the right to vote and the like. [212] The full discussions of the criticisms lodged against the Standard Rules, lay out of the scope of this work. So leaving that as it may, we can safely conclude that The Standard Rules, although have generally been considered as weak instrument on account of their non binding nature, were of great significance in the realization of the enjoyment to socioeconomic rights such as the right to equal employment opportunities of PWDs.

3.2.4. The Convention on the Rights of Persons with Disabilities (CRPD)

As was made clear above, the major human rights conventions that precede the CRPD did not explicitly mention disability or PWDs hence, although it was generally accepted that disability is implicitly included in the "other status" phraseology of the conventions, it can safely be argued that disability was not of prime concern to these human rights conventions. On the other hand, long after the coming into force of these conventions there had been a number of declarations that tried to address the issue of disability as discussed above. These declarations could not attain the goals they were set to address because of one or the other reasons. But generally speaking all the declarations including the more comprehensive instrument the Standard Rules on Equalization of Opportunities for PWDs, did not serve much beyond indicating the

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[209] Rule 7(2)

[210] Raymond Lemay, A Review of the Standard Rules on the Equalization of Opportunities for PWDs, United Nations Department for Policy Coordination and Sustainable Development (1994) p.49 Available at: www.socialrolevalorization.com Last accessed on 10/04/2012. See Also Reaching the most vulnerable: Proposed supplement to the Standard Rules on the equalization of Opportunities for Persons with Disabilities [Annex E/CN.5/2004/4] available at: www.un.org/disabilities Last accessed on 12/04/2012

[211] Id p. 50

[212] Ibid

good intentions of the States as they did not have binding effect. The CRPD, on the other hand, being a binding international convention it imposed duties of respect, protect and fulfill on the States that have ratified it.

All human rights issues being inseparable and interdependent, all the provisions of the CRPD[213] are in one or the other way relevant to the realization of the right to employment of PWDs.[214] In the same vain violation of the right to employment may lead to violation of the other human rights of the PWDs.[215] However, It would be next to impossible to look into all the provisions in respect of their relevance in promoting the right to employment of PWDs. Thus, in the following section only article 27 of the Convention will be discussed. Under this provision we find various concepts some of which are those we highlighted under Chapter two of this thesis. So under this section we will only briefly touch upon the main concepts that are included in this provision.

3.2.4.1 The Right to Equality and Non Discrimination under the CRPD

The meanings of the concepts of "equality" and "non discrimination" are discussed at length elsewhere in this thesis. So, here we will not go back to the discussions of the concept. But as clearly put under this article[216] States parties to the Convention are duty bound to prohibit discrimination on the basis of disability with all matters concerning employment and to protect the rights of PWDs on equal basis with others.[217]

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[213] One important feature of the CRPD is an inclusion of an article that sets forth general principles. The drafters of the CRPD wanted the Convention to recognize a core set of concepts that underlie disability rights issues and are of particular importance in the disability context. They believed that it was crucial to identify these explicitly at the beginning of the text to ensure that all of the rights expressed in the Convention are interpreted through the lens of these particular principles. Available on www.hpod.org/pdf/HumanRightsYes.pdf Last accessed on April 21,2012.

[214] For example the proper observance of the right to education helps PWDs to get the necessary qualifications to get employed or to be promoted and increase their earning potential. Similarly. the right to health is essential so that PWDs in poor health get necessary medications to be able to (continue) work. The right to access has also far reaching implications on the right to employment. Such as Access to means of transportation, information etc have tremendous effect on the realization of the right to equality in employment of PWDs.

[215] For example, a PWD who cannot work and therefore earn a fair wage may be unable to attain adequate standard of living.

[216] Article 27(1) a and b CRPD

[217] The CRPD contains three articles of particular relevance to the principle of equality and non discrimination: Articles 2, 3 and 5. Article 3 (General Principles) clearly establishes equality and non discrimination as two of the most important principles of the Convention, which along with the other principles contained there under should be applied to interpretation and implementation of all, other substantive articles in the CRPD such as article 27. Article 5 recognizes the equality of PWDs before the law and the equal protection of the law. It also prohibits discrimination on the basis of disability. This article, nevertheless, does not list the other grounds on which PWDs should not be discriminated against. The list of prohibited grounds of discrimination is given under paragraph (P) of the preamble. This list appears wider than those under the ICCPR and the ICESCR because it includes additional grounds like "ethnic" and "indigenous" origins and "age".

The CRPD being binding on member States it imposes three sets of obligations on them.[218] The first is the obligation to respect: This obligation refers to the duty to refrain from engaging in any act, custom or practice that is inconsistent with the principles of equality and non discrimination. The second obligation is the duty to protect. States must take all appropriate measures to eliminate discrimination and violations of equality by any non- state actors like private individuals and enterprises. And thirdly, States have the obligation to fulfill which means that States should adopt and implement measures that give effect to the right to equality and non discrimination. For example, the State needs to design various mechanisms (employment options) like affirmative actions, public employment policies, vocational rehabilitation strategies etc so that PWDs will have substantive equality in the arena of employment.

3.2.4.2The Right to Just and Favourable Conditions of Work under the CRPD

This right includes many work related rights as provided for in the article. This will be clear from the reading of the provision which partly goes:

> "...to just and favourable conditions of work, *including* equal opportunities and equal remuneration for work of equal value safe and healthy working conditions, *including* protection from and the redress of grievances." [219] (Emphasis added)

As can be seen here the right to just and favourable conditions of work includes four distinct types of rights (at least for the purpose of this provision). These are the right to equal opportunities, the right to equal remuneration for work of equal value, right to safe and healthy working conditions and the right to protection from grievances and the right to redress in case it happens. In this connection it would be important to remember that the ICESCR has also a very similarly worded provision.[220] The concept

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[218] Janet E. Lord, Katherine N. Guernsey (eds.) Action and Advocacy on the Rights of Persons with Disabilities, Human Rights Resource Center, University of Minnesota 2007 p. 44

[219] Article 27-1-a CRPD. The word 'including' under this provision is arguably indicative of the existence and possible inclusion of other conditions.

[220] ICESCR article 7 provides: The States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure in particular:
a)Remuneration which provides all workers as a minimum with: I) Fair wages and equal remuneration for work of equal value without distinction of any kind in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work: II) a decent living for themselves and their families in accordance with the provision of the present Covenant:
b) Safe and healthy working conditions:
c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence:
d) Rest leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays.

of just and favourable conditions of work, as can be seen from the reading of the two provisions, is a vast subject that deserves a detailed research work in its own right so that discussing the essence of all these rights will be beyond the scope of this thesis. Thus, only some general remarks will be given on each concept.

3.2.4.2.1 The Right to Equal opportunity

The concept of "equal opportunity" refers to the right of PWDs to equality and non-discrimination in recruitment, hiring, placement, promotion, transfer, training, compensation, layoff, or termination of employment contract.[221] This writer is of opinion that equal opportunity in this article is meant to be substantive equality and not mere formal equality. So that affirmative actions, quotas, reserved (designated) employment positions and other similar measures are permitted to correct the historic inequality PWDs were subjected to.

3.2.4.2.2 The Right to Equal Remuneration for Work of Equal Value

The term "remuneration" refers to all forms of reward for employment including salary or wage, allowances, benefits, commissions, bonuses and the like payable directly or indirectly, whether in cash or in kind to which the employee is entitled under the terms of the employment contract.[222] There are three approaches regarding remuneration.[223] 1) Fair Wages[224]2) Equal Remuneration for Work of Equal Value[225] and3) Decent Remuneration.[226]

Of these three remuneration approaches, the CRPD adopts the right to equal remuneration for work of equal value approach. This right (approach) in addition to the CRPD and ICESCR is also provided for under other international human rights instruments.[227] The main theme of this concept is that PWDs have the right not to be paid less than their work colleagues where the work is different but of equal value.

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[221] Trades Union Congress, Equal Opportunities at Work, 2006 Available at www.khrc.net/pdf/ksemployposter.pdf Last accessed April 20, 2012

[222] ILO Equal Remuneration Convention No 100 (1951) Article 1(a)

[223] Jeff King, An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights, Center for Economic and Social Rights, 2003, Brooklyn NY P 78 Available at www.cesr.org/downloads/CESR_s Last Accessed 22/04/2012

[224] Fair wage is the principle that the level of pay for an occupation ought to reflect the nature and circumstances of the work. See note 218 above P.79

[225] Ibid. Equal pay for work of equal value means that notwithstanding that people hold different job titles, they deserve the same pay if the work is of the same value.

[226] Ibid. It refers to equitable minimum wage levels that are geared to the cost-of-living index.

[227] Look the UDHR article 23(2), CEDAW article 11(1-d) and ILO Equal remuneration Convention, 1951 (No 100) Recommendation, 1951 (No 90) article 2.1, 3.3

Equal value refers to the demands of the job in terms of skills, efforts decisions and the like. What matters is the demands made on employees by their work, rather than the value of the work to the employer.[228]

3.2.4.2.3 The Right to Safe and Healthy Working Conditions

This refers to a work environment that is physically, socially and psychologically suitable for the PWDs. PWDs have, like any other worker, the right to be protected from a work environment that is dangerous to their health and life. The work place also must have preventive, treatment and control mechanisms for workplace diseases and things that might cause physical harm or death to the PWDs. The ILO has the role of monitoring and setting standards in relation to safe and healthy work environment.[229] As the standards so far set by the ILO are not disabilities specific PWDs like their other colleagues in the workplace are protected by them. However, this writer is of the opinion that in the future we may need to have disability specific health and safety standards that have taken into account the special needs of PWDs.

The other issue mentioned in the provision in relation to safe and healthy work environment is the right of PWDs to be protected from workplace harassment. Workplace harassment refers to any unwelcome verbal, written or physical conduct that either denigrates or shows hostility to the PWDs that: a) has the purpose or effect of creating an intimidating, hostile or offensive work environment. b) has the purpose or effect of unreasonably interfering with the work of the PWDs and c) affect the employment opportunity or compensation of the PWDs.[230] Though this is a good guarantee for PWDs who most often than not are subject to mockery and harassment, this writer thinks that it will at times be difficult to draw the line that separates workplace conduct that can be considered as harassment from the normal day to day workplace friendly exchanges and jokes.

3.2.4.3 Labour and Trade Union Rights

The right to labour refers to the right of PWDs to engage in employment on their free consent. This also includes their right to withdraw their labour.[231] The absence of this

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[228] Equal pay for work of Equal Value Available at: www.equalityhumanrights.com Last accessed on 22/04/2012

[229] The ILO has created 21 Conventions that operate in this area. Including the ILO Occupational Health and Safety Convention 1981 (No 155)

[230] Workplace Harassment, Available at: www.dhrm.state.va.us/hrpolicy/policy/pol230workplaceharassment.pdf Accessed on 20-04-2012

[231] The right to withdraw ones labour refers to the right of the PWDs (the other workers included) to strike without being subjected to personal sanctions. They also have the right to refuse any activity to which they morally object and to refuse to carryout duties which they genuinely believe to be dangerous to their health or safety or to the

right implies slavery. The trade union rights, on the other hand, refer to the rights of the PWDs to unionize like any other workers and to effectively exercise their right of trade union membership.[232] These rights are contained in greater detail under the ILO conventions[233] and also under the UDHR and the ICESCR[234] This title contains many and varied subjects in relation to employment. It refers to areas such as the right to form and join trade unions,[235] the right to collective bargaining,[236] the right to strike,[237] the right to rest and leisure[238] and the like. PWDs have all these rights in equality with the other workers.

All the other provisions enumerated under article 27(1) of the CRPD are about the policy approaches available to increase the employment opportunities of PWDs. These include Vocational training, provision of reasonable accommodations, job retention and return to work, public and private employment etc. All these have been discussed at some length in this paper elsewhere so that there is no need to touch upon these concepts here.

3.2.4.4 The Right to be Free from Slavery or Servitude and Forced or Compulsory Labour.

Freedom from slavery, servitude and forced labour is a fundamental human rights issue. Though the three words represent distinct concepts that violate human rights, they also have similarities in some respects and are often conflated with each other. Each of them involves some type of exploitation, control or coercion related to the extraction of labour or personal service by one individual from another. By reason of

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safety of other workers or the community. See Manfred Davidmann, the Right to Strike. Available at: www.solhaam.org Last accessed on 13-05-2012.

[232] See, European Court of Human Rights, Trade Union Rights-Factsheet 2012. Available at: www.echr.coe.int last accessed on 13-05-2012

[233] There are a number of ILO Conventions and Recommendations related to trade union rights. These include: The Right to Organize Convention, 1948 (No 87), The Right to Organize and Collective Bargaining Convention, 1949 (no98),Workers Representative Convention, 1971 (No 135) and Recommendation, 1971 (No143), Labour Relations (public Service) Convention, 1978 (No 151) and its Recommendation 1978 (No 159), Collective Bargaining Convention, 1981 (No 154) and its Recommendation 1981(No 163) and Collective Agreement Recommendation, 1951 (No 91) Texts available at http://www.ilo.org/ilolex/english Last accessed 09-02-2012

[234] Look ICESCR Article 8, Look also UDHR article 23 (4)

[235] Trade union is an organization whose membership consists of workers and union leaders, united to protect and promote their common interests.

[236] Collective bargaining is a process of negotiations between employers and a group of employees (usually a trade union) aimed at reaching agreements that regulate working conditions.

[237] Strike is a work stoppage caused by the mass refusal of employees to work due to grievances. In addition to total work stoppage it can also take other forms like: go slow, work to rule, sit down and repeated walkouts.

[238] This right recognized under UDHR article 24 is all about peoples need to rest as human beings are not machines; they need time for their biological and social reasons. These concerns could not be answered by staying at workplace. Work gives money, self esteem and social status which are only part of the varied human need.

their vulnerability, the PWDs are usually more exposed to these human rights abuses. There are a number of international conventions that prohibit slavery, servitude or forced labour including the International Bill of Human Rights and the CRPD which is the subject of our discussion under this section.[239] It would be important to look at each of these to see how they violate the right to equal employment opportunities of PWDs which is essentially a right based on the free consent of the PWD either to get involved or not in a certain kind employment or work.

3.2.4.4.1 Slavery and Servitude

Slavery is a form of labour exploitation. Its primary legal reference is the International Convention to Suppress the Slave Trade and Slavery of 1926 which defined slavery as: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[240] Servitude which is also known as serfdom differs from slavery in that people under servitude have not lost their legal capacity as such but must place their labour at the disposal of their master until such time as the latter declares his or her willingness to change the relationship.[241] It may also be narrowly defined as the status of a person who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his or her status.[242]Following the establishment of the UN, a provision was included in the UDHR that confirmed the international community's opposition to the practice of slavery. It run: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[243]

As the newly established UN continued its revision of the League of Nations conventions, in 1949 an ad hoc committee of experts on slavery stated that there was no need to discard or amend the definition of slavery under the Slavery Convention of 1926. The Committee, however, came to the conclusion that the definition in the Convention did not cover other issues as repugnant as slavery itself and that should be included in the definition. Thus, came into existence the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to

[239] The UDHR, the ICESCR and the ICCPR are together known as the international bill of human rights. Although these instruments clearly prohibit all the three practices as violations of human rights, they do not contain definitions of the concept. So in applying them it would be necessary to look into definitions provided by other instruments.

[240] The 1926 Slavery Convention Article 1.1

[241] Walter Kalin and Jorg Kunzli, The Law of International Human Rights Protection, 2009 Oxford University Press Inc. New York P. 421

[242] Ibid Look also Supplementary Slavery Convention, Article 1(b)

[243] UDHR Article 4

Slavery of 1956. [244] The Supplementary Convention expands the definition of Slavery to encompass "debt bondage,[245] serfdom,[246] forced marriage and certain instances of child exploitation."[247] Although there have been concerns that slavery may need redefinition in light of changing social and economic conditions of the world the combined definition of these two conventions has remained in place.

The ICCPR and the ICESCR also prohibited slavery. As discussed above, under the ICESCR, any work should be freely chosen or accepted by the individual concerned if it is to fall within the ambits of the right to work of the Convention.[248] However what we see in the case of slavery is the exact opposite of this condition. The ICCPR directly prohibits slavery and servitude in article 8. The importance given to this right is very apparent from the fact that it is made a non-derogable right under the ICCPR.[249] In times of public emergencies that threaten the life of the nation and the existence of which is officially proclaimed, countries may take measures derogating from certain of their obligations. However the right to freedom from slavery and servitude is specifically excluded from the rights in regard to which derogation is permitted.

3.2.4.4.2 Forced (compulsory) Labour

Forced labour as a legal term is defined by the ILO Convention No 29 which defines it as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[250] This definition has three concepts that need to be clarified to understand the nature of forced labour as a legal concept. These are: the notion of "work or service"[251], the "menace of

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[244] Adopted by a conference of plenipotentiaries convened by Economic and Social Council resolution 608 (XXI) of 30 April 1956. Entered into force 30 April 1957.

[245] Debt bondage is defined in the Supplementary Convention as: "The status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

[246] The Supplementary Convention of 1956 categorizes as a form of "servile status", and defined it as "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not and is not free to change his status. Look article 1 (b)

[247] Supplementary Convention of 1956 Article 1

[248] ICESCR, Article 6. Note also that Articles 6 and 7 of this Covenant set out certain conditions and rights that must be upheld and protected by governments, such as fair wages, equal pay for work of equal value, and the right to form and join trade unions. That are non-existent in situations of slavery.

[249] See Article 4 (2) of the ICCPR which provides: "No derogation from articles 6, 7, 8 (paragraphs 1and 2) ...may be made under this provision."

[250] Article 1 of ILO Convention No 29.

[251] "work or service" refers to any work or service except for case in which an obligation is imposed to undergo compulsory education or compulsory scheme of vocational training. It is concluded that compulsory education and compulsory scheme by analogy with and considered as an extension to compulsory general education, does not

any penalty"[252] and the requirement of not having "offered oneself voluntarily"[253] However, not all compulsory labour is categorized as "forced labour" There are exceptions provided by Convention No 29.[254] These are: Compulsory military service, Normal Civic Obligation, Prison Labour, work or service exacted in cases of emergency (force majeure), and the minor communal service (service performed in the direct interest of the community).

In conclusion, PWDs like all the other members of the society have the right to be protected from slavery, servitude and forced labour. It seems that the CRPD in putting these under a provision specifically designed wants to give emphasis to the importance this right has for the PWDs who, owing to their impairments, are presumably more vulnerable to such types of human rights violations than the other members of the society.

3.3 The Right to Equal Employment Opportunities of PWDs under the ILO Conventions

The 1944 Declaration of Philadelphia was the first ILO instrument to address discrimination by affirming the right of every human being to pursue their welfare "irrespective of race, creed or sex."[255] This assertion is crucial not only because it constitutes the mission of the ILO but also it clearly assigns the ILO the task of combating discrimination and providing work place equality.

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constitute compulsory work or service within the meaning of the Convention No 29. However, vocational training usually entails a certain amount of practical work, and for that reason, the distinction between employment and training is sometimes difficult to draw. It is, therefore, only by reference to the various elements involved in the legal context of a particular scheme of training that it becomes possible to determine whether such scheme is unequivocally one of vocational training or on the contrary involves the exaction of work or service within the definition of "forced or compulsory labour." Look: ILO,2007, Eradication of Forced Labour, ILO, Geneva, p20

[252] The penalty hereunder covers a wide range measures from penal sanctions to simple loss of rights and privileges. This may occur, for instance, where persons who refuse to perform voluntary labour may lose certain rights, privileges or other benefits when such rights, privileges or other benefits (for instance promotion, transfer, access to new employment, participation in education and training programs etc.) depend on the merits that have been accumulated and noted in the worker's work book. The Menace can also take physical, psychological or financial nature. Look ILO, Eradication of Forced Labour, ILO, Geneva, 2007 PP20-21

[253] Offered oneself voluntarily refers to the worker's freely consenting to work. This reveals in our case, the PWD's right to free choice of employment, freedom to leave their employment even when they had freely consented initially. ILO, Eradication of Forced Labour, ILO, Geneva PP20-22

[254] Forced labour Convention 1930 (No 29) Article 2 Paragraph 2.

[255] The Declaration of Philadelphia 10 may 1944 is annexed to the ILO Constitution of 1919. It restated the traditional objectives of the ILO to the centrality of human rights to social policy. Hence equality and non discrimination were among its core values. Text available at: www.ilo.org/ilolex/english/iloconst.htm Last visited on April 25-2012.

Shortly after the Declaration of Philadelphia, the ILO decided to adopt specific instruments to resolve workplace discrimination. Thus, two Conventions accompanied by two Recommendations were adopted.[256] And then after a number of Conventions and Recommendations were adopted by the ILO in a move that clearly shows the weight given to the right to equal employment opportunities for all categories of employees in general and for PWDs in particular. These instruments are discussed in the following sections.

3.3.1 The Equal Remuneration Convention No 100 and Recommendation No 90

The issue of discrimination has been one of the main agenda of the ILO since the 1950s.[257] As a result, the first international instrument with the objective of promoting equality and eliminating discrimination, the Equal Remuneration Convention No 100 and its accompanying recommendation No 90 came in to existence in 1951. These instruments were limited to the promotion of equality between men and women and then only with regard to the issue of pay. But before long it was recognized that true equality and elimination of discrimination will materialize only by including other grounds on which discrimination is prohibited and by widening the areas of employment they should be applied to. This was a move away from the older policy which focused on equality of sexes in relation to payment alone.

3.3.2 The Discrimination (Employment and Occupation) Convention No 111 and Recommendation No 111.

The first instrument being inadequate in solving the problem of workplace discrimination, the Discrimination (Employment and Occupation) Convention No 111 and ILO Recommendation 111 were adopted by the International Labour Conference in 1958.[258] These two instruments were the first international instruments to address the issue of discrimination on other additional grounds than the one provided by Convention No 100. Article 1 of the Convention in part reads as follows:

> "any distinction exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which

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[256] The Equal Remuneration Convention No 100 and its accompanying Recommendation No 90, and the Discrimination (Employment and Occupation) Convention No 111 and ILO Recommendation 111.

[257] In 1955 the UN requested the ILO be tasked with undertaking a study of discrimination in the area of employment and occupation.

[258] To date, these instruments are the most anti discrimination tools of the ILO because of their potentially universal coverage with respect to the various forms of discrimination and the grounds of discrimination.

has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[259]

From the reading of this provision one can see the conspicuous absence of PWDs. But article 5 (2) of the convention which runs as:

> "Any member may after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, *disablement*, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination."[260][Emphasis added]

Though this provision is mainly meant to provide for the importance of affirmative action or in the words of the provision "special measures", to make for the prevailing imbalances due to past discriminatory practices, this writer is of the opinion that impliedly the Convention has accepted disability as one of the prohibited grounds of discrimination by specifically naming "disablement" as one of the grounds worthy of special protection. In spite of the apparently close ended list provided under Article 1 cited above.

On the other hand, the expression "such other" in "*such other* distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation ..."[261] [emphasis added] under article 1 is a clear manifestation of the fact that the possibility of including additional grounds to the list remains open.

Thus, having considered all the above provisions, it is beyond question that disability based discrimination is prohibited by this ILO Convention. Recommendation 111 on its part contains a long list of areas in which the right to equality and non discrimination is

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[259] Convention 111 Article 1 This definition is made very general and wide in scope in order to guarantee the flexibility of adapting it to the continuous changes of labour relationships and new forms of discrimination. Thus the Committee of Experts provided additional interpretation of the concept of discrimination under this Convention. First, the definition includes both direct and indirect forms of discrimination regardless of the article's silence on the issue. Second the presence of intent is not necessary to identify a situation as discriminatory. Look Int'l Labour Conference, Equality in Employment and Occupation: General Survey by the Committee of Experts on the application of Conventions and Recommendations, 1988, para.26

[260] Convention No 111 Article 5 (2).

[261] Convention No 111 article 1(b) In this connection it has to bear in mind that the scope of the Convention as a whole or the provision on equality and non discrimination specifically apply to both employment and occupation. The International Labour Conference decided to use both these terms to point out the anti discrimination concern the access to employment and the free access to occupation. Thus, the Convention does not apply only to employees but also to self employed persons.

to be practiced.[262] Coming back to Convention No 111, there are certain measures that the Convention does not consider as discrimination.[263] These measures of exclusion will be discussed in the next chapter as possible grounds of defence available for the employer in cases of charges of discrimination.

Therefore, these ILO Conventions also affirm that PWDs have the right to equality and non-discrimination in all aspects of employment and also the opportunity to get the benefit of special measures (affirmative actions) that enhance their right for equality in employment.

3.3.3 The Vocational Rehabilitation (Disabled) Recommendation No 99 of 1955.

This is the most important instrument of the ILO in relation to employment of PWDs. For the first time this instrument invited member states to shift the objectives of their disability policies from one of social welfare to that of labour integration. As a result it had profoundly influenced laws that were made in various countries in the 1950s and 1960s.[264]

Vocational rehabilitation refers to a special form of rehabilitation medicine aimed at enabling a person with disability to secure and retain suitable employment. It was thought that with, (vocational) rehabilitation services PWDs could overcome the inhibitions associated with their disabilities and could function as normal as possible in society.[265] In relation to the development attained by medical sciences in those days, expectations grew with respect to the rehabilitative solutions that come along. This optimism was also clearly reflected in this recommendation.[266] This Recommendation is the first ever international instrument on the right to employment of PWDs. In connection with this the General Conference of the ILO noted that:

> "There are many and varied problems concerning those who suffer

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[262] All persons should without discrimination, enjoy equality of opportunity and treatment in respect of: I access to vocational guidance and placement services II) access to training and employment of their own choice on the basis of individual suitability for such training or employment: III) advancement in accordance their individual character, experience, ability and diligence; IV) security of tenure of employment; V) remuneration for work of equal value; VI) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures as well as social security measures and welfare facilities and benefits provided in connection with employment. Look Recommendation No 111 Article 2 (b)

[263] a) Those based on the inherent requirements of the job, b) those warranted by the protection of the security of the State and c) measures of protection and maintenance. Look articles 1(2), 4 and 5 of Convention No 111.

[264] O'Reilly, International Legal Instruments and Policy Initiatives Concerning the Right to Work of PWDs, ILO P163

[265] David P Forsythe, Encyclopedia of human rights, Oxford University Press, 2009.

[266] See Paragraph 26 of Recommendation NO 99 of 1955

disability, rehabilitation of such persons is essential in order that they be restored to the fullest possible physical, mental, social, vocational and economic usefulness of which they are capable."

The Recommendation, thus, provides that if the PWD has somehow adapted him/herself to his/her environment and manages to engage in a work of equal value with the non disabled employees, he/she should not as a result of their disability be discriminated against in respect of wages and other conditions of employment.[267]

The Recommendation also suggests that in order to widen the employment opportunities of PWDs it is necessary to give them equal opportunity with the non-disabled to perform work for which they are qualified and in this sense emphasis should be placed on the abilities and work capacities of the PWDs and not on their disabilities.[268] From this one can infer the fact that this recommendation is not only the first international instrument with regard to the right to employment of PWDs but also is the earliest instrument that tried to give human rights inspired solutions like the principles of equal payment for equal work and the right to equal opportunity in general to the problems PWDs face in the realm of employment.

This recommendation unlike the other ILO instruments was not supported by a convention as such it did not have a binding nature on member states. Thus, the ILO was not satisfied with the progress this instrument brought abought to the vocational rehabilitation and the elimination of all discrimination in relation to the employment of PWDs. This fact goaded the International Labour Conference (ILC) to pass a resolution in 1968 requesting the ILO to carry out appropriate studies to enable the ILC to consider possible revision of Recommendation N0 99 of 1955 or the adoption of a new international instrument with a binding effect.[269]

3.3.4 The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No 159) and Vocational Rehabilitation and Employment Recommendation, 1983 (No 168)

These instruments supplemented and updated Recommendation No 99 of 1955 which was discussed above. Though there are various ILO conventions and recommendations that directly or indirectly refer to the issue of disability these two instruments are the principal reference documents for social policy on the issue of disability.[270] The good

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[267] Id Paragraph 25
[268] Id Paragraph 29
[269] Supra Note 264 P. 22
[270] Jeanne Mager Stellman, Encyclopedia of Occupational health and Safety, ILO V 1

beginning of Recommendation No 99 in inviting member states to shift their social policy on disability from a social welfare objective to labour integration objective was given the real breakthrough effect when the ILC adopted these instruments. (Convention No 159 and Recommendation No168).These two instruments together with the Vocational Rehabilitation (Disabled) Recommendation No 99 of 1955, discussed above, have a unity of purpose in ensuring the right of PWDs to equal participation in labour market and challenging the sole validity of social welfare approach to the issue of disability.[271]

The international labour standards which are founded on this premise have as an objective the removal of the barriers that stand in the way of full social participation and integration of PWDs into the mainstream labour market and to provide the means to promote effectively their economic self reliance and social independence which can be realized through their right to employment. The provisions of these two instruments and that of Recommendation No 99 provide two pronged approach to realize the equal right to employment of PWDs .

The first approach is to give PWDs equal opportunity to employment and the other is equal treatment in employment.[272] In order to give them equal opportunity, states are recommended to take the following four types of measures:

- Take action to empower the PWDs to achieve the level of competencies and abilities required to take advantage of employment opportunity and to provide the technical and other required assistance so that the PWDs can equally compete. This type of action is what is referred to as vocational rehabilitation.[273]
- Take action to adjust the physical environment such as the work site, job and tool (machine) adaptation.[274]
- Take measures in legislations and policies which favour remunerative work of PWDs over passive income support measures as well as those which encourage employers to employ or to keep in employment PWDs.[275]

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[271] Ibid

[272] The first refers to measures to improve employability of PWDs by providing them with the necessary training and accommodations and the like (the government is duty bound to Promote) while the second refers to the right of PWDs to be protected from discriminatory practices in employment, recruitment, promotion, training etc. (the government's role is one of Protection.

[273] See for example Articles 9 of Convention No 159, Article 8 of Recommendation 168

[274] Look for example Article 11(g) of recommendation 168

[275] Ibid Section III

- Take affirmative action measures to give financial incentives for employers to hire PWDs, promote sheltered employment etc.[276]

The second approach is the principle of equal treatment. This principle is a human rights issue. ILO Convention No 159 under article 4 guarantees the right to equal treatment of people with disabilities in employment. All ILO member states have accepted as their duty the observance of these principles and to be monitored and be held legally answerable in cases of violation. The Convention also provides that the equality has to be a substantive one and not mere formal equality.[277]

3.3.5 The ILO Declaration on Fundamental Principles and Rights at Work (1998)

This Declaration[278] being a promotional instrument it differs from the usual labour conventions and as such it brought a new approach to the ILO's effort in securing the core workplace human rights values to all categories of workforce PWDs included. Under paragraph 2 of this declaration it is clearly stated that all member states of the ILO whether or not they have ratified a core convention in question are duty bound to "respect, to promote and to realize in good faith and in accordance with the ILO constitution of 1919, the principles concerning the fundamental rights of all workers, which are: a) freedom of association, and the effective recognition of the right to collective bargaining b) the elimination of all forms of forced or compulsory labour c) the effective abolition of child labour d) the elimination of discrimination in respect of employment and occupation.[279]

Although all the fundamental rights mentioned above are very essential to PWDs like any other employee, the relevance of the elimination of discrimination in respect of employment is particularly of great significance to PWDs they being most susceptible to discriminatory practices than any other group in the workplace.

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[276] Ibid

[277] Look at the phrase "....Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers." See, Article 4 Convention No 159.

[278] Adopted by the International Labour Conference (ILC) at its 86th Session, Geneva 18 June1998.

[279] These fundamental rights are found in eight conventions of the ILO namely, Convention No 87, 98, 29, 105, 138, 100, 111, 182

3.3.6 The ILO Code of Practice on Managing Disability in the Workplace (2002)

This code is basically founded on international labour standards including Convention No 159 and its recommendation No 168 discussed above. The code is founded on the conviction that employers benefit from the employment of PWDs, who can make a significant contribution at their place of employment, in jobs matched to their skills and abilities, if disability related issues are appropriately managed. It is also based on evidence that enterprises may gain from the retention of experienced workers who become disabled and on indications that significant savings can be made in terms of health costs, insurance payments and time lost, if an effective disability management strategy is in place.[280]

The code is made with the objective, among other things, of ensuring that PWDs have equal opportunities in the workplace, promoting a safe, accessible and healthy workplace and to maximizing the contribution which workers with disabilities can make to the enterprise.[281]

3.4 The Right of PWDs to Employment under the African Regional System

Regional human rights systems are advantageous as they serve an intermediary role between the domestic system that violates human rights and the global system which by virtue of distance is far removed from the domestic realities as a result of which it becomes ineffective in the provision of effective redress.[282] The other advantage of regional systems over the global ones is the fact that the former are better placed to respond flexibly to regional diversity in both substantive and procedural ways. The shared historical and political experiences that States within a given region have serve as ready bases for engendering consensus on human rights protections.[283]

When we come back to the issue of disability, Africa as a region does not have a Convention on disability.[284] Therefore, the issue of disability comes in to the picture in

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[280] Managing Disability in the Workplace, ILO Code of Practice ILO 2002 paragraph 1

[281] Ibid

[282] D Shelton "The Promise of Regional Human Rights Systems as cited in Negwena Supra Note 22 p 45.

[283] Ibid

[284] The only regional convention available is the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. It was adopted in June 1999. It is also the first regional instrument to define discrimination against PWDs. Article 2-a provides "The term discrimination against persons with disabilities any distinction exclusion or restriction based on a disability, record of disability, condition resulting from a previous disability or perception of disability, whether present or past which has the effect or objective of

the general equality clause of the African Charter on Human and Peoples' Rights. Also known as the Banjul Charter.[285] Article 2 of the Charter provides:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth *other status.*"[Emphasis added]

This provision follows the style of equality clauses in the UDHR, ICCPR and ICESCR. All these human rights instruments do not explicitly mention disability as one of the prohibited grounds of discrimination. Disability is impliedly included by virtue of the "other status" phrase which renders the provision open ended. Look above for the discussion on this matter.

Similarly the African Charter on Human and Peoples' Rights borrowed the "other status" phrase to imply the inclusion of disability into the list of prohibited grounds. In relation to this, article 18(4) of the Charter unlike the above mentioned international instruments, mentioned disability which signifies the fact that disability is better amplified under the Charter than the other instruments. Hence, there seems to be a consensus that disability is among the prohibited grounds. [286]The other point that need mentioning in this relation is that the provision is dependent just as in the case of ICCPR art 2(1) which means it can only be invoked in relation to the rights and freedoms recognized in the Charter.

Regarding the right to employment, article 15 of the Charter provides that "Every individual shall have the right to work under equitable and satisfactory condition, and shall receive equal pay for equal work." This writer is of the conviction that, the cumulative reading of this article and article 2 of the Charter, establish in no vague terms the right of PWDs to equality and non -discrimination in employment under the African Charter. Article 5 recognizes the right of every individual to respect and to recognition of legal status and continues to provide that "....All forms of exploitation

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impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms. The Convention does not enumerate rights but affirms the commitment of member States to eliminating discrimination, in all its forms and manifestations against PWDs.

[285] The African Charter on Human and Peoples Charter (ACHPR) adopted on 27 June 1981, and entered into force on 21 October1986.

[286] On the inclusive nature of the 'other status' in the African Charter see: R Murray and F Viljoen "Towards non Discrimination on the Basis of Sexual Orientation: The Normative Basis and the Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 Human Rights Quarterly 86 p.88

and degradation of man particularly slavery,[287] slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[288]

At the level of soft laws one which can be mentioned is the African Decade of Persons with Disabilities (1999-2009).[289] This programme arose from the UN Decade of PWDs (1983 1992). The latter programme was criticized for attempting to adopt global solutions without taking cognizance of political and socio-economic realities of the African countries. That was why the African Decade of PWDs was adopted. As put in the Continental Plan of Action (CPOA) one priority of the member States is to ensure and improve access to employment of PWDs.[290] to achieve this objective States are expected to adopt measures that improve the employment accessibility of PWDs such as: vocational rehabilitation,[291] job retention,[292] train PWDs in different skills for self employment,[293] encourage employers to employ PWDs through incentive mechanisms of tax rebates,[294] increase physical accessibility through universal design and other means and promote accessible information.[295]

In sum, therefore, it can be said that the Continental Plan of Action gives wider options for States to adopt as a means for promoting employment of PWDs including the revision of existing laws or promulgating new disability specific legislations and even by ratifying disability conventions like ILO Convention No 159.

3.5 Conclusion

In this chapter, the major international human rights instruments have been discussed in light of their importance to promote the right to equal employment opportunities of

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[287] Where allegations were made regarding large scale slave labour the African Commission stated that: "independently from the justification given by the defendant state, the Commission considers in line with Article 23(3) of the UDHR, that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary by other means of social protection. These provisions are complemented by those of Article 7 of ICESCR. In view of the forgoing, the Commission deems that there was a violation of Article 5 of the charter due to practices analogous to slavery and emphasizes that unremunerated work is tantamount to a violation of the right to respect for dignity inherent in human being." See African Commission on Human and People's Rights, Malawi African Association and Others V Mauritania Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98

[288] Supra Note 285 Article 5

[289] The African Decade of Persons with Disabilities is Extended to the period 2010-2019. The Continental plan of action remains in place to guide the member states on the implementation of the African Decade.

[290] Continental Plan of Action article 28

[291] Ibid article 2-b

[292] Ibid

[293] Id article c

[294] ID article 4-c

[295] Id article 5

PWDs. Accordingly, the international bill of human rights, the disability specific UN instruments, ILO conventions and recommendations that are relevant to our topic and the African regional human rights instruments were directly treated in addition to the other instruments alluded to here and there all along the chapter.

It has to be known that some of the instruments that are discussed in this chapter are replaced by other conventions as in the case of the replacement of the Standard Rules on the Equalization of Opportunities of PWDs by the CRPD. Nevertheless, all the instruments are discussed in the chapter for the benefit of the historical analysis of the development of the rights of PWDs in general and their right to equal employment opportunities in particular, in the global context and at the same time to clearly see the arguments and propositions embodied in each of these instruments.

Depending on the prevailing mode of thinking during their making, the instruments adhered to various models of disability ranging from charity to human rights. The instruments provide for a number of measures that State parties should implement in order to materialize the equal employment opportunities of PWDs. These include measures to be taken to make workplaces accessible for PWDs by provision of reasonable accommodations and application of ergonomic principles and also the application of different approaches of employment of PWDs, like the sheltered employment, quota systems of employment, designated employment positions, provision of financial incentives for employers, encouraging CBR mechanisms etc.

On the other hand, regardless of the form of their employment, the instruments provide that PWDs, like all the other workers, have the right to basic rights and freedoms of the workplace. These include the right to be free from slavery, servitude and forced labour, the right to equal pay, safe and favourable working conditions and to labour and trade union rights.

Ethiopia is signatory to most of the instruments discussed under the chapter. These instruments have, therefore, tremendous impact on the national laws and policies of Ethiopia. The right of PWDs to equal employment opportunities under the Ethiopian laws being the subject of discussion under the next chapter, the lessons drawn from the present chapter will be very instrumental in the analysis of the strengths and weaknesses of the domestic laws in comparison with the international standards laid down by these instruments.

Chapter 4

The Right to Equal Employment Opportunity of Persons with Disabilities in Ethiopia

In this chapter, how disability was viewed and understood in different times in Ethiopia, the employment status of PWDs, the barriers they encounter in their way to secure employment and the major legislative measures and strategies put in place to address their problems of employment and to what extent these legislations protected and promoted their equal employment opportunities will be the major points of discussion.

4.1 The Status of International Conventions in Ethiopia

As alluded to in chapter three of this paper Ethiopia has ratified many international conventions that have direct or indirect relevance to the right to equal employment opportunities of PWDs. Therefore, to begin with, it would be important to see the benefits of the ratification of these conventions for materializing the rights of PWDs in the Ethiopian context.

Countries use various approaches in terms of their relationship with international law. International law scholars have traditionally used the concepts of monism and dualism to describe the relationship between international legal order and domestic legal order.[296] Monism sees international law and the domestic legal system as part of the same legal order.[297] International law has a primary place in this unitary legal system, such that domestic legal systems must always conform to the requirements of international law.[298] In contrast dualism, views the international legal order as distinct only, penetrating the domestic legal order by explicit consent of the state involved.[299]

Coming back to the Ethiopian case as clearly enshrined in the Constitution, all international agreements once ratified they become an integral part of the law of the land.[300] However, the status of the international agreements is subject to academic

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[296] Tom Ginsburg, Svitlana Chernykh, Zachary Elkins, Commitment and Diffusion: How and Why National Constitutions Incorporate International Law, University of Illinois Law Review V 2008 P. 204. Available on: www.lexglobal.org Last visited May 9, 2012.

[297] Ibid

[298] Ibid

[299] Ibid

[300] FDRE Constitution Article 9(4). The FDRE Constitution was adopted in the Constituent Assembly on the 8th of December 1994. It came into "full force and effect" as of the 21st of August 19995. Look Tsegaye Regassa, the

debate.[301] Article 9 (1) of the Constitution provides that "the Constitution is the supreme law of the land...." Thus, a literal reading of this provision with Article 9(4) which provides for the incorporation of ratified international agreements as integral part of the law of the land sets the place of international agreements as subordinate to the constitution.[302] Since, human rights conventions are part of a special kind of international agreements; they should be understood to be subordinate to the constitution.[303] Nevertheless, the reading of Article 13 (2) of the Constitution has led some scholars to come to the conclusion that international human rights instruments that are ratified have a status higher than or at least equal to the Constitution itself.[304]The Provision runs:

> "The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia."[305]

The point is that both of these arguments, place the Ethiopian legal order in the monist category.[306]

However, others argue that although there are no additional requirements put under the constitution than the fact of ratification to be incorporated into and become the integral part of the laws of the land, the Federal Negarit Gazette Establishment Proclamation,[307] provides that all laws of the Federal Government shall be published in the Federal Negarit Gazette[308] and it goes on further and adds that all Federal or Regional legislative, executive and judicial organs as well as any juridical or natural person shall take judicial notice of the laws published in the Federal Negarit Gazette.[309] From this they argued that Ethiopia could be put in the dualist category as there is a

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Making and Legitimacy of Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice, Africa Focus Vol. 23 No 1 2010 P. 87.

[301] Adem Kassie Abebe, (2011) Human Rights under the Ethiopian Constitution: A descriptive Overview, Mizan Law Review Vol. 5 No 1 p 47

[302] Ibid

[303] Ibid

[304] Ibid

[305] FDRE Constitution Article 13(2).

[306] Tobias Pieter Van Reenen and Helene Combrinck, The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After Five Years, International Journal of Human Rights No 14 Vol. 8 p. 147

[307] Proclamation No 3/1995

[308] Id Article 2 (2)

[309] Id Article 2 (3)

need for national legislation in addition to ratification of an international convention to be incorporated into domestic law.[310]

This writer is opined that Ethiopia can at least, theoretically, be considered as monist. However, that is to no avail as some remarked that many members of the judiciary believe that the rights included in ratified international treaties but which are not clearly guaranteed in domestic laws are not justiciable.[311] Thus, litigant parties like PWDs to a legal case and the courts of law do not invoke international human rights instruments Ethiopia has ratified such as those discussed under chapter three above even in circumstances wherein they are most pertinent. Their one advantage though is that domestic legislations are usually crafted in accordance with the principles conveyed by them.

4.2 Definition of Disability under Ethiopian Laws

From a theoretical perspective definitions of disability are challenged by the debate what causes disability: medical conditions, environmental factors, social structures and/ or individual or collective behaviours and attitudes. This debate about medical (individual) vs. social model of disability has had a large impact on disability policy everywhere. Because it has led to the paradigm shift from charity- based to rights-based disability policy and it has helped to understand disability as a social construct, it will be from this viewpoint that in the following section some pertinent legislations of Ethiopia are examined.

In the study of the definition of "disability" in the Ethiopian context, one has to see three disability specific legislations promulgated at different times and apparently for different purposes.

4.2.1 Imperial Order No 70/1971.

This law was enacted to provide for the establishment of the Rehabilitation Agency for the Physically Disabled People.[312] This instrument defined disabled person as:

> "Any person who because of limitations of normal physical or mental health, is unable to earn his livelihood and does not have

[310] Rakeb Messele, Enforcement of Human Rights in Ethiopia 2002 p 13
[311] Supra note 241 p. 148
[312] Imperial Order No 70/1971 Preamble Paragraph 3

protect them from discriminatory practices as such.[315] Here one has to remember that defining PWDs in so short and exhaustive manner is at least difficult and at most erroneous. Because it encompasses numerous conditions of mind and body and the boundary between ability and disability is not very clear and porous. One can take the case of visual and hearing conditions as an example. When exactly does a visual limitation constitute a disability? Or when do we call a person hard of hearing a disabled person? Thus, the definition is more of an addition to the confusions around the subject than a solution.

The other part of the definition that needs a closer look is where the causes of disability are said to be either of the two reasons *inter alia* "natural" or "manmade." What is meant in the legislation by "manmade" is not clear enough and can be controversial. Does it mean that the impairment itself was manmade such as car accident, employment injury, war etc. or what actually caused the disability of the person is the society's discriminatory outlook and lack of concern to accommodate them (this can also be considered in some sense as manmade) is not outright clear. Nevertheless, when it is seen in light of the argument raised above, it will not be difficult to come to the conclusion that the provision refers more to the former than to the latter.

Hence, one can safely conclude that the definition of disabled person contained in this provision is coined after the outmoded medical (individual impairment) model. As a result of which its contribution to promote the equal employment opportunity of PWDs was very limited.

4.2.3 The Proclamation to Provide for the Right to Employment of Persons with Disabilities (Proclamation No 568/2008)

Proclamation No 568/2008, like legislations usually do, began by defining the beneficiaries of the rights and privileges enshrined therein. In doing so it defined Persons with Disabilities as:

> "Person with Disability means an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination." [316]

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[315] There are arguments to the contrary though. See for example Dagnachew Bogale, Employment Discrimination on the Basis of Disability: the Current Legal Regime in Ethiopia and its Implementation, Unpublished, Faculty of Law, A.A.U 2006 P.62

[316] Proclamation 568/2008 Article 1(1)

The plain reading of this provision reveals that the root cause for the reduction of equal employment opportunity of a person with disability is the conspiracy between his/her impairment and the discrimination that ensue there from.

This Proclamation, as clearly depicted in its preamble[317] has as its main objective the prevention of unequal treatment (discrimination) in employment based on the status of a person's disability. Like all discrimination laws do, it is based on the assumption that discrimination is wrongful and a major problem for disabled persons' enjoyment of equal employment opportunity. It sends to the general public a strong message that the society has a positive role to play in solving the problem of disability.[318] Thus, the definition endorses the social model[319] of disability because it locates the problem of disability outside the individual person and neatly fits it as a social construct. This definition deconstructed the medical (individual impairment) models of disability that the two instruments discussed above arguably adopted.

In a similar vein the definition of person with disability under this proclamation is broad and inclusive in scope. Unlike the definitions under the instruments discussed above, we do not find a demarcation to indicate the impairments that fall within and outside of its bounds. In this respect it can be considered to be broader and more inclusive than the definitions under some of the prominent discrimination laws.[320] In this sense one may conclude that, the proclamation is wider in scope and its protective mandate extends to all persons with impairments that have the effect of mere reduction of their equal employment opportunity.

However, the reading of the directives issued by the MoLSA,[321]proves otherwise. The directive in addition to the definition of "Person with Disability" given under the

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[317] Id preamble paragraph 3

[318] A closer look of the provisions of the proclamation with regard to the role of the society in disability will be made in this thesis in the sections that follow.

[319] See section 2.2.2of this thesis for the discussion of the social model of disability.

[320] Seyoum Yohannes Tesfay, Toward Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/2008 on the Employment of Persons with Disabilities, Ethiopian Journal of Law Vol.24. No 1 2010 p. 102,103

[321] MoLSA issued the Directive in accordance with Article 9 (2) of Proclamation No 568/2000 which provides "...the Ministry of Labour and Social Affairs, the Federal Civil Service Agency and appropriate Regional Organs may, in their respective jurisdiction, issue directives necessary for the proper implementation of this Proclamation." To the knowledge of this writer except MoLSA the other organs have not issued directives at the time of this writing. The Directives issued by MoLSA are applicable only in regard with the employment relations that are covered by the Labour Proclamation No 377/96. In line with the provision mentioned above the Federal Civil Service Agency is expected to issue a separate directives that regulate the employment conditions of PWDs in government institutions (those covered by Proclamation No 515/2007) shortly.

proclamation and discussed above, defined a number of concepts[322] that will in due course of time be discussed in this paper. Thus, "Disability" is defined as follows:

> "Disability means a physical, mental or sensory impairment that causes *higher* limitation on the capacity of the individual to undertake his day to day activities and which *lasts for long time.*" [323][Translation mine][324]

Although the directive provides that it does not change the definition of "Person with Disability" given under the proclamation,[325] this writer is of opinion that the directive has practically redefined the concept of PWD and reframed the scope of the proclamation itself.

As discussed above, the Proclamation does not take into account the magnitude of the impairment or the causes thereof for one to be considered as a PWD and become beneficiary of the proclamation so far as his/her equal employment opportunity is reduced as a result of such impairment.[326]

The directive on the other hand, demands the fulfillment of the cumulative conditions set by the definition of disability, namely, the existence of higher limitation in undertaking day to day activities and the lasting nature of the impairment for long time for one to be covered by the provisions of the directive.[327] Lasting for long time refers to the minimum 12 months period mentioned under article 3(2) of the Directives. Thus, for the directives to operate, the existence of mere reduction of equal employment opportunity as a result of impairment is not a sufficient condition.

In fact, on top of the cumulative conditions mentioned above, the directive lists down additional conditions that even seem to be more limiting of the broad scope of the proclamation. The following conditions of impairment are made out of the directive's scope of application. First, where the impairment is of the nature that it could be easily controlled and does not limit mobility,[328] second, if the impairment is caused by substance abuse or alcohol addiction;[329] and thirdly, the mere aggravation or frequent occurrences of the impairment without being externally observable or where the extent

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[322] Some of these major concepts are: Reasonable Accommodation, Undue Burden, Higher (substancial) Limitations, Day to day activities and the like.
[323] See Article 3(1) of the Directive.
[324] The Directive was prepared only in the Amharic language. Thus, all quotations from the directive are mine.
[325] See Article 3(7) of the Directive.
[326] See Article 2(1) of Proclamation 568/2008
[327] See Article 4(1) of the directive Cum. Article 2(2) of Proclamation No 568/2008.
[328] See Article 4(3-a) of the directive
[329] Id Article 4(3-b)

of the impairment is such that it does not create higher (substantial) limitation on the individual's capacity to perform his/her work.[330]

As discussed in chapter two, especially, the exclusion mentioned under the second point is related to what is known as public policy exclusion. The provision in the directives, however, excluded the impairments as opposed to the behaviors that are not acceptable for public policy reasons. This writer is opined that the exclusion of impairments that are caused by substance or alcohol addiction is erroneous. As will be discussed at length in chapter five, the point of exclusion should be the behaviors that caused the impairments not the impairments per se.

From this it follows that the directive imposes additional requirements both in the causes and extent of impairment for one to be considered as a PWD and become beneficiary there under. And, thus, it can safely be argued that the directive contradicted the broad scope of the proclamation by considerably narrowing down the same.

4.3 The Right to Equality and Non-Discrimination of PWDs under Ethiopian Laws.

Equality is always raised as an issue in any human rights discourse because there are inequalities among us based on different grounds. As was discussed in detail under chapter two of this paper, in common parlance equality means lack of discrimination between people based on such attributes as color, race, sex, disability and the like. It is about meting out equal treatment to everybody without discrimination and without granting any privileges to anyone.

The FDRE Constitution of 1995[331] provides for the right to equality in much the same way as international human rights instruments[332] and constitutions of other countries do.[333] The relevant provision of the constitution runs as:

> "*All* persons are *equal before the law* and are entitled without any discrimination to the *equal protection of the law*. In this respect the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social

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[330] Id Article 4(3-c)
[331] Look Supra Note 300.
[332] See UDHR Article 2 , ICESCR Article 2(2), ICCPR Article 26
[333] See for example Constitution of Ghana Article 17-3

origin, colour, sex, language, religion, political or other opinion, property, birth or other status.[334] [Emphasis Added]

Before we embark on analyzing the status of disability under this constitutional provision it would be important to see the norms of equality the Provision recognizes: the right to equality before the law and the right to equal protection of the law. There are similar expressions in international human rights instruments as well.[335] It is not clear in what ways the two expressions differ. But some argue that "equality before the law" constitutes the doctrine of the essence of the rule of law. Which means no one is above the law and every person is subject to the same law irrespective of his status, rank or any other ground.[336] The equal protection formulation on the other hand, refers to the impartial application of the substantive law to everyone equally.[337] Others reject this and opt for a broader interpretation of the concepts. Going into all that, will be out of the scope of the thesis. At this stage, however, it would be enough to recognize that when we talk of equality under the Ethiopian Constitution, we refer to both norms of equality. Thus, let us leave that as it may and come back to our main focus, the grounds on which discrimination is prohibited under the Constitution.

As can be seen from the provision disability is not included as one of the prohibited grounds of discrimination. But this writer is opined that the omission does not necessarily indicate the deliberate exclusion of disability from the prohibited grounds of discrimination. An otherwise, interpretation of the provision would take us to the contemporarily unacceptable and even illogical conclusion which says discrimination on the basis of disability is a permitted practice.

It can be soundly argued that disability is one of the protected grounds of discrimination under the FDRE Constitution based on at least two grounds. The First is that the Constitution used the open ended approach of listing of the prohibited grounds of discrimination.[338] Hence, disability can be accommodated into the provision by virtue of the phrase "or other status" at the end of the provision.

The second is the fact that "disability" appeared under Article 41(5) of the Constitution as one of the grounds on which the State is obliged to allocate resources to provide

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[334] See Article 25 of the FDRE Constitution.

[335] Article 7 of the UDHR Provides: "All are equal before the law and are entitled to equal protection of the law." Similarly the ICCPR under article 26 provides: "All persons are equal before the law and are entitled without discrimination to the equal protection of the law..."

[336] Li Weiwei, Equality and non discrimination under international law, Norwegian Centre for Human Rights 2004 p.23

[337] Ibid

[338] See Supra note 181 above for the alternative approaches used by legislations.

rehabilitation and assistance to materialize their right to equal enjoyment of the economic, social and cultural rights.[339] The cumulative reading of the two provisions[340] squarely puts disability among the prohibited grounds of discrimination. On the other hand, disability is one of the prohibited grounds of discrimination under many of the international conventions Ethiopia has ratified. This issue is fully discussed under chapter three above. These Conventions are part of the Ethiopian laws[341] Once again this fact makes disability indisputably one of the prohibited grounds of discrimination under Ethiopian laws.

In connection with Article 41(5) of the Constitution, the lone provision of the Constitution that mentions disability, there are opinions that contend the provision is one based on the charity model of disability[342] which is outmoded and unacceptable to the modern disability rights discourse that is based on the social or human rights model of disability. This writer is opined otherwise.

In the first place, the Article being part of the Constitutional provision that provides for the economic, social and cultural rights, it is directly relevant to the issue we have at hand, namely, the right to equal employment opportunity. Ensuring a given socio-economic rights to any social group necessitates the government's positive action in some manner. When this concerns a traditionally disadvantaged and discriminated against social groups such as PWDs the positive role of the State is more amplified.[343] In the case we have at hand, to ensure the equal employment opportunities of PWDs, the duty of the State naturally cannot be one of mere protection. In that case the equality rhetoric that the international human rights law has as its main objective to promote and the FDRE Constitution also shares will be a futile exercise.

Hence, this writer is of the opinion that Article 41(5) of the Constitution gives real meaning and substance to the formal equality provision of the Constitution.[344] Thus, the

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[339] See Article 41 of the Constitution.

[340] See Articles 25 and 41(5) of the Constitution.

[341] See section 4.1 of this thesis for the discussion on the status of ratified Conventions in the FDRE Constitution.

[342] "Hence, one notes that in the only explicit and directly relevant provision of the FDRE Constitution uses language suggestive of the Charity model.... "See Supra note 320

[343] It should be noted, however, that neither economic, social and cultural rights nor civil and political rights as a whole offer a single model of obligation or enforcement. No particular right can be reduced only to a single duty on the State, such as a duty to refrain from acting, or a duty to do or provide something. The traditional distinction that civil and political rights impose only negative duties and ESC rights impose only positive duties, for State is in accurate. Every human right imposes an array of positive and negative obligations. It is incorrect to say that any particular right has only one kind of duty associated with it. See Courts and the Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, International Commission of Jurists, 2008, Geneva, Switzerland p.10

[344] See Article 25 of the FDRE Constitution.

FDRE Constitution by virtue of this article provides for the right to substantive equality of the PWDs as opposed to formal equality.[345] And as will be discussed below in this thesis the inclusion of affirmative action measures under Proclamation No 568/2008 is one clear manifestation of this constitutional provision.

When we come to the Labour Proclamation No 377/96, it makes unlawful for the employer to discriminate between employees on certain grounds listed out.[346] The list, once again, as the one in the Constitution, conspicuously missed out disability. However, the list being open ended, for similar reasons mentioned above, it can be assumed that disability can safely be taken care of by the "or other conditions" phraseology.

In a major departure from the trend, the Federal Civil Servants Proclamation No 515/2007 made sure that disability is included in the prohibited grounds of discrimination. It runs:

> "There shall be no discrimination among job seekers or civil servants in filling vacancies because of their ethnic origin, sex, religion, political outlook, *disability*, HIV/AIDS or any other ground."[347] [Emphasis mine]

The explicit inclusion of disability in this provision, this writer presumes, is a show case of the attention increasingly being given to the right of PWDs to equal employment opportunity. It is a good development that legal instruments to be issued in the future are also expected to follow.

4.4 The Status of Employment of PWDs in Ethiopia

In the Sub-Saharan Africa, 55-90 per cent of PWDs are unemployed[348]and in every country in the world PWDs have lower employment rates than the non disabled persons.[349] The reason for this is the various barriers PWDs face in the exercise of their right to employment. Based on the analysis of the UN, it is estimated that about eight million people with disabilities live in Ethiopia. That is about 10 percent of the total number of the Ethiopian population. The number of people that have attained the employment age[350] is expected to be 54% of the total population and it is growing by about 1.2 million people per year. According to the Government of Ethiopia (GOE) the

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[345] Look section 2.7 above for discussion on forms of equality.
[346] Look Labour Proclamation 377/96 Article 14(1-f)
[347] Look Federal Civil Servants Proclamation No 515/2007 Article 13-1
[348] United Nations Economic Forum for Africa, UN CRPD: A Call for Action on Poverty, Discrimination and Lack of Access, May 2008 Addis Ababa p.103
[349] Ibid
[350] In Ethiopia the age of employment is 14 years and above. See Labour Proclamation No 377/2003 article 89(2)

unemployment rate is 20.6% and 2.6% for urban and rural areas respectively.[351]And an estimated 95 percent of PWDs in Ethiopia live in poverty[352] which is one of the manifestations of unemployment. Malnutrition accounts for 20 percent of the disabilities in the country.[353]

These figures are clear demonstrations of the critical problem of unemployment in Ethiopia in general and its magnitude on the PWDs who are more prone to unemployment than the non disabled owing to the various barriers and discriminatory practices rampant in the country.

4.5 Barriers PWDs in Ethiopia Face in the Process of Exercising their Employment Rights.

There are a number of barriers PWDs in Ethiopia encounter in the exercise of their right to equal employment opportunities.[354] Any legislative or policy measures taken by the government to improve the employment opportunity of PWDs should take cognizance of these barriers and design appropriate mechanisms to overcome them. For that matter, it would be difficult to enjoy human rights of any nature if there is an obstacle (barrier) that hampers access to the enjoyment of such a right. When it comes to the case of PWDs, it is the barriers themselves that constitute the concept of disability itself. This fact is clearly depicted in the CRPD in the following words:

> "Recognizing that disability is an evolving concept and that disability results from the interactions between persons with impairments and *attitudinal and environmental barriers* that hinder their full and effective participation in society on an equal basis with others."[355][Emphasis added]

The barriers being many and varied no country in the world has managed to effectively remove all of them. The path to employment of PWDs everywhere is littered with similar barriers although there are differences with regard to their prevalence from one place to the other.[356] PWDs in Ethiopia like their counterparts in all parts of the world have to face and overcome barriers of various nature to materialize their right to employment. Toward the achievement of this goal, as outlined in detail under the

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[351] FDRE, Combined Report to the African Commission on human and peoples Rights 2005 p 43
[352] FDRE, Ministry of Labour and Social Affairs: National Plan of Action for Inclusion of PWDs, 2010-2020.
[353] Federation of National Association of People with Disabilities, Study on DPOs Historic Mission and Survival Strategies in Future under the New Civil Societies Law 2010
[354] USAID/Ethiopia disability inclusion Strategy 2011-2015.
[355] See Preamble of the CRPD "e"
[356] ILO,UNESCO,WHO Joint Position Paper: A Strategy for Rehabilitation, Equalization of Opportunities and Social Inclusion of People with Disabilities, 2004 p.47

CRPD, States parties to the Convention[357] have to undertake far reaching measures of which one is "to develop promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public"[358]

Hence, in this part of the thesis effort will be made to look into some of the major barriers that negatively affect the equal employment opportunities of PWDs so that the impact of the legislative and policy measures taken by the government in dismantling (neutralizing the effects of) the barriers and thereby increase the employment opportunities of PWDs will be evaluated in the succeeding sections.

4.5.1 Environmental Barriers

Barriers that are put under this class are those related to the physical environment that is not accessible to PWDs. For example such instances as a building with no ramps or lifts or accessible toilets and the like. Most of the time, PWDs face these types of barriers both at the place of work and out of the place of work. When they exist within the workplace, they could be overcome with very minimal or reasonable cost, yet many employers for lack of goodwill are reluctant to pay for these adjustments opt to hire other employees who do not demand the said adjustments instead of PWDs

The way in which the physical environment is developed and organized has great effects on the extent of the independence and equality PWDs experience in their life in general and in the exercise of their right to employment in particular. But, the built environment in Ethiopia is largely designed and developed to cater for the needs of able bodied people and do not take the needs of PWDs into account. In the Ethiopian context, therefore, environmental barriers can be put as the major obstacles for the employment of PWDs.

4.5.2 Attitudinal Barriers

This is one of the formidable barriers PWDs encounter in Ethiopia. It refers to the exclusion of PWDs from employment and denial of access to social services due to stigma.[359] PWDs in Ethiopia, most often than not, are seen as helpless and dependent.[360]

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[357] Ethiopia was the 88th ratifier of the Convention on the Rights of Persons with Disabilities on July 7,2010

[358] CRPD article 9(2-a)

[359] Stigma is the disrespect condescension or discounting of people out of ignorance and or faulty information. Stigma causes PWDs to be poorly and discriminatorily treated. This results in low self esteem and may keep people from seeking employment. Look Wordsworth 2004 p 73

[360] Tirussew Teferra, Disability in Ethiopia Issues, Insights and Implications 2005 AA Printing Press p.2 See also ENDAN/CCM A study of opportunities and Services for People with Disabilities in Addis Ababa 2010 p 10

Also as ill persons who are in need of constant care and medical attention. They are also considered as tragic victims. People focus more on their disabilities than on their personality as human beings. Many people even think that physical disabilities automatically imply intellectual disability.

These types of stereotypes have negatively affected the right to equal employment of PWDs in Ethiopia. Due to attitudinal problems, some employers are unwilling to hire PWDs while other workers become reluctant to work with them as colleagues. Thus, as will be indicated in Chapter five, the public media, should, as a matter of policy make informing the general populace and particularly private employers about disability in general and the right of PWDs to equal employment opportunities in particular one of their prime objectives.

4.5.3 Barriers Related to Family Members

As indicated earlier in this thesis, family members in Ethiopia sometimes are embarrassed to have PWDs in their home and tend to hide them and keep them behind closed doors to prevent the PWDs from interacting with the immediate neighborhood and the community at large[361] and discourage them from looking for employment opportunities. This is largely due to backward outlooks or ignorance of the legal rights PWDs have to come out be employed, get their own income and live an independent life.

4.5.4 Public Service Barriers

In Ethiopia the public transport system is not suitable for the use by PWDs. For example, the buses and taxies do not have features that cater for the need of wheelchair users.[362] As a result PWDs encounter challenges to commute between their home and workplace daily.

4.5.5 Educational Barriers

PWDs in Ethiopia are largely discouraged from public participation for reasons mentioned above under 4.5.3 from their early ages. So that they have the lowest school participation in comparison with the non disabled children.[363] This minimal participation in education haunts them all along their adult life and hampers them from

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[361] Ibid
[362] Ibid
[363] USAID/Ethiopia Disability Inclusion Strategy 2011-2015 p2

equal participation in applying for and eventually become successful in getting employment.[364]

The reasons for limited or lack of education for PWDs needs to be understood in terms of the barriers PWDs face in education such as financial constraints to pay for school, environmental barriers, lack of accessible transport, negative attitudes etc. This clearly demonstrates that the barriers PWDs face in employment are interlocked with the barriers they face in regard to the exercise of their other rights. Thus, this demands a redoubled effort on the part of duty bearers.

The barriers related to education and training have also manifestation in the workplace scenario as well. Most of the training programs in the workplace are developed according to the needs of the able bodied. Attentions are not given if the subject matter, the methodology used to conduct the training, the learning materials the training venue etc are suitable for PWDs. Thus, most of the time PWDs are excluded from training programs organized by employers which in turn has negative repercussions on their prospect for promotion and professional development. Thus, policies should be designed so that PWDs get equal access to on job and vocational trainings, and also vocational rehabilitation programmes.

4.5.6 Communication Barriers

Vacancy announcements are not made using different media so that people with various types of disabilities can easily access them.[365] Most of the vacancy advertisements are usually made through newspapers only which are not accessible for the blind or through the radio only in which case the deaf will not access them and the like.

4.6 Approaches used in Ethiopia to Ensure Equal Employment Opportunities of PWDs.

Imperial Order No 70/71 did not provide for any distinct form of employment opportunity for PWDs. The Objective of the Order was to lay ground to facilitate a

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[364] In a certain study conducted in South Africa out of 46 total participants, eight had no formal education, ten had only primary level education, twenty eight had some high school education and only seven completed grade twelve. None of them has received any tertiary education, other than one who is currently attending a further education and training course. Those with no education mentioned the challenge of being illiterate and how this is a barrier to employment. Those with limited schooling or lack of particular skill training also cited it as a barrier to employment.

[365] Look Supra note 348

mechanism whereby PWDs were able to get charity. This was clearly expressed in the order in the following words:

> "Whereas, it is our desire to establish a rehabilitation agency to give assistance to those in need of social, physical and mental rehabilitation and there by maintain the long standing tradition among our people of cooperating to render assistance...." [366]

This part of the Order expresses in no uncertain terms that the order was not issued to materialize the right to employment of the disabled. Further, the Order goes on to provide that the purpose of the Rehabilitation Agency established by virtue of the Order shall be to foster and facilitate through direct assistance and extension services increasingly effective participation of private charitable organizations engaged in the rehabilitation of the disabled.[367] Therefore, one can safely conclude that before the coming into force of Proclamation 101/94 the right to employment of PWDs did not have any legal recognition. PWDs were simply seen as subjects of charity and not as holders of rights. Therefore, Proclamation 101/94 was in a sense a breakthrough as far as the right of PWDs to employment is concerned. Thus, our discussion in this section will start by the employment approach this Proclamation adopted namely, reserved or designated employment.

4.6.1 Reserved (Designated) Employment Approach under Proclamation 101/94

The Proclamation Concerning the Rights of Disabled Persons to Employment No 101/94 did contain important features of an anti discrimination legislation, that were also included in the proclamation that replaced it, which will be discussed in the next section.[368] However, it also provides for the reserved employment approach. An approach more inclined to affirmative action than to equalization of opportunity. Indeed, the main reason for repealing this law was its adherence to the approach of reserved employment.[369] The main focus of this approach is to designate certain types

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[366] Rehabilitation Agency for the Disabled Order 1971, Paragraph 3.

[367] Id Article 5

[368] The anti discrimination feature Proclamation No 101/94 contained were those mentioned under article 3which goes as: 1. Disabled person having the necessary qualifications shall unless the nature of the work dictates otherwise, have the right to compete and to be selected for a) vacant post in any office or undertaking through recruitment, promotion, placement or transfer procedures; b) a training programme to be conducted either locally or abroad 2. No selection criteria shall refer to the disabilities of a candidate unless the nature of the work dictates otherwise. 3) Any disabled person shall have the right to get the salary and other benefits of the position he occupies 4.) a disabled person shall be provided by his employer or the training institution as the case may be with equipments and materials necessary to carry out his duties or to pursue his training.

[369] See Proclamation 568/2008 Preamble paragraph 2

of jobs to be exclusively reserved for disabled applicants. The Proclamation under Article 4 provides:

> "1. Posts suitable for disabled persons shall be identified and reserved from among vacancies created in offices and undertakings. 2 Only disabled persons may compete for posts reserved pursuant to this section."

This proclamation did not identify the said job titles and there were no regulations and/or directives issued to identify them either. Therefore, to the knowledge of this writer, the Proclamation did have very little impact, if ever it had any, on the employment conditions of PWDs in reserved posts.

Nevertheless, the reserved posts approach of employment of PWDs as indicated in various literatures is believed to have some advantages though it does not find enough support from proponents of disability rights.[370]It would be good to see some points that are usually raised as merits of the approach on the one hand and its demerits on the other so that one can look into the exact meaning of the approach.

The first point that is mentioned as a merit of this approach is that it gives PWDs a preferred chance to do (be employed) in jobs they can objectively do.[371] Under the approach jobs are selected and categorized before they are reserved for PWDs depending on the nature and extent of their disabilities. Therefore, PWDs regardless of the nature of their disability will always have some feasible chance of getting employment.

The second point that can be mentioned as an advantage is the fact that it makes the education and training of PWDs simpler and cheaper.[372] As the type of employment for a person with a certain form of disability is known in advance, he /she will focus on trainings pertinent to that specific form of employment. Thus, it is assumed that the PWDs will be able to save their time and money in getting various types of trainings.

The third advantage is that employers can in advance design the work place and work equipments according to the specific needs of the PWDs to whom a given job is reserved. [373]Therefore, it spares the money and time spent in arranging

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[370] Look Quota Employment Systems and Reserved Working Places, available at: www.designingsteps.com. Lat accessed on 15-05 2012.
[371] Ibid
[372] Ibid
[373] Patricia Thornton and Neil Lunt, Employment for Disabled People: Social Obligation or Individual Responsibility P 15,16 Available on www.york.ac.uk Last accessed on 10/05/2012

accommodations after the PWD is employed as the accommodation needed is not known in advance in conditions wherein no reservations are made.

Finally, the approach makes it simple to pin point the potential employers of Persons with a given form of disability. It would be possible to check if the employers have actually placed PWDs in the reserved employment posts.[374]

The reserved employment approach is not without its own demerits. The following are just some of these. It highly limits the possibility of PWDs to easily change their employment type.[375] It is as if PWDs of a certain type of disability are destined to only a specific kind of job. It, therefore, perpetuates the mistaken and undesirable belief that PWDs are only capable of those specific job types which are usually low grade employment.

It segregates PWDs from being employed on equal terms with the non disabled in the open labour market and keeps them in a separate corner.[376] The very thinking that some types of jobs are particularly suited only for PWDs is outmoded and organizations of PWDs are usually against it. Their opposition mainly emanates from the point that the reserved jobs are usually low status jobs. It is not clear, however, if they oppose to high status job reservations as well.

The other weakness of this approach is its extreme sensitivity to technological changes in the undertaking of the work or to changes in the production orientation of the employer. In countries where the approach was applied technological changes have rendered the reserved jobs either totally irrelevant or much fewer people are actually needed to do them.[377] Hence, more and more PWDs were left without jobs. Though the approach has undeniably some merits of its own, as discussed above, it finds little support as it contradicts the basic tenets of human rights of the PWDs to equal employment opportunities.

4.6.2 Anti Discrimination and Equal Employment Opportunities Approach

Proclamation 101/94 was repealed by an anti discrimination legislation that was titled as "Right to Employment of Persons with Disability Proclamation No 568/2008." The new proclamation, in addition to eliminating the unnecessary feature of the former proclamation namely: reserved employment, it also incorporated the anti

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[374] Ibid
[375] Ibid
[376] Ibid
[377] Ibid

discrimination precepts of same in a detailed manner.[378] Thus, the proclamation has all the features of an anti discrimination law. In the following section the most important features of the Proclamation will be discussed.

4.6.2.1 Reasonable Accommodation under Proclamation 568/2008

Reasonable accommodation is one of the basic features of the Proclamation. It is, as a concept, heavily present in the proclamation.[379] Reasonable accommodation as a vital tool of ensuring equal employment opportunities of PWDs, it has, wide acceptance both at national[380] and international[381] levels. Without the application of reasonable accommodation the rights based approach to equal opportunity will be without meaning. The Proclamation defines reasonable accommodation as:

> "Reasonable accommodation means an adjustment or accommodation with respect to equipment at the work place, requirement of the job, working hours, structure of the business and working environment with a view to accommodate persons with disabilities to employment."

Denial of reasonable accommodation under the proclamation is tantamount to discriminate against the PWDs[382] and thus can entail the penalty provided by the Proclamation.[383]

4.6.2.2 Types of Reasonable Accommodations under the Proclamation

The Proclamation in what seems to be an exhaustive list[384] enumerates a number of adjustments and modifications the employer is expected to provide to meet the requirements of reasonable accommodation.[385]These are:

- Adjusting equipment at the workplace.

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[378] Paragraph 3 of the preamble is a clear indication of this fact. It runs: " Whereas, it has become necessary to enact a new law that complies with the countries policy of equal employment opportunity, provides reasonable accommodation for people with disabilities to employment and lays down simple procedural rule that enable them to prove before any judicial organ discriminations encountered in employment"

[379] See for example, Articles 1(5), 5(3), 6(1-b)

[380] See for example, 42 U.S.C. § 12112(b)(5)(A)of the ADA, Paragraph 5(2) of the DDA and Sections 5 and 10 of the EEA.

[381] At the international level the concept is embodied in instruments like the CRPD, Optional protocol to the Convention on the Rights of Persons with Disabilities G.A. Res. 61/106 (2007), and Optional Protocol to the Covenant on Economic Social and Cultural Rights G.A. Res A/Res/63/117.

[382] See Article 5(3)

[383] See Article 11

[384] The provision apparently seems exhaustive but other types of reasonable accommodations are mentioned elsewhere in the proclamation.

[385] Ibid Article 1(5)

- Restructuring requirement of the job.
- Adjusting working hours.
- Adjusting structure of the business.
- Adapting the working environment.
- Assigning an assistant to enable the person with disability perform his work.

Given the diverse nature of disabilities and work environments it would be difficult to come up with an exhaustive list that is why additional reasonable accommodations types were included under other provisions.[386] So this writer is opined that the definition under Article 1(5) of the Proclamation should have been left open ended in the first place.

The other point that can be raised with relation to the definition of reasonable accommodation under the Proclamation is its purpose. The Purpose of reasonable accommodation is to enable the PWD employee or job applicant [387]to be able to undertake the job and not to assist him/her in respect of functions that are strictly of a personal nature and unrelated to the workplace.[388]

Reasonable accommodation is aimed at achieving parity in participation in the workplace. It is based on the social approach to disability; it is founded on the theory that what is disabling is the barriers that emanate from the socio-economic arrangements as opposed to the impairment itself.

The disabling factors being societal, primarily, the solution need to come from the society itself but under proclamation 568/2008 the issue of providing reasonable accommodation is left to the employer and the PWD employee or job applicant.[389] The employer provides reasonable accommodation where it does not cause him undue

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[386] See Article 6 1-b

[387] As made clear under Article 2(2) "employment" includes recruitment, promotion, training, transfer and other conditions of work. The PWDs are entitled to reasonable accommodation at every level of the employment process.

[388] Directives of the MoLSA Article 8(3)

[389]The Proclamation under Article 6 which is entitled as "Responsibilities of the Employer" it is explicitly mentioned that the employers are the ones who should bear the burden of the provision of reasonable accommodation. The employer can avail himself of this duty under the proclamation only in circumstances wherein such a provision creates an "undue burden" to the employer (Article 6-2). The Proclamation does not make clear as to who suggests the kind of accommodation, who must prove the existence of undue burden or in other words the reasonableness of the accommodation. The Directives issued by MoLSA under Article 7(2) provides that both the employee and employer come together and determine the appropriate reasonable accommodation. As regards the reasonableness or not of the accommodation whenever there is a disagreement,(though we do not as yet have enough court cases, presumably, this will be one source of disagreement between the employee and employer) will be something to be decided by the courts of law. The courts in so deciding use the points given under Article 6 of the Proclamation and Article 7 of the directives.

burden. The Proclamation has nothing to say in cases where in such provision causes undue burden to the employer and he cannot be obliged to provide. This approach of leaving the matter to the two parties, as Negwena rightly put it, is privatizing equality.[390] It makes provision of the accommodation, or differently put, the right of the PWD to be accommodated, totally dependent on the fortune of the employer who is mostly a private individual.

As will be discussed in detail in the next chapter, this writer is opined that two alternative approaches could be used in this respect: first, where providing reasonable accommodation is proved to be beyond the means of the employer, the State should step in and cover the difference (the proportion that made the provision of the accommodation impossible solely by the employer.) Secondly, some form of mechanism should be put in place whereby financial incentives are given to the employers who incurred capital expenditures in the provision of reasonable accommodation.

4.6.2.3 Defenses Available to the Employer in Cases of Charges of Discrimination under Proclamation No 568/2008

Proclamation 568/2008 under Article 7 made it clear that a PWDs without the requirement of the burden of proof, may institute a suit to the competent court[391] if he is discriminated against by the defendant [employer] in any condition of employment.[392] Hence, the defendant is the party that bears the burden to proof that there was no discrimination.[393] The shifting of the burden of proof from the PWD employee or job applicant (claimant) to the employer (defendant) in itself is one of the basic features of proclamation 568/2008 and of all similar anti discrimination legislations for that matter.[394]There are comments that this provision of the Proclamation not only departs from the litigation procedures under the Ethiopian laws but also leaves the defendant in a completely dark position that it would be difficult for him to exactly know what to proof or disproof in the court of law.[395]

On the other hand, the proclamation provides that any PWD whose rights under the proclamation are infringed or the association of PWDs of which he is a member … may

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[390] Negwena Look Supra note 22

[391] The Directives issued by MoLSA under article 14 provided that the competent court to consider these kinds of allegations will be as provided for in the Labour Proclamation No 377/96.

[392] Proclamation 568/2008 Article 7(1)

[393] Proclamation 568/2008 Article 7(2)

[394] See Supra note 320 and ILO, Achieving Equal Employment Opportunity for PWDs Through Legislation: Guidelines, (2007) Gladnet Collection Paper 548 p. 33

[395] See Supra note 320

institute a suit before a competent court of law.[396] The court shall render decision within 60 days.[397] The directives on its part, provides that the competent court to see these cases will be determined in accordance with the labour Proclamation No 377/2003.[398]

Both instruments focused only on the issue of competent courts and do not provide if procedural issues like the period of limitation under the Labour Proclamation are mutatis mutandis applicable for discrimination charges as well or not. Particularly, the presence of article 10(2), a procedural provision, under the proclamation, helps only to make the omission more apparent. Though it remains to be seen in the future as cases will be presented to the courts of law, this writer thinks that for reasons of convenience and expediency all the procedural provisions of the labour Proclamation should be applied to discrimination charges as well.

Leaving the problem with the burden of proof, as it may, for the time being when we look into the provisions of the Proclamation we come up with the following two major defences available to the defendant [employer] in allegations of discrimination.[399]

4.6.2.3.1 Undue Burden

The Proclamation provides that failure to provide reasonable accommodation is regarded as discrimination[400] and the duty to make reasonable accommodation will be limited when the provision of the accommodation causes an undue (disproportionate) burden to the employer.[401] And undue burden is defined as:

> "Undue burden means an action that entails considerable difficulty or expense on the employer in accommodating persons with disabilities when considered in light of the nature and cost of the adjustments, the size and structure of the business, the cost of its operations and the number and composition of its employees."

The Proclamation lays that the employer can raise the defence of undue burden for charges of discrimination under Article 5(3) of Proclamation No 568/2008 which

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[396] Proclamation 568/2008 Article 10(1)
[397] Id Article 10(2)
[398] Directives Article 14
[399] Here, it has to be noted that ILO Convention No 111 Concerning Discrimination in Respect of Employment and Occupation, has identified three grounds of defence in cases of discrimination suits. These, however, are not those used in relation to disability discrimination alone. They can be invoked under all discrimination suits including disability discrimination. These are, inherent requirements of the job, security of the State and reasons of protection and maintenance. See Articles 1(2), 4, and 5 of the Convention.
[400] Proclamation 568/2008 Article 5(3)
[401] Id Article 6(2)

provides that failure to provide (absence) of reasonable accommodation shall be regarded as discrimination.[402] This defence as indicated in the definition has two sources: the first is that which entails considerable difficulty to implement. This refers to the difficulties that are not related to financial issues. And the second and most obvious source of the undue burden defence is that which is related to financial expenses. Both (the financial and non-financial) aspects of undue hardship are evaluated in light of:[403]

- The nature and cost of the adjustments (accommodations) needed.
- The size and structure of the business and its cost of operation
- The number and composition of its employees.

As the employers have to pass through these strict evaluation criteria, it can be assumed that they, in most cases find it difficult to avail themselves of this defence. However, when the existence of undue burden is proven, the law had to make some alternatives whereby the provision of the accommodations would be made possible. As indicated above, this writer is of opinion that the complete silence of the law on the issue may give the impression that the principles of human rights and equality that underpin the concept of reasonable accommodation itself are made subject to making profitable business.

The only reasonable accommodation measure that the employer is compelled to implement regardless of the application of the evaluation criteria mentioned above, or to put it differently, a reasonable accommodation measure that under no circumstance be considered as causing undue burden to the employer is the provision of an assistant to the PWD.[404] That is under no circumstance can the employer resort to the defence of undue burden when the issue involves the provision of an assistant. The proclamation does not go beyond this and stood short of ruling what constitutes undue burden and what does not. The Directives, on the other hand, lists some possible (non financial) arguments, that cannot be accepted as valid for invoking the defence of undue burden.[405]

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[402] Ibid
[403] Id Article 1(6)
[404] Id Article 6(2)
[405] These are: other employees' or customers' fears or prejudices toward the working capacity of the PWDs, the fact that the provision of the reasonable accommodation might have a negative impact on the morale of other employees (however, there is the case of undue hardship where provision of reasonable accommodation is disruptive of other employees' ability to work) and failure to make improvements (reasonable accommodations) on the rented property by securing necessary permissions. See Directives Article 9.

In Connection with this, it is provided[406] that the employer cannot raise as a proof of the existence of undue burden the fact that a certain claim of accommodation measure which was rejected for being considered as causing undue burden to him at one time, as a defence in another claim of reasonable accommodation. This is an indicative of the fact that the existence of undue burden needs a case by case evaluation. The defence of undue burden is temporal by its nature. It may apply to one circumstance and not to another. The fact that failure to provide reasonable accommodation at one given time is regarded as undue burden does not necessarily imply existence of same on a different occasion. Although the provision does not clearly put it, this writer thinks that, this logic should extend to the circumstances wherein an accommodation which was once said not to have caused undue burden and the employer was forced to provide may become undue burden to the same employer on a different occasion.

The other point that should be raised in this connection is the fact that the employer before invoking the defence of undue burden, has to come up with different alternatives of reasonable accommodations in consultation with the PWD. If the employer decides that one mode of reasonable accommodation causes him undue burden but a second type (alternative) does not, he must provide the second type given it is also effective and suitable for the PWD.[407] The existence of this provision makes it even harder for the employer to proof to the court the existence of undue burden in a given situation.

4.6.2.3.2 Inherent Requirement of the Job

The concept of the "inherent requirement of the job"[408] though is explicitly mentioned under Article 1(4) it is defined in the Proclamation in a slightly different manner as: "unless the nature of the work dictates" [409] This writer is opined that the proclamation should stick to the more widely used expression "inherent requirement of the job" it used in the definition of "discrimination" under the Article mentioned above, than jump to the less used expression "Unless the nature of the work dictates." Leaving this as it may, let's turn to the discussion of the concept of inherent requirement. The definition given to the concept under the proclamation goes:

> "Unless the nature of the work dictates means a job that could not be performed by a qualified person with disabilities even if reasonable accommodation is provided"

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[406] Id Article 9(4)
[407] Id Article 7 (2-b)
[408] The expression "inherent requirement of the job" is used by most anti discrimination legislations. See, for example, Section 6(2)(b) of the EEA, Section 21A of the DDA etc.
[409] Look Proclamation 568/2008 Article 2(8)

Furthermore, it is provided that "unless the nature of the work dictates otherwise, a PWD, having the necessary qualifications and scored more to that of other candidates will be employed without any discrimination."[410] Additionally, "making reference to disabilities in selection criteria is prohibited under the law unless the nature of the work dictates otherwise."[411]

The logical conclusion of the foregoing is that for a PWD to be successfully employed, having the necessary qualification, better scoring points and being provided with reasonable accommodations are not in themselves sufficient unless, given the nature of the jobs, he can perform them with or without reasonable accommodation.

Under the directives the "inherent requirement of the job" takes on a different expression as "key activities of the job "[412] It provides that a PWD must be able to perform key activities of the job with or without reasonable accommodation and goes on to list the criteria to be applied to differentiate the key activities from the non-key ones.[413]

The defence of "inherent requirement of the job" refers to the situation wherein the person because of his/her disability would not be able to carry out the inherent (permanent feature or quality) of the job even with reasonable accommodation or will somehow perform the job with reasonable accommodation but his/her performance will decrease the quantity of production or negatively affect quality of same.[414]

This writer is of opinion that, unlike the defence of "undue burden" which is temporal in nature, that can be changed from time to time depending on the factors enumerated in article 1(6) of Proclamation 568/2008, this defence is permanent. It is not just a requirement of one particular moment. It exists as long as the job itself exists. Hence, where there is a court of law ruling to the effect that a PWD with a certain form of impairment cannot perform the inherent requirements of a given job, the employer can use this ruling to fend off similar claims of discrimination. There is no need for a case by case examination of similar claims of discrimination.

In order to justify a decision not to employ a PWD or not to continue employing him/her[415] the employer would be required 1) to identify the inherent requirements of

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[410] Id Article 4(1)
[411] Id Article 4(3)
[412] See Directives Article 10
[413] Ibid
[414] Id Article 8(2)
[415] Id Article 12(2)

the relevant job[416]2) to show the inability of the PWDs to perform those inherent requirements[417] and 3) the inability could not be rectified by provision of reasonable accommodation.[418]

It would be unrealistic to expect an employer to recruit or continue employing a person in a job the requirement of which he/she does not fulfill. Given the controversial nature of the concept, there are real possibilities that the employers may discriminate against PWDs using the defence of inherent requirement of the job. Hence care should be taken in sorting out the inherent requirements from the rest. [419] In this respect the criteria set out in the directives to identify key activities will, hopefully, be instrumental in identifying the key (inherent) requirements of the job.

4.6.2.4 Affirmative Action Measures

Affirmative action measures seek to achieve increased representation of PWDs in employment through efforts beyond non discrimination legislations. Affirmative action does not focus on the systematic elimination of the existing discrimination but on equalization of numerical imbalances. Proclamation No 568/2008 though is primarily an anti discrimination legislation, has some provisions that necessitate affirmative action measures to correct the impact of past discriminatory practices against PWDs particularly in relation to their right to equal employment opportunities.

The Proclamation in its definition part indicates that taking of affirmative actions, under the Proclamation may not be considered as discrimination.[420] This being located in the definition part of the proclamation, it is a precursor of the fact that affirmative action is part of the principles contained in the Proclamation.

In one of the clearest affirmative action measures the Proclamation takes, it provides that a PWD (employee or job applicant) who "acquires the necessary qualification and having *equal* or *close* score to that of other candidates shall be given preference [in all conditions of employment]" [Emphasis mine] This Provision bestows preferential status on PWDs when they are either equal or even less but close in scores to the other

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[416] Id Article 10(2)
[417] Proclamation 568/2008 Article 1(8)
[418] Ibid
[419] In identifying the inherent requirements of the job one has to look at requirements that are characteristic of the job as opposed to the peripherals. The inherent requirements are essential or intrinsic to a particular job. Inherent requirement may also extend to what the employee is expected to do in the foreseeable future. See The Revised code of Practice on employment under the Disability Discrimination Ordinance. Section 5.3 Available at www.legco.gov.hk Last accessed 05/05/2012
[420] See Proclamation 568/2008 Article 2(4)

Furthermore, it is provided that "unless the nature of the work dictates otherwise, a PWD, having the necessary qualifications and scored more to that of other candidates will be employed without any discrimination."[410] Additionally, "making reference to disabilities in selection criteria is prohibited under the law unless the nature of the work dictates otherwise."[411]

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This writer is of opinion that, unlike the defence of "undue burden" which is temporal in nature, that can be changed from time to time depending on the factors enumerated in article 1(6) of Proclamation 568/2008, this defence is permanent. It is not just a requirement of one particular moment. It exists as long as the job itself exists. Hence, where there is a court of law ruling to the effect that a PWD with a certain form of impairment cannot perform the inherent requirements of a given job, the employer can use this ruling to fend off similar claims of discrimination. There is no need for a case by case examination of similar claims of discrimination.

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[410] Id Article 4(1)
[411] Id Article 4(3)
[412] See Directives Article 10
[413] Ibid
[414] Id Article 8(2)
[415] Id Article 12(2)

candidates. The problem is that the Proclamation left us clueless as to what exactly "close" mean or as to how close the PWDs should get to the other candidates to be beneficiaries of the affirmative action. The Directives issued by the MoLSA provides the answer at least with respect to the employer-employee relationship covered by the Labour Proclamation No 377/2003.[421] It provides that:

> "Where a PWD is a candidate for recruitment or promotion and his/her average total score is not less by more than 3% from the candidate who stood first but is not entitled to affirmative measures, preference will be given to the PWD. In case both candidates are PWDs the female candidate will be preferred and if both candidates are either female or male then the employer will be given the chance to prefer."[Translation mine]

The application of this affirmative action measure extends also to training in addition to recruitment and promotion.[422]

In a similar affirmative action move the directives provides that "A PWD applicant to a vacancy announcement, who meets the minimum requirements, should be given the chance to sit for examination without further screening."[423] Thus, unlike the other candidates whose application might be rejected at further screening in spite of the fact that they have met minimum requirements, the PWDs are given the benefit of this affirmative action measure which coupled with the former one, this writer thinks will to a certain degree enhance the probability of the employment of PWDs.

Similarly, the Directives provide that "In a vacancy announcement it is possible to include the expression that "PWDs will be encouraged." Though this provision does not have a mandatory nature on employers to always include this in their vacancy announcements, if employers, both public and private honestly apply it, this will have a far reaching impact on the PWDs in moralizing them to come forward and give it a try to all openings big or small and thereby widen their inclusion in the open labour market. One should not forget that PWDs due to the discriminatory practices they used to pass through at different stages and encounters in their lives, may tend to give up even before trying.

Similarly, the Federal Civil Servants Proclamation No 515/2007 has included affirmative action provision that promotes the rights of PWDs in cases of recruitment, promotion and redeployment. Accordingly, the provision rules that next only to

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[421] See the Directives Article 4(1)
[422] Id Article 10(c)
[423] Id Article 5

women candidates, PWDs shall be given preference if they have equal or close scores to the other candidates.[424] The problem is that the Ministry of Civil Service, (MCS) has not yet issued directives that help the proper implementation of this proclamation or Proclamation No 568/2008. Hence, under the prevailing circumstance, it would be difficult to give preference to PWDs who got less but close scores. In this regard the MCS should follow the exemplary work MoLSA undertook in preparing directives of Proclamation 568/2008.

This writer is of opinion that the negative impact the long years of discrimination caused to the PWDs in the exercise of their human rights in general and their right to equal employment opportunities in particular is of great proportions. Thus, it would be difficult, at least in the short run, to materialize their right to equal employment opportunity through anti discrimination legislations only. As will be indicated in the next chapter, while it is a good gesture to include some affirmative action measures in the anti discrimination legislation, it is by no means enough. So we need to take further affirmative action measures that took into consideration the heterogeneous nature of PWDs and help improve their chance of employment and economic self sufficiency.

4.6.2.5 Job Retention and Return to Work

As discussed earlier, these are two distinct but interrelated strategies for keeping PWDs in employment.[425] The essence of job retention is that the employer is duty bound to reinstate the employee who suffered employment injury to his original employment post with accommodation or to transfer him into a comparable job with comparable salaries. Proclamation 568/2008 is silent on the job retention strategy.

But the directives issued by the MoLSA in line with the mandate it is given by the Proclamation, devoted one whole article for the issue.[426] The directives under one of its sub articles provides that: "An employer should transfer an employee who suffered a disabling employment injury to an employment position of similar status[427] by discussing with the disabled employee."[428] This provision directly went into transferring the employee to a similar position without first giving a chance of finding out if he can retain his position of employment before the injury.

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[424] Look Federal Civil Servants Proclamation Article 13-3

[425] Look section 2.6.5 of this thesis for detailed discussions of the concepts of job retention and return to work.

[426] See Directives Article 11

[427] "A job of similar status" is interpreted as one with a high degree of similarity in terms of demands, rewards, status and opportunities with comparable wages. See Morley Guanderson, and Alina Gildiner, International Research Project on Job Retention and Return to Work Strategies for Disabled Workers, ILO, Geneva Switzerland, 1998 p. 45

[428] Supra Note 426.

The next sub article took this one step ahead and provides: "If employment position of similar status is not found, and the disabled employee is willing he can be assigned to a lesser position in which case his salary and other benefits will not be reduced."[429] The directives limited the job retention possibility of the disabled employee by making the alternatives available two instead of three. This writer could not see the logic behind for taking the transfer of the employee to a similar position as the first alternative without first checking if the employee could retain his current employment with or without reasonable accommodation.

And further, it does not indicate the procedures that are to be followed in either options of keeping him at his current position, transferring him to a position of similar status, or assign him to a position of lesser status.[430] The only criterion set out in the directives is the need of discussing the matter with the employee. And even then the directives fail to indicate a way out in case the employer and employee having discussed but could not come to an agreement.

The employee who suffered employment injury has all the rights and privileges given by the proclamation No 568/2008 except that he/she is not expected to pass through the recruitment process. As such, the employee must be provided with reasonable accommodation if that will enable him perform the inherent requirements of the job. Those elements of the job that are not inherent to the employment position could be reassigned. (See above for discussion of inherent requirements of the job) Hence if the disabled employee can perform the inherent requirements of the job with or without reasonable accommodation he should be allowed to retain his current employment.

The options of transferring to other positions should come into play only in cases of the failure of the first option. However, the issue of providing reasonable accommodation and the inherent requirement of the job criteria are to be tried to see suitability of the job at each stage until the employee is finally placed.

The Federal Civil Servants Proclamation No 515/2007 Under Article 53 (2) also has a provision that indicates the employee who suffered employment injury has the right to job retention. The Provision in part reads:

> "Any civil servant who has sustained an employment injury shall be entitled to injury leave with pay until he recovers and *resumes*

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[429] Ibid

[430] In Canada, for example, if the employer could not find similar (comparable) employment then he must assign the employee in the first suitable job that becomes available with the employer. See Supra note No 336 at p 47

work or until it is medically certified that he is permanently disabled...."[emphasis mine]

One thing this provision makes clear is that, the employee who has sustained employment injury definitely has the right to job retention. The question that begs answer, however, is whether the employee has only the right to be reinstated in his current position or he can also be reassigned to other positions in case he is no more fit for his current position. This question will get answer through time either when the MCS issues directives or when courts pass biding decision on the issue.

The question that can be raised in connection with the reassignment, to another position, of an employee who suffered disability in employment, is whether such a transfer is a reasonable accommodation measure or an affirmative action measure?[431] This issue mainly comes due to the fact that the employer may instead of making the necessary adjustments to make the employee perform his/her current job prefer to transfer him/her to an entirely new job.[432]

On the other hand when, we look at the Labour Proclamation,[433] disability is one of the grounds on which employment contract is terminated by the operation of the law. The pertinent provision runs: "A contract of employment shall terminate when the worker is unable to work due to partial or total permanent incapacity."[434] The prima facie reading of this provision may give one the impression that if an employee is disabled due to employment or non employment injury and become unable to work the employer can legally terminate him/her. To make matters worse, the Proclamation goes on to provide that:

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[431] Proclamation 568/2008 does not provide for job retention as a whole therefore, we do not find job reassignment in the Proclamation either. In our case both concepts are found in the Directives issued by MoLSA. The ADA, on the other hand, under 42 U.S.C.§12111(9)(B) listed reassignment as one mode of reasonable accommodation. The problem was that reassignment unlike the other accommodations negatively affected the rights of non disabled employees by depriving their possibility of filling that position by promotion or transfer. Viewed in this light, the reassignment accommodation has the effect of providing a preference to the rights of the disabled over those of the non disabled. See Stephen F. Befort and Tracey Holmes Donesky, Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action or Both? Washington and Lee Law Review 2000 Vol. 57, Issue 4 P.1054

[432] The point that should be born in mind is that the two concepts of reassignment are different in some ways. The reassignment of some jobs to be handled by other employees so that the PWD can effectively undertake the remaining jobs is, as discussed above, a reasonable accommodation measure. What is being discussed in this section is the reassignment of the employee himself to another employment position which is a quite distinct concept from the former. See Ibid.

[433] Labour Proclamation No 377/2003

[434] Id Article 24(5)

> "The following shall not be deemed to constitute legitimate grounds for the termination of a contract of employment: his nationality, sex, religion, political outlook, marital status, race, colour, family responsibility, pregnancy, lineage line and descendents."[435]

We do not find disability in this close ended list provided by the Article. This implies, therefore, that the employer can lawfully terminate on the other grounds not included in the list. As a result of which, Disability can be considered as one legitimate ground for termination.

Similarly, when we go to chapters two and three of the Proclamation the part that provides for occupational injuries and the benefits they entail, we see lots of provisions regarding liability of the employer, the degrees of disablement and the like.[436] The liability of the employer toward an employee who suffered employment injury is only of financial nature.[437] The right to job retention and return to work are nowhere in the Proclamation. This Coupled with the provisions mentioned above, seem to settle the issue that the possibility of job retention of a disabled employee squarely rests on the good will/or not of the employer.

In the midst of all these one solace comes from Article 29 of the proclamation. In fact, this provision does not have to do with termination of employment or employment injury. It is all about reduction of workforce. In the order of reduction laid in the provision, however, PWDs are given better chance of being retained in employment. Save expectant mothers and workers' representatives they are the last to be reduced from employment.[438] However, it should be stressed that this benefit is given only to those employees disabled by an employment injury in the undertaking.[439] It is not available for all PWDs.

Having said all these, this writer, is of the opinion that the cumulative reading of Article 29(3) and that of Article 24(5) bring us to the logical conclusion that the employer under article 24(5) terminates the employee who sustained injury only in case he is unable to perform the inherent requirements of the job even being provided with reasonable accommodation. Had this not been the intention of the legislator disabled employees would not come around the end of the line (order) of reduction under Article 29(3).

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[435] Id Article 26(2-d)
[436] Id See Articles 99-112
[437] Id.
[438] Id Article 29(3)
[439] Ibid

Surely, this can be subject to arguments and counter arguments; however, the enactment of the proclamation on the Right to Employment of PWDs No 568/2008 spared us all these arguments it being specific to the issue of disability employment and addressed it in a fairly detailed manner. As was discussed above, for obvious reasons, Proclamation 568/2008 prevails over the Labour Proclamation with regard to disability issues.

On the other hand, vocational rehabilitation is a very important component of the job retention and return to work strategy.[440] It helps the disabled employee to develop skills how to be competitive in the job market with his new reality of disability and helps as an early intervention to prevent people from losing their jobs, gives professional support so that the disabled employee obtains the necessary reasonable accommodations, it applies a "bio-psycho-social" approach to help the disabled employee to keep employed and develop self confidence.[441]

Regardless of all these benefits, all the legal instruments do not say anything on the issue of vocational rehabilitation. This writer is opined that as a crucial part of the strategy of job retention, the instruments should not be silent. In fact, they had to contain articles that provide for the rights the disabled employee has to access vocational rehabilitation services as part of the reasonable accommodation measure. The absence such a provision left a rift in the worker's right of exercising his right to retain his employment.

4.7 Conclusion

In this chapter effort has been made to see the pertinent legislative measures taken in Ethiopia to ensure the equal employment opportunity of PWDs. In this regard, particularly, the labour related legislations, namely, the Proclamation to Provide for the Right to Employment of Persons with Disabilities No 568/2008, the Labour Proclamation No 377/96 and the Federal Civil Servants Proclamation No 515/2007 were extensively discussed and the merits and demerits of the various approaches these legislations promoted were evaluated from the angle of the right of PWDs to equal employment opportunities.

However, this does not mean that these are the only legislative and policy measures taken in Ethiopia that are instrumental in one or the other way to advance the right of

[440] Look Section 2.6.6 of this thesis for further discussion on Vocational Rehabilitation.
[441] Vocational Rehabilitation: What is it, Who can deliver it, and Who pays? College of occupational therapists, 2008 p. 3 Available at www.centreformentalhealth.org.uk Last visited on 23-05-2012.

PWDs to equal employment opportunities. As indicated from the outset this research has its own limitations as any research of these nature will have. Therefore, it was mandatory to limit the focus of the thesis to the legislations on the area of employment, both private and public and legislations and other legal instruments that are specific to the right to employment of PWDs.

As it was, understandably, difficult to dwell on each single legislation and policy paper that was thought to have considerable importance to our subject matter within the given space and time, some important legislations were admittedly, not adequately treated, though they were not totally ignored either.

To mention but some of these legislations, the Value Added Tax (VAT) Proclamation No 285/2002 for example, has a tax exemption provision which roughly runs as: the following types of supplies of goods ...are exempt from payment of VAT.... The supply of goods or services by a workshop employing disabled individuals if more than 60% of the employees are disabled.[442]

The VAT Proclamation by virtue of this provision gave great enhancement to the employers who are willing to hire PWDs within the given margin. Indeed, some argue that this provision took into consideration the existence of sheltered workshops which are nowadays outdated and are no more useful.[443] Though this is true in principle, this writer, as will contend in the last chapter of this thesis, do not totally subscribe to this argument. Even if we presume that the provision was coined with sheltered workshops in mind, it still is useful because sheltered employment is useful to employ persons with severe disabilities who cannot join the mainstream labour market owing to the severity of their disabilities. On the other hand, it can also be used by the PWDs as a spring board (as a means of acquiring experience) for employment in the open labour market.[444]

The other Proclamation that can be worth mentioning in this regard is the Ethiopian Building Proclamation.[445] It provides that buildings used for public purposes should have accessibility and service features such as toilets that took into account PWDs.[446] The Higher Education Proclamation also contains mandatory provisions that institutions of higher education to the extent possible made all facilities accessible to

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[442] See Value Added Tax Proclamation No.285/2002 Article 8(2)(o)
[443] See Dagnachew Bogale Supra note 315
[444] See Section 2.3.1.1 for full discussion of sheltered employment.
[445] Proclamation No 624/2009.
[446] Id Article 36

PWDs.[447] The provisions in these proclamations are not directly relevant to employment rights of PWDs. Nevertheless, as pointed out earlier, barriers of various natures, like those of physical, environmental, educational, access to facilities etc. are the major impediments PWDs daily face in their effort to exercise their right to equal employment opportunities. As such these proclamations obviously have much to contribute for realization of the employment rights of PWDs.

Similarly, the National Employment Policy and Strategy of 2009 has a component on the promotion of the right to employment of PWDs. Some of the major strategies for promoting employment of PWDs laid down in the document are:[448]

- Improving and expanding training and other skill development services suited to the special needs of PWDs.
- Support them start their own business. For it is often difficult for PWDs to penetrate the formal private sector.
- Providing better access to credit facilities.
- Awareness creation among the formal private sector community about the cause of PWDs etc.

Similarly, the Physical Rehabilitation Strategy of 2011 has been designed and made available for implementation. The main objective of the strategy is to provide physical rehabilitation services to PWDs to enhance their mobility.[449] It goes without saying that if their mobility problem is resolved, then their possibility to engagement, interaction and eventual employment will be improved.

Finally, I would like to add that, first, the instruments that have been touched upon here are not the only instruments that are in some form or another relevant to our topic (the list is by no means exhaustive) and second, some of the issues raised in each one of the instruments mentioned above, such as self employment, are so pervasive subjects that they deserve a fully fledged research on their own. So, understandably, it was difficult to encompass all of them in the current work.

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[447] See Higher Education Proclamation No 250/2008 Article 40
[448] See National Employment Policy and Strategy of Ethiopia 2009 P47
[449] National Physical Rehabilitation Strategy July 2011 p3

Chapter 5

Conclusions and Recommendations

5.1 Conclusions

As recognized in several international human rights instruments discussed in chapter three, the right to employment is one of the fundamental human rights. The right to employment has tremendous significance to enable people to effectively exercise their other rights. This right is part and parcel of the essence of humanity itself.[450] It contributes to one's recognition by his/her fellow community members. PWDs as one part of the society have equal rights in this respect.

Ethiopia has passed through some legislative experiences in its effort to tackle the various problems PWDs face in the exercise of their right to equal employment opportunities. Different approaches were adopted to make them self sufficient citizens who can care for their own and their families' financial and other needs. In this regard, particularly, the enactment of Proclamation No. 101/94 and then its rescindment and substitution by Proclamation 568/2008 are clear indications for the fact that the right of PWDs in general and their right to equal employment opportunities, in particular, is increasingly becoming among the prime concerns of the country.

This, in turn, instigated scholars to undertake research work on the various aspects of the rights of PWDs. The outcomes of these research works are expected to be of use for those concerned governmental and non-government bodies to redouble their effort in pursuit of the realization of the rights of PWDs. These can be considered as moves in the right direction.

However, it does not follow that the problems PWDs daily encounter in the exercise of their human rights in general and their right to equal employment opportunities in particular have been effectively resolved. PWDs still find it more difficult to secure a decent employment in the open labour market than the non-disabled citizens. This truth is not something unique to Ethiopia alone. In the US for instance, there are evidences that the employment and earnings rate of PWDs have declined in the decades that followed the enactment of the ADA.[451]

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[450] See CESCR General Comment No 18 Paragraphs 1&2

[451] Douglas Kruse and Lisa Schur, Employment of People with Disabilities Following the ADA, (2003) Industrial Relations Vol. 42 No 1 p.33, See also Supra Note 101.

Various reasons are forwarded as to why employers mostly refrain from employing PWDs. Some of the reasons are based on valid concerns, some based on ignorance, and misunderstanding and lack of imaginations while the others on mere prejudices.[452] Mark classified employers in to three with regard to their approaches to employ PWDs: Those who ignore hiring PWDs, those who comply with the laws to hire PWDs and those who value hiring PWDs.[453]

In the case of Ethiopia, while the enactment of Proclamation No 568/2008 and the issuance of its Directives by the MoLSA in 2011 have gone a long way toward ensuring equal employment opportunities and remedying workplace discrimination against PWDs, to change attitudes of employers and also to address some of their valid concerns some additional measures may have to be taken.

Based on the theoretical and philosophical basis of the right to equal employment of PWDs discussed under chapter two, having analyzed the contents of international human rights instruments in relation to our topic under chapter three and having scrutinized the Ethiopian legal frame work around the subject for their strengths and weaknesses in chapter four in light of the lessons drawn from the previous chapters, the following points are forwarded by way of recommendations for future improvements.

5.2 Recommendations

- It should be put in policies of the public media (TV, radio, and news papers etc) that giving wide publicity to employers that honestly and correctly implement proclamations and directives pertinent to the employment of PWDs is one of their major priorities. As discussed in chapter four, one of the barriers PWDs in Ethiopia face is social stigma and misconceptions about the ability of PWDs to perform their work. These policy measures help in tackling the social barriers PWDs face in this respect.

- Proclamation No. 568/2008 provides that employers are responsible to provide reasonable accommodations to employees or job applicant persons with

[452] Mark L. Lengnick Hall (ed.) Hidden Talent: How Leading Companies Hire, Retain and Benefit from PWDs (2007) P.4,5

[453] Those who ignore hiring PWDs, simply do not pay attention to the PWDs. They favour non-disabled applicants over applicants with disabilities and take their chances with possible litigation. Those who comply, pay attention to legal requirements and ensure that they follow the law. They do not actively seek out employees with disabilities but neither do discourage them from applying. Those who value hiring PWDs, on the other hand, go beyond mere compliance they seek out employees with disabilities and create organizational cultures and climates that are disability friendly. This approach actually leads to competitive advantage to the employer since it increases the pool of possible applicants as a result of which the access to best talent of the employer is high.

are extraordinarily heterogeneous population; no one tailored solution equally fits them all. Since the PWDs are heterogeneous group it would be important to provide a wide variety of options to allow for choice.

Sheltered employment options are presumably more fitting to people with severe disabilities that the open employment option does not serve their interest. It can also be used as an option for a vocational rehabilitation or vocational training mechanism so that PWDs get the necessary skills that will enable them to eventually join the open labour market. It is, therefore, the conviction of this writer that the option of sheltered employment be used mainly as a social and occupational integration and rehabilitation mechanism than as a business (production of goods and services) establishment.

In doing so, however, care should be taken to reshape the sheltered workshops in a way that they become compatible with modern day disability policies. The basic human rights of those working in the sheltered workshops should be protected. For this reason the country should have a legislation or policy that governs the running of the sheltered workshops.

- As indicated in chapter two and also chapter four one of the reasons employers refrain from hiring PWDs is their unfounded fear that they could hire somebody else who can (better) do the job for as much a payment. So, legislative and policy measures could be put in place that the government pays a certain percentage of the salary of the employee with disability.[458] This approach could, at least, be useful in the short term until the outlook of the employers change. Alternatively, incentives in the form of reward could be given for employers that have hired more number of PWDs than the minimum threshold set.

- Under the existing laws PWDs have the right to a healthy and safe work environment as all employees do. However, as indicated in this paper, due to their disablement, they might be more exposed to various dangers and health risks in the workplace than the other employees working in similar environment. Hence, it would be logical and humane to take into account their particular circumstance of exposure at the workplace and make a legislation a policy or

[458] This approach is recommended as beneficial for all the parties involved the PWDs, the employer and the government. From the government's side, this payment is less expensive than the payment for unemployment or disability benefits (where these are paid), from the side of the PWDs, it gives them sense of importance and self support and the employers also gets an employee for a subsidized wage. These types of measures, though apparently attractive, are easily entangled in administrative and implementation problems. See: Tom Martin and Associates, Sheltered employment: A Review of the Literature, Dublin (2001) P. 18

guidelines that provide for a disability specific health and safety standards that employers should observe as a matter of duty. In this regard MOLSA and MCS in collaboration with pertinent bodies should do a lot.

BIBLIOGRAPHY

A. Books, Articles, Reports

African Union , Continental Plan of Action for the African Decade of Persons with Disabilities 1999-2009

Albert, B 2004.Briefing Note, the Social Model of Disability, Human Rights and Development Disability KAR Knowledge and Research.

Albertyn C., Goldblatt B. and Roederer (ed) Introduction to Promotion of Equality and Prevention of Unfair Discrimination Act Johannesburg (2001)

Alston P. and Quinn G., the Nature and Scope of State Parties Obligations under ESCR: Human Rights Quarterly

Anton, Francois Van Staden , A Strategy for the employment of Persons with Disabilities, 2011, Unpublished University of Pretoria

Arlene S Kanter, An Introduction of Disability Legal Studies, Syracuse University, 2009

Armstrong F and Barton L Disability, Human Rights and Education: Cross Cultural Perspective Buckingham: Open University Press 1999

Barness C & G Mercer, Introduction Exploring the Divide: Illness and Disability 1996.

Barnes, CA 1997 Legacy of Opposition: A History of Disability in Western Culture in disability Studies: Past, Present and Future. Leeds

Benjamin O. Alli, Fundamental Principles of Occupational Health and Safety, ILO, 2001

Bickenbach JE Physical Disabilityand Social Policy, Toronto University of Toronto Press 1993

Bill Lockyer, Legal Rights of Persons with Disabilities, California 2006

Breslin ML & YEE S (eds.) Disability Rights law and Policy Ardsley : transnational Publishers Inc.2002

Byrnes A. and Alex Conte. et; al, Disabilities: From Exclusion to Equality; Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention

on the Rights of Persons with Disabilities and its Optional Protocol, SRO-Kunding Geneva 2007

Carol Goldstone, Barriers to Employment for Disabled People 2002

Charles Gideon Ngwena 'Disabled People' and the Search for Equality in the Workplace: An Appraisal of Equality Models for a Comprehensive Perspective, Unpublished, the University of Free State 2010.

Charlton J Nothing About us without Us: Disability, Operation and Empowerment University of California Press 1998

Christanson, Strydown ed.) Disability Discrimination in the Workplace, in Essential Employment Discrimination Law Cape Town 2004

Commission for Social Development, maintaining Disability in the development Agenda: Follow up to the World Summit for Social Development and the 24th Special session of the General Assembly 2008

Cooper, J and Whittle, R Enforcing Rights and Freedoms of Disabled People the Role of Transnational Law (Part I) 2004

Cronin Furman, Kathleen Renee, Sixty year of Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect" American University International Law Review 25

Dagnachew Bogale, Employment Discrimination on the Basis of Disability: the Current Legal Regime in Ethiopia and its Implementation Unpublished Faculty of Lau AAU 2006

David P. Forsythe, Encyclopedia of Human Rights, Oxford University Press, 2009

David W Anderson, Human Rights and Persons with Disabilities in Developing Nations of Africa, Samford University 2004

Debra A Perry, New Directions Toward Decent Work for People with Disabilities: ILO Perspective on Employment and Skills Development A Background Paper, ILO 2004

Dianne Pothier and Richard Delvin, Critical Disability Theory: Essays in Philosophy, Politics Policy and Law UBC Press 2006.

Ethiopian National Disability Action Network, A Study on Opportunities and services for Persons with Disability in Addis Ababa, ENDAN/CCM 2010

Federal Democratic Republic of Ethiopia, ILO: Decent Work Country Programme (DWCP) Ethiopia (2009-2012) Addis Ababa 2009.

Gerard Quinn and Theresia Degner, The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability, New York, Geneva 2002.

Hassan M. Yousif (ed.) United Nations Convention on the Rights of Persons with Disability: A Call for Action on Poverty, Discrimination and Lack of Access, Report of Conference Held at the UN Conference Center in Addis Ababa, 2008

Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities, Understanding the Human Rights of Persons with Disabilities 2009.

International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, ICJ 2008

ILO, Achieving Equal Employment Opportunities for Persons with Disabilities through Legislation Guidelines 2004

ILO, Code of Practice on Managing Disability in the Workplace, Tripartite Meeting of Experts on the Management of Disability at the Workplace, Geneva 2001

ILO, Employment of People with Disabilities: A Human Rights Approach 2006

ILO, Moving Toward Disability Inclusion, Ethiopia Disability Inclusion Support Services 2006

ILO, People with Disabilities Pathways to Decent Work, Report of a Tripartite Workshop Lusaka 2006

ILO: Time for Equality at Work Global Report under the Follow up to the ILO Declaration on the Fundamental Principles and Rights at Work ILC 2003

Jan Grue, Interdependent Discourses of Disability: A Critical Analysis of the Social/Medical Model Dichotomy, University of Oslo (Unpublished) 2011

Janet E. Lord, Kathrin N Guernsey(eds.) Action and Advocacy on the Rights of People with Disabilities, Human Rights Resource centre University of Minnesota 2007.

Janet E. Lord & Rebecca Brown, The Role of Reasonable Accommodation in Securing Substantive Equality for People With Disabilities: The UNCRPD, 2010

Japan International Cooperation Agency Planning and Evaluation Department, Country Profile on Disability, Federal Democratic Republic Of Ethiopia, Addis Ababa 2002

Jeanette N Cleveland, Janet L Barnes and Joan M Ratz, Accommodation in the Workplace, Human Resource Management Review V.7 No. 1

John Hasnas, equal Opportunity, Affirmative Action, and the Anti Discrimination Principle: the Philosophical Basis for the Legal Prohibition of Discrimination, Fordham Law Review, 2002

John W Vellacott, Walking the Talk? Models of Disabilityand Discourse in Employment Policy for Canadians with Disabilities, 2011

Kassie Adem Abebe, Human Rights under the Ethiopian Constitution: A Descriptive Overview Mizan Law Review Vol.5 No 1

Keitil Froyland, Supported Employment or Segregated Rehabilitation: Vocational Rehabilitation and the Idea of Rapid Job Placement, A Literature Review 2006

Kevin Kitching, Non Discrimination in International law : A Handbook for Practitioners , Interights 2005

Laurent Visier, Sheltered Employment for People with Disabilities, International Labour Review 1998

Lawson A. & Mark Priestly, Monitoring the Implementation of the United Nations Convention on the Rights of Persons with Disabilities in Europe, Principles for Identification and use of Indicators , May 2009

Li Wei Wei, Equality and Non Discrimination under International Human Rights Law, Norwegian Center for Human Rights, 2004

LL Rover, Disability Equality and Identity, Alabama Law Review 2004

L. Wadington, A Hendriks "the Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination 2002

Madeleine Loyson, Substantive Equality and Proof of Employment Discrimination: A Critical Analysis of the Changing Nature of the test for Justification of Discrimination in Employment (Unpublished) 2009

Marcia Rioux and Anne Carbert; Human Rights and Disability: The International Context, Journal on Developmental Disabilities Vol.10 No 2

Maria Luz, Vega Ruiz & Daniel Martinez, Fundamental Principles and Rights at Work: Value, Viability, Incidence and Importance as Elements of Economic Progress and Social Justice, ILO, 2002

Marilyn Achiron: From Exclusive to Equality: Realizing the Rights of Persons with Disabilities: A Handbook for Parliamentarians on the CRPD and its Optional Protocol 2007

M Crossley "the Disability Kaleidoscope, Notre Dam Law Review 1999

M.E Waterstone & MA Stein , "Disability Prejudice" North Western University Law Review 2008

Messele Rakeb, Enforcement of Human Rights in Ethiopia, Action Professionals Associationfor the People (APAP) 2002

Michael Ashley Stein, Disability Human Rights; California Law Review 2007

Michael Selmi, Interpreting the ADA: Why the Supreme Court Rewrote the Statute, and Why Congress Did not Care, the George Washington Law Review vol. 76

Ontario Human Rights Commission, Policy and Guidelines on Disability and the Duty to accommodate 2009

O' Reilly the Right to Decent Work of People with Disabilities 2003

O' Reilly, Arthur and International Labour Office, "the Right to Decent Work of Persons with Disabilities (2007)

O'Reilly, ILO International Legal Instruments and Policy Initiatives Concerning the Right to Work of People with Disabilities.

Patricia Thornton, Employment Quotas Levies and National Rehabilitation Funds for People with Disabilities: Pointers of Policy and Practice 1998

Paul O'leary and David Dean, International Research Project on Job Retention and Return to Work Strategies for Disabled workers study Report USA 2005

Peter Coleridge, Claude Simonnote, Dominique Steverlynck, Study of Disability in EC Development Cooperation 2010

R. Roosvelt Thomas,Jr. Diversity Management and Affirmative Action: Past Present and Future 2004

Remond Lemey A Review of the Standard Rules on the Equalization of Opportunities for People with Disabilities, UN Department of Policy Coordination and Sustainable Development 1994

Robert Heron & Barbara Murrey, Assisting Disabled Persons in Finding Employment: A Practical Guide, ILO 2003

Samuel R Bagnestos, The Future of Disability Law, the Yale Law Journal Vol.114 No 1

Sandra Fredman, Providing Equality: Substantive Equality and the Positive Duty to provide, South African Journal of Human Rights

Schulze M, Understanding the United Nations Convention on the Rights of Persons with Disabilities, Handbook on the Human Rights of Persons with Disabilities ,2009

Seyoum Yohannes Tesfay, Towards Inclusive Employment: the Conceptual Basis and Features of Proclamation 568/2008 on the Employment of People with Disabilities. Journal of Ethiopian Law Vol. 24 No 1 2010

S. Mitra, Disability and Safety Nets in Developing Countries 2005

Stephen F. Befort and Tracy Holms, Reassignment under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action or Both? Washington Law review 57 2001

Stewart J Schwab and Steven L Willborn, Reasonable Accommodation of Workplace Disabilities, WM & Mary Law Review 2003

Susan Hemmings and Jenny Morris, Employing People with Learning Disabilities: A Handbook for Employers, Joseph Rowntree Foundation 2004

Tefera Tirusew, Disability in Ethiopia, Issues, Insights and Implications 2005

Thabo Mbeki Development Trust for Disabled People, Strategies for Skills Acquisition and Work for People with Disabilities: A Report Submitted to the ILO, Geneva Switzerland 2006

Thornton P, ILO International Research Project on Job Retention and return to Work Strategies for Disabled Workers 1998

Tom Ginsburg, Svitlann Chernykh Zachary Elkins , Commitment and Diffusion: How and why National Constitutions Incorporate International Law, University of Illinois Law Review 2008

Valorie Cooks, Changes in Disabled Women's Experiences of the Workplace, Life Spaces and Employment Supports in Hamilton Ontario, 2001

USAID, Ethiopia: Disability Inclusion Strategy 2011-2015

William K Smith, Sarah M Huges(eds) the International Disability Rights Compendium, Chicago Center for Rehabilitation 2003

World Health Organization, World Disability Report, 2011

B) LEGAL INSTRUMENTS

I) Domestic Laws

The Constitution of the Federal Democratic Republic of Ethiopia 1995

The Value Added Tax (VAT) Proclamation No 285/2002

The Proclamation Concerning the Rights of Disabled Persons to Employment No 101/1994 (Repealed)

Rehabilitation Agency for the Disabled Order 70/1971 (Repealed)

The Labour Proclamation 377/2003 as amended

The Federal Civil Servants Proclamation No 515/2007

Right to Employment of Persons with Disability Proclamation No 568/2008

Directives on the Right to Employment of Persons with Disability Proclamation 568/2008

Building Proclamation No

Higher Education Proclamation

National Employment Policy of Ethiopia 2009

II) Foreign Laws

The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act Amendment Act (ADAAA)

Employment Equity Act (EEA)

The Constitution of Ghana

III) International Conventions and Instruments

Universal Declaration of Human Rights (UDHR) 1948

International Covenant on Civil and Political Rights (ICCPR) 1966

International Convention on Economic Social and Cultural Rights (ICESCR) 1966

Convention on Elimination of Discrimination Against Women (CEDAW) 1981

Convention on the Rights of Persons with Disabilities (CRPD) 2006

Convention on the Right of the Child 1989

African Charter on Human and People's Rights (ACHPR) 1981

The Declaration on Mentally Retarded Persons 1971

The Declaration on Rights of Disabled Persons 1975

Tallinn Guidelines for Action on Human Resource Development in the Field of Disability 1989

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities

The Equal Remuneration Convention No 100 and Recommendation No 90

The Discrimination (Employment and Occupation) Convention No111 and Recommendation No 111

The Vocational Rehabilitation and Employment (disabled Persons) Convention 1983 (No 159) and Vocational Rehabilitation and Employment Recommendation 1983 (No 168)

The ILO Declaration on Fundamental Principles and Rights at Work 1998

The ILO Code of Practice on managing Disabilities in Workplace (2002)

C) Website Sources

http://nea.gov

http://www.worksupport.com

http://www.jan.wvu.edu/media/tax/html

http://www.ilo.org/public/english/protection/safework/accidents/index.htm

http://www.ilo.int/wcmsp5/groups/public/@dgreports/@docmm/documents/publications/wcms

http://www.ccnmtl.colombia.edu

http://www.umn.edu/humanrts/undocs/session29-index.html

http://www.un.org/esa/socdev/enable/disiydp.htm

http://www.un.org/disabilities/dfault.asp?id=23

http://www.socialrolevalorization.com

http://www.hpod.org/pdf/humanrightsyes.pdf

http://www.cesr.org/downloads/CESR

http://www.solhaam.org

http://www.ilo.org/ilolex/english

http://www.equalityhumanrights.com

http://www.designingsteps.com

http://www.york.ac.uk