

**Persons with Disability's Right to Work in Africa:  
A Comparative Study of Employment and Disability Laws, Policies and  
Relevant Institutional Mechanisms of Tanzania and Selected African States**

Inaugural-Dissertation  
In the Faculty of Humanities, Social Sciences, and Theology  
of the Friedrich-Alexander-Universität  
Erlangen-Nürnberg,

for  
the award of Doctoral Degree Dr. Phil.

Presented by

**Abdallah Possi**  
from  
**Dar es Salaam, Tanzania**

Thesis accepted by the Faculty of Humanities, Social Sciences, and Theology of the  
Friedrich-Alexander-Universität Erlangen-Nürnberg, 4<sup>th</sup> December 2014.

**Oral examination: date** 19<sup>th</sup> December 2014.

**Dean:** Proffessor Dr. Reiner Trinczek.

**First Reviewer:** Proffessor Dr. Heiner Bielefeld.

**Second Reviewer:** Privatdozent Dr. Michael Krennerich.

**Das Recht auf Arbeit für Menschen mit Behinderung: Eine vergleichende  
Untersuchung relevanter Gesetze, institutioneller Mechanismen und  
politischer Umsetzung in Tansania sowie in einigen anderen afrikanischen  
Staaten**

Inaugural-Dissertation  
in der Philosophische Fakultät und Fachbereich Theologie  
der Friedrich-Alexander-Universität  
Erlangen-Nürnberg,

zur  
Erlangung des Doktorgrades Dr. Phil.

vorgelegt von

**Abdallah Possi**  
aus  
**Dar es Salaam, Tansania**

Als Dissertation genehmigt von der Philosophische Fakultät und Fachbereich Theologie der  
Friedrich-Alexander-Universität Erlangen-Nürnberg, 4 Dezember 2014.

**Tag der mündlichen Prüfung:** 19 Dezember 2014.

**Dean:** Universitätsprofessor Dr. Reiner Trinczek.  
**Erstgutachter:** Universitätsprofessor Dr. Heiner Bielefeld.  
**Zweitgutachter:** Privatdozent Dr. Michael Krennerich.

## **ACKNOWLEDGEMENTS**

Praise to God the Almighty, who by his beneficence has done righteous deeds, and peace be upon all God's Messengers who have brought guidance to mankind. I thank God for the strength and guidance given to me during the three years and six months of my stay in Germany of this exciting but challenging experience.

This thesis would not have been possible without the help and support of many people and institutions. I am heartily grateful to my supervisor, Prof. Dr. Heiner Bielefeld, and his work colleague, PD Dr. Michael Krennerich for their invaluable time, guidance, encouragement and support from the beginning of the doctoral research to its completion. They were always willing to assist whenever I needed assistance. I am also grateful also to Prof. Dr. Chris Maina Peter for his invaluable time and advice during the writing of this thesis. His help aided me immensely to see things which I would have otherwise overlooked. He too was willing to assist whenever I needed assistance.

While I appreciate the contribution, support and encouragement of the above mentioned individuals, I wish equally to acknowledge that there are many more who in one way or another contributed to the success of this work. Due to space limitation, I am not able to mention them all by their names. These include all my interviewees and all other individuals who provided necessary information for my research; and all secretariats of the University of Erlangen, and in particular, of the Chair of Human Rights and Human Rights Policy, the International Center, the Graduate School, and the Examination Office. I thank them All.

Special thanks to my family, my relatives, my friends and all of those who supported me in any respect during this unforgettable journey as well as those who gave up their time and agreed to be interviewed by me.

## **ABSTRACT**

“Disability is a human rights issue.” This is a common expression in many contemporary disability rights scholarly work. While researching on disability rights may not raise questions, often, a selection of topic could be generated by many factors, including the researcher’s personal interest.

Matters of personal interest aside, I opted to research on Persons with Disability’s Right to work, not because everything is perfect with other aspects of disability rights, but because work (or employment) should be among means of empowerment. Unfortunately, work is among such areas where persons with disability have been facing discrimination.

Considering the complexities of poverty, and the economies of African nations, it is worth undertaking a study focusing on Africa because, while human rights are perceived as universal, there are also concerns that imposing a universal approach throughout the world risks ignoring some specific differences across nations and continents. This work is also intended to add on to the existing knowledge on disability, especially with respect to Africa, considering the fact that compared to other parts of the world, there has not been so much literature on disability rights in Africa.

My work is limited to Tanzania and five other selected African countries, namely Kenya, Uganda, Zambia, South Africa and Ghana. Because of Tanzania’s political and legal structure, a discussion of Tanzania covers both Tanzania Mainland and Zanzibar. I elaborate how the international approaches to employment and disability rights have evolved, and how these approaches have influenced laws and policies on the employment of persons with disability in Tanzania and other States selected for the purposes of this work.

The combination of “disability rights” and “employment rights” mean that as with other rights, what is needed is to construe rights in such a way that they fit the requirements of persons with disability, enabling them to enjoy the rights on equal basis with other persons without disability. The nature of matters inquired in this work has necessitated a pragmatic approach to research - an inter-disciplinary approach. Nevertheless, because of my legal profession background, there is a heavy reliance on legal instruments.

This work is divided into five chapters. Chapter 1 of this work contains some introductory and methodological issues. Chapter 2 is devoted to issues of equality and disability, while Chapter 3 is about measures employed to ensure persons with disability’s access to, and equality at work. Chapter 4 is about the institutional mechanisms put in place to ensure the implementation of matters stated in chapters 2 and 3. There are a number of challenges with respect to the implementation of human rights in general, and the rights of persons with disability in particular. These challenges, directly or indirectly affect persons with disability’s enjoyment of the right to work. The challenges notwithstanding, there are positive signs. I address the challenges and the positive prospects in Chapter 5. Chapter 6 sums up the work.

## ZUSAMMENFASSUNG

„Behinderung ist eine Frage der Menschenrechte“: Dies ist ein allgemeiner Bestandteil in vielen zeitgenössischen wissenschaftlichen Arbeiten über Behindertenrechte. Obwohl die Wichtigkeit der Recherche über die Rechte von Menschen mit Behinderung außer Frage steht, ist die Auswahl eines bestimmten Themas von vielen Faktoren abhängig, einschließlich des persönlichen Interesses des Forschers.

Das Forschungsthema wurde abgelehnt, weil Arbeit nicht nur eine der mittels Ermächtigung ist, sondern auch unerlässlich für eine unabhängige Lebensweise. Trotz seiner Bedeutung ist es bedauerlich, dass für viele Menschen mit Behinderungen, Arbeit in vielen Fällen unzugänglich gewesen ist.

Behindertenrechte sind ein relativ neues Forschungsthema in Afrika, und in Anbetracht der Komplexität von Armut, und Wirtschaftslage der afrikanischen Staaten, lohnt es sich eine Studie mit Schwerpunkt Afrika. Hinzu kommt auch, dass obwohl die Menschenrechte als universelle wahrgenommen werden, es auch Bedenken gibt, dass zur Einführung eines ganzheitlichen Ansatzes in der ganzen Welt einige spezifische Unterschiede zwischen den Nationen und Kontinenten ignoriert werden. Unter diesen Umständen wurde die Forschung, mit dem Blick auf das Hinzufügen zu vorhandenem Wissen über die Rechte behinderter Menschen in Afrika immer wichtig sein, weil es im Vergleich zu anderen Teilen der Welt, es nicht so viel Literatur über die Rechte von Behinderten in Afrika gibt.

Die Forschung wurde auf Tansania und fünf weiteren ausgewählten afrikanischen Ländern, nämlich Kenia, Uganda, Sambia, Südafrika und Ghana beschränkt. Aufgrund der politischen und rechtlichen Struktur Tansanias, deckt eine Diskussion über Tansania sowohl tansanisches Festland als auch Sansibar ab. Ich erarbeite, wie die internationalen Ansätze zur Beschäftigung und die Rechte von Behinderten entwickelt wurden, und wie diese Ansätze hinsichtlich der Beschäftigung von Menschen mit Behinderung in Tansania und anderen Staaten, die für die Zwecke dieser Arbeit ausgewählt wurden, beeinflusst haben.

Die Kombination von "Behindertenrechten" und "Arbeitsrechten" bedeutet, dass man die Rechte in einer Weise konstruieren soll, dass sie zu den Anforderungen von Menschen mit Behinderung passen, sodass sie diese Rechte gleichberechtigt wie andere Personen ohne Behinderung genießen können. Die Natur der Dinge, die in dieser Arbeit erkundet wurden, benötigt einen pragmatischen Ansatz der Forschung - einen interdisziplinären Ansatz. Wegen meines juristischen Hintergrunds gibt es dennoch eine starke Abhängigkeit von Rechtsinstrumenten.

Im Laufe dieser Arbeit unterstütze ich den Menschenrechtsansatz für Behinderung, der die weitere Auslegung der Gleichheit (substantielle Gleichheit) für die Förderung und den Schutz der Gleichberechtigung von Menschen mit Behinderung erfordert. Ich halte diesen Menschenrechtsansatz auch für einen der neuen Ansätze für Behinderung. Frühere Ansätze, vor der Behindertenrechtskonvention, die zu internationalen Menschenrechtsinstrumenten wurden, hatten nicht nur wegen der Nachsicht gegenüber einzelner gesunder (medizinischer) Wahrnehmung von Behinderung einige Einschränkungen, sondern auch wegen des Mangels an verbindlichen internationalen Instrumenten zum Schutz der Rechte von Menschen mit Behinderungen. Dies war auch der Fall mit den IAO-Übereinkommen, aber ohne die Verharmlosung ihrer Signifikanz für Menschen mit Behinderung. Die neuen Entwicklungen im Rahmen der UNO (in Bezug auf die Rechte von Behinderten) scheinen regionalen Menschenrechtsmechanismen in Afrika, sowie einige Einzelstaaten zu beeinflussen. Es ist auch wichtig zu beachten, dass obwohl es in der Regel einige Fortschritte im Bereich der

Behindertenrechte in einigen afrikanischen Staaten gab, entwickelt sich dieser Zustand nicht im gleichen Tempo, und dass die Fortschritte in den Behindertenrechten ein Spiegelbild der allgemeinen Lage der Menschenrechte in einzelnen Ländern sind.

Speziell hinsichtlich des Rechts auf Arbeit, verstärken die einschlägigen Bestimmungen der Behindertenrechtskonvention das bestehende Recht auf Arbeitsbestimmungen der internationalen und regionalen Instrumente, die von allen der für diese Studie ausgewählten Staaten ratifiziert sind. In diesen Staaten sind Gesetze und Politik für Beschäftigung und Behinderung vorhanden. Obwohl die Qualität und der Umfang der Instrumente von Land zu Land variieren, gibt es einige Ähnlichkeiten in Bezug auf einige Fragen. Eine Sache ist klar: In Afrika geht der Trend dahin, Quotenregelungen und Antidiskriminierungsansätze zu kombinieren.

Für die Zwecke der Umsetzung der entsprechenden Gesetze und Politiken zum Thema Behinderung, wurden verschiedene institutionelle Mechanismen etabliert. Diese institutionellen Mechanismen gehören zu den nationalen Menschenrechtsinstitutionen, die Behinderungsanlaufstelle und einige Institutionen, die zum Zwecke der Umsetzung der Arbeitsgesetze etabliert sind. Es gibt eine allgemeine Ähnlichkeit der Funktionen dieser Institutionen, und zwar mit einigen Ausnahmen in Bezug auf die Art der Behinderungsanlaufstellen und die Bildung von Gleichbehandlungsstellen und nationalen Menschenrechtsinstitutionen. Während der Mangel an ausreichenden Daten Bewertung der Leistung der verschiedenen Einheiten schwierig gemacht hat, scheinen Gerichte ~~scheinen~~ mit der Entwicklung einer aussagekräftigen Jurisprudenz zu Fragen der Beschäftigung von Menschen mit Behinderung begonnen zu haben, insbesondere mit angemessenen Vorkehrungen.

Gesetze und Richtlinien können sinnvolle Auswirkungen auf das Leben der Menschen haben, wenn die Herausforderungen oder Beschränkungen, die direkt oder indirekt die ordnungsgemäße Umsetzung dieser Gesetze hindern, nicht ignoriert oder unterschätzt werden. Daraus folgt, dass der Menschenrechtsansatz allein nicht das Ende aller Probleme für Menschen mit Behinderungen bedeutet. Zu den Herausforderungen gehören theoretischen diejenigen, die auf die soziale Haltung bezogen sind, Herausforderungen an die Rechts- sowie institutionelle Verwaltung. Trotz dieser Herausforderungen gibt es einige positive Anzeichen für Fortschritte im Bereich der Behindertenrechte, auch in Fragen der Arbeit. Es ist aber immer noch schwierig zu bestimmen, wie angemessen Menschen mit Behinderung (in der Praxis) von den neuen Gesetzen und Richtlinien profitieren.

Der Zweck der Vergleichsstudie ist unter anderem, gute Beispiele von anderswo heranzuziehen. Regierungsorgane, Menschenrechtsorganisationen, sowie die Organisationen von Menschen mit Behinderung in Ländern wie Tansania, können auf jeden Fall einige Beispiele für bewährte Verfahren wählen. Dazu gehören Aspekte wie die Rechte von Behinderten, Rechtsstreitigkeiten, Ansporn für Arbeitgeber und Arbeitnehmer mit einer Behinderung, die effektive Nutzung der öffentlichen Institutionen um mehr Arbeitsplätze für Personen mit Behinderungen zu gewährleisten, oder die Besserung der Strukturorganisationen der zuständigen Stellen, die für die Menschen mit Behinderung beauftragt sind.

Der Inhalt dieser Doktorarbeit ist in Kapitel unterteilt. Kapitel 1 enthält einige einführende und methodische Fragen. Kapitel 2 wird den Fragen zur Gleichstellung und Behinderung gewidmet, während es in Kapitel 3 es um Maßnahmen geht, die eingesetzt werden, um Menschen mit Behinderung den Zugang zu und die Gleichheit bei der Arbeit zu gewährleisten. In Kapitel 4 geht es darum, die institutionellen Mechanismen für die Umsetzung der Angelegenheiten zu gewährleisten, die in den Kapiteln 2 und 3 genannten



worden sind. Kapitel 5 befasst sich mit den Herausforderungen und den positiven Aussichten in Bezug auf die Umsetzung der Rechte von Behinderten in Tansania und den ausgewählten afrikanischen Staaten. Kapitel 6 fasst die Arbeit zusammen.

## ACRONYMS

ACDEG	African Charter on Democracy, Elections and Governance.
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child.
ARI	African Rehabilitation Institute
AU	African Union
ACDEG	African Charter on Democracy, Elections and Governance
AYC	African Youth Charter.
CESCR	Committee for Economic, Social and Cultural Rights.
CHRGG	Commission for Human Rights and Good Governance.
CRPD	Convention on the Rights of Persons with Disabilities.
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
DPP	Director of Public Prosecution.
DRDP	Declaration on the Rights of Disabled Persons.
DRMRP	Declaration on the Rights of Mentally Retarded Persons.
ECOSOC	Economic and Social Council.
ICCPR	International Covenant on Civil and Political Rights.
ICD	International Classification of Diseases.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ICIDH	International Classification of Impairments, Disability and Handicaps.
ILO	International Labour Organisation.
LRCT	Law Reform Commission of Tanzania.
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity.
TUICO	Tanzanian Union of Industrial and Commercial Workers
UDHR	Universal Declaration of Human Rights.
UN	United Nations.

## TABLE OF CONTENT

### CHAPTER 1

<b>GENERAL BACKGROUND AND METHODOLOGY .....</b>	<b>1</b>
1.1. Introduction.....	1
1.2. Disability as a Human Rights Issue .....	6
1.3. Statement of the Problem.....	11
1.4. Significance of the Study .....	12
1.4.1. The Study on Law and Policies.....	12
1.4.2. The Study on the Right to Work .....	12
1.4.3. The Study on Tanzania and Selected African States .....	13
1.4.4. Disability Rights Promotion.....	16
1.5. Study Objectives .....	17
1.6. Research Questions.....	17
1.7. Language Use .....	18
1.8. Methodology and Design.....	19
1.8.1. Inter-Disciplinary, Comparative and Qualitative Study .....	20
1.8.1.1. Qualitative Approach to Human Rights Research.....	21
1.8.1.2. Inter-Disciplinary Nature of Disability Rights Study .....	21
1.8.1.3. Weighing the Limits and Benefits of a Comparative Study .....	24
1.8.2. Multiple Data Collection Methods.....	26
1.8.2.1. Library Research .....	29
1.8.2.2. Interviews .....	33
1.8.2.3. Questionnaires.....	34
1.8.3. Purposive Sampling .....	35
1.8.4. Data Analysis .....	36
1.8.5. Participation, Transferability and Ethical Issues.....	37
1.8.5.1. Participation of Persons with Disability .....	37
1.8.5.2. Generalisation (Transferability) of Results .....	38
1.8.5.3. Ethical issues .....	38
1.8.6. Researcher's Declared Position .....	39
1.8.7. Challenges and Limitations.....	40
1.9. Conclusive summary.....	41

## CHAPTER 2

<b>DISABILITY AND EQUALITY .....</b>	<b>42</b>
2.1. Introduction.....	42
2.2. Development of Disability Rights Framework .....	43
2.2.1. United Nations .....	43
2.2.2. African Union .....	47
2.3. Evolving Equality Concepts and Anti-Discrimination Measures .....	54
2.3.1. Sameness Approach .....	56
2.3.2. Specific Differences and Equality of Results .....	60
2.3.3. Substantial Equality .....	62
2.4. General Approaches to Disability .....	65
2.4.1. Individual Approaches .....	68
2.4.2. The Human Rights Approach .....	72
2.5. Approaches Disability and Equality in Tanzania.....	79
2.5.1. Separate Legal and Policy Regimes.....	79
2.5.2. Disability and Equality in Tanzania Mainland .....	80
2.5.2.1. Overview .....	80
2.5.2.2. Development of Equality Measures.....	81
(a) Formal Equality in the Absence of the Bill of Rights.....	81
(b) The Bill of Rights and the Transition from Formal Equality to the Recognition of Differences .....	82
(c) From Recognition of Differences to Substantial Equality .....	87
2.5.2.3. Equality Measures under the Current Disability and Employment Legislation.....	91
2.5.2.4. Defining Disability .....	97
(a) Prevailing Societal Perceptions of Disability .....	98
(b) Development of Official Definitions .....	99
2.5.3. Approaches to Equality and Disability in Zanzibar .....	104
2.5.3.1. Overview .....	104
2.5.3.2. Development of Equality Measures.....	105
(a) Equality and Disability in the Absence of the Bill of Rights.....	105
(b) Developments after the Bill of Rights .....	105
2.5.3.3. Equality Measures under the Current Disability and Employment Legislation.....	106
2.5.3.4. Defining Disability .....	108

2.6.	Comparative analysis: Selected African States .....	109
2.6.1.	Constitutional Disability Rights Provisions .....	111
2.6.2.	General Equality and Anti-Discrimination Measures .....	113
2.6.3.	Defining Disability .....	118
2.7.	Conclusive Summary .....	119

## **CHAPTER 3**

<b>WORK AND DISABILITY.....</b>	<b>121</b>
3.1 Introduction.....	121
3.2 Significance of Work to Persons with Disability.....	122
3.3 Persons with Disability and the Challenge of Accessing the Labour Market.....	123
3.4 Work as a right.....	125
3.4.1 Overview .....	125
3.4.2 Origins and Developments.....	126
3.4.3 Right to Work under Selected International Law Instruments and Recommendations .....	129
3.4.3.1. ILO Conventions and Recommendations .....	129
3.4.3.2. UDHR.....	133
3.4.3.3. ICESCR.....	134
3.4.3.4. Banjul Charter .....	135
3.4.3.5. CRPD.....	136
3.5 General Domestic Approaches for the Protection of Persons with Disability’s Right to Work .....	138
3.6 Persons with Disability’s Right to Work in Tanzania .....	140
3.6.1 Tanzania Mainland.....	140
3.6.1.1. Developments.....	140
3.6.1.2. Policy Position and General Objectives of Disability and Employment Laws.....	145
3.6.1.3. Protection of the Right to Work.....	148
3.6.1.4. Selected Measures for Achieving Equality of Persons with Disability at Work Places .....	150
(a) Quota Provisions and the Obligation to Employ Persons with Disability .....	150
(b) Placement Services.....	155
(c) Job Retention and Reasonable Accommodation .....	155
(d) Vocational/Skill Training and Industrial Rehabilitation .....	163

	(e) Provision of Assistive Devices .....	167
	(f) Safe and Healthy Working Conditions .....	167
	(g) Incentives .....	168
	(h) Organisational Rights .....	169
3.6.2	Tanzania Zanzibar .....	170
3.6.2.1.	Developments .....	170
3.6.2.2.	Policy Position and General Objectives of Disability and Employment Laws .....	171
3.6.2.3.	Protection of the Right to Work .....	171
3.6.2.4.	Selected Measures for Achieving Equality of Persons with Disability at Work Places .....	172
	(a) The Obligation to Employ Persons with Disability .....	172
	(b) Placement Services .....	174
	(c) Job Retention and Job Accommodation .....	174
	(d) Vocational/Skill Training and Industrial Rehabilitation .....	174
	(e) Provision of Assistive Devices .....	175
	(f) Safe and Healthy Working Conditions .....	175
	(g) Incentives .....	176
	(h) Organisational Rights .....	176
3.7	Comparative Experience .....	177
3.7.1	Protection of the Right to Work .....	177
3.7.2	Selected Measures for Achieving Equality of Persons with Disability at Work Places .....	177
3.7.2.1.	Quota Provisions and the Obligation to Employ Persons with disability .....	177
3.7.2.2.	Placement Services .....	178
3.7.2.3.	Job Accommodation .....	179
3.7.2.4.	Vocational/Skill Training and Industrial Rehabilitation .....	183
3.7.2.5.	Provision of Assistive Devices .....	184
3.7.2.6.	Incentives .....	186
	(a) Incentives to Employers .....	186
	(b) Incentives to Persons with Disability .....	187
	(c) Organisational Rights .....	187
3.8	Conclusive Summary .....	187

## CHAPTER 4

### ADMINISTRATION, MONITORING AND ENFORCEMENT, AND INVOLVEMENT OF CIVIL SOCIETY..... 189

4.1. Introduction.....	189
4.2. CRPD and Domestic Structural Mechanisms .....	190
4.2.1. Disability Focal Points and Co-ordination Mechanisms.....	192
4.2.2. National Human Rights Institutions.....	195
4.2.3. Civil Society and Consultative Mechanisms .....	199
4.2.4. Specific Labour-Related Mechanisms and Other Measures .....	202
4.3. Tanzania's Institutional Mechanisms .....	202
4.3.1. Tanzania Mainland.....	202
4.3.1.1. Disability Focal Point(s) and Co-ordination Mechanism .....	203
(a) The Ministry of Health and Social Welfare .....	203
(b) The National Advisory Council for Persons with Disabilities .....	204
(c) Office of the Commissioner for Social Welfare .....	207
4.3.1.2. The Commission for Human Rights and Good Governance .....	209
4.3.1.3. Civil Society and Consultative Mechanisms.....	212
4.3.1.4. Labour Law and Policy Mechanisms .....	214
(a) Ministry for Labour and Employment.....	214
(b) Office of the Commissioner for Labour.....	214
(c) Tanzania Employment Services Agency .....	215
4.3.1.5. Enforcement (Dispute Resolution) Mechanisms .....	216
(a) Standard Human Rights Adjudication Mechanisms.....	216
(b) Employment and Labour Relations Dispute Resolution Mechanisms.....	217
(c) Disability Legislation Complaint Procedure.....	218
4.3.2. Zanzibar .....	219
4.3.2.1. Disability Focal Point(s) and Co-ordination Mechanisms .....	219
(a) Zanzibar National Advisory Council for Persons with Disability .....	219
(b) Department of Persons with Disability Affairs in the Office of First Vice President.....	220
4.3.2.2. The Commission for Human Rights and Good Governance .....	221
4.3.2.3. Civil Society and Consultative Mechanisms.....	221
4.3.2.4. Ministry for Labour and Employment, and the Labour Commission..	222
4.3.2.5. Enforcement (Dispute Resolution) Mechanisms .....	222

4.3.3. Comparative Experience .....	223
4.3.3.1. Disability Focal Points and Co-ordination Mechanisms .....	223
4.3.3.2. National Human Rights Institutions .....	225
4.3.3.3. Civil Society and Consultative Mechanisms.....	228
4.3.3.4. Enforcement (Dispute Resolution) Mechanisms .....	229
4.4. Conclusive Summary .....	230

## **CHAPTER 5**

<b>LIMITATIONS, CHALLENGES AND PROSPECTS .....</b>	<b>232</b>
5.1. Introduction.....	232
5.2. Limitations and Challenges .....	233
5.2.1. Limitations of Human Rights Approach to Disability .....	233
5.2.1.1. Disability Impairment Dichotomy .....	233
(a) Real Limitations of Impairment .....	233
(b) Effects of Poverty on Disability .....	234
(c) Limits of Barrier-Free Environment .....	234
5.2.1.2. General Limitations of Human Rights .....	235
(a) Weak Human Rights Language .....	235
(b) Limited Legal-Dominated Approach to Human Rights .....	239
5.2.1. Specific Issues Relating to Disability and Employment Law .....	240
5.2.1.1. Legal Definition of Disability.....	240
5.2.1.2. Complaint Procedure under Disability Law .....	241
5.2.1.3. Judicial Technicalities.....	244
5.2.1.4. Poor Drafting, Lack of Implementation and Abuse of the Law .....	245
5.2.2. Institutional Weaknesses .....	248
5.2.2.1. Health or Welfare Affiliation of Disability Focal Points.....	249
5.2.2.2. Limited Capacity of Disability Focal Points .....	249
5.2.2.3. Uncoordinated Operations of Labour and Disability Institutions .....	250
5.2.2.4. Underutilised National Human Rights Institutions, and the General Challenges thereof .....	252
5.2.3. General Issues relating to Disability Movement and Other Civil Society Organisations .....	253
5.2.4. Awareness Issues .....	255
5.3. Some Positive Signs.....	256
5.3.1. Emphasis on Indivisibility and Inter-dependence of Rights .....	256



5.3.2. On-going Developments in the Area of Disability Rights .....	258
5.3.3. Emerging Signs of Cooperation among Civil Society Organisations .....	259
5.4. Conclusive Summary .....	260

## **CHAPTER 6**

<b>SUMMING UP .....</b>	<b>262</b>
-------------------------	------------

<b>BIBLIOGRAPHY .....</b>	<b>269</b>
---------------------------	------------

## CHAPTER 1

### GENERAL BACKGROUND AND METHODOLOGY

#### 1.1. Introduction

Human rights are inherent in the condition of humanity.<sup>1</sup> They have been defined as “inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being.”<sup>2</sup> Human rights are not “metaphysical entities”: they have been developing on various theories and enforced by a number of international covenants and agreements as well as by national laws and Regulations.<sup>3</sup>

While the current international human rights framework is usually associated with the aftermath of the Second World War (WW II),<sup>4</sup> and the *Universal Declaration of Human Rights* (UDHR) is generally referred to as the “main source” of human rights,<sup>5</sup> the origin of human rights is dated many years back in the enlightenment period, during which human rights were seen as “elementary preconditions for an existence worthy of human dignity.”<sup>6</sup> The international community has therefore deemed it essential to provide human rights with a status which ensures their respect, and therefore human rights have been transferred from moral stipulations to the binding instruments.<sup>7</sup> The list of universal rights is specified in the UDHR,<sup>8</sup> which “today exerts a moral, political, and legal influence far beyond the hopes of many of its drafters.”<sup>9</sup> The rights contained in the UDHR were later elaborated in

---

<sup>1</sup>Alsaif, A. S. (2008) *The Rights of Disabled Persons and Discrimination A comparative study in British, American and Saudi Arabian Disability*, PhD Thesis, Newcastle University, at p. 1; Hellsten, S. (2004) 'Human Rights in Africa: From Communitarian Values to Utilitarian Practice', *Human Rights Review*, Vol. 5, No. 2, at p. 61

<sup>2</sup>Sepúlveda, M. et al. (2004) *Human Rights Reference Handbook*, 3rd (edn), San Jose: University for Peace, at p. 3.

<sup>3</sup>Hellsten, S. (2004), *supra*, n. 1, at p. 62.

<sup>4</sup>Koh, H. H. and Gostin, L. O. (2003), 'Introduction: The Human Rights Imperative', in S. S. Herr, et al. (Eds.), *The Human Rights of Persons with Intellectual Disabilities: Different but Equal*, at p. 1; Forsythe, D. P. (2006) *Human Rights in International Relations*, 2nd (edn), New York: Cambridge University Press, at p. 3.

<sup>5</sup>Nickel, J. (2013), 'Human Rights', in E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/rights-human>, accessed: 13.9.2014.

<sup>6</sup>Sepúlveda, M. et al. (2004), *supra*, n. 2, at p. 4; Shivji, I. G. (1999) 'Constructing a New Rights Regime: Promises, Problems and Prospects', *Social and Legal Studies*, Vol. 8, No. 2, at p. 254.

<sup>7</sup>Alsaif, A. S. (2008), *supra*, n. 1.

<sup>8</sup>*Universal Declaration of Human Rights*, General Assembly Resolution 217 A (III) of 10 December 1948 (UDHR).

<sup>9</sup>Hannum, H. (1996) 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, Vol. 25, at p. 289.

the *International Covenant on Civil and Political Rights* (ICCPR),<sup>10</sup> and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),<sup>11</sup> both of which have been almost universally signed and ratified by members of the international community.<sup>12</sup> It should be noted however, that the distinction between civil and political rights on one hand, and economic social and cultural rights on the other, is not the only way to classify human rights.<sup>13</sup>

The adoption of ICCPR and ICESCR was followed by the adoption of regional human rights instruments, including the *African Charter on Human and People's Rights (Banjul Charter)*.<sup>14</sup> In addition to these instruments, the international community has adopted several other instruments focusing on vulnerable groups, and I regard these as the extended forms of the previous conventions.

While the international human rights framework has changed lives everywhere, it is only recent that persons with disability have their rights recognized in a binding international instrument,<sup>15</sup> and in most countries, the statutory rights of persons with disability to social inclusion lag far behind the rights of other minorities.<sup>16</sup> Real effort on disability rights at the international level started in 1970s, but even at this period, “there was no real understanding of disability as a rights issue and even less recognition that what was needed to secure those rights was considerable social change to services, systems and legislation and policy.”<sup>17</sup> Many of persons with disability’s “specific” rights have been generally categorized as social rights, whose enforceability has been a subject of debate among

---

<sup>10</sup>*International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), 1966 (ICCPR).

<sup>11</sup>*International Covenant on Economic, Social and Cultural Rights*, General Assembly Resolution 2200A (XXI), 1966 (ICESCR)

<sup>12</sup>Koh, H. H. and Gostin, L. O. (2003), *supra*, n. 4, at p. 1.

<sup>13</sup>Wambali, M. K. B. (2009) 'Reflections on the Main Features of the Bill of Rights Following Some Amendments to the Constitution of the United Republic of Tanzania, *Eastern Africa Law Review*, No. 35 – 40, at p. 69.

<sup>14</sup>*African Charter on Human and Peoples' Rights*, Organisation of African State Document CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 1981 (Banjul Charter).

<sup>15</sup>UN (2007) 'From Exclusion to Equality: Realising the Pights of Persons with Disabilities, Handbook for Parliamentarians, UN, at p. III, <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>, accessed: 17.1.2014.

<sup>16</sup>Marks, D. (1999) *Disability Controversial Debate and Psychological Perspective*, London: Routledge, at p. 2.

<sup>17</sup>Hurst, R. (2003) 'The International Disability Rights Movement and the ICF, *Disability and Rehabilitation*, Vol. 25, No. 11-12, at p. 572.

scholars.<sup>18</sup> This narrow perception that human rights are “intended primarily to protect individuals from abuse of power by governments,”<sup>19</sup> meant that social and economic rights had less priority over civil and political rights. Disability specific rights, such as those related to reasonable accommodation, or assistive devices, are closely related to social and economic rights. The UN had therefore “ignored” persons with disability in its first three decades of operation.<sup>20</sup> It is admitted though, that at the domestic level, arrangements for persons with disability had existed in some States even before the UDHR, although these were centered on the social welfare or medical/individual perceptions of disability (I explain these approaches/models in Chapter 2),<sup>21</sup> and as a result, the stereotype of people with disabilities as nonproductive was prominent.<sup>22</sup> In Africa, disability rights may be seen as a recent phenomenon, but some disability policies had reached the continent (in some countries) through colonialism.<sup>23</sup>

Although generally from 1970s, some activity started to emerge with respect to the rights of persons with disability at the UN, the international community had to wait until 2006 when the *Convention on the Rights of Persons with Disabilities* (CRPD)<sup>24</sup> was adopted. The CRPD, like the ICESCR contains the principle of “progressive realization” of rights, according to which States have obligation at least to gradually improve the realization of persons with disability where imminent realization is impossible. It should however be

---

<sup>18</sup> Flóvenz, B. G. (2009), 'The Implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, at p. 259.

<sup>19</sup> Freeman, M. (2011) *Human Rights*, 2nd (edn), Cambridge: Polity Press, at p. 16

<sup>20</sup> Biegon, J. (2011), 'The Promotion and Protection of Disability Rights in the African Human Rights System', in Du Plessis, I. G. and T. van Reenen (Eds.), *Aspects of disability law in Africa*, at p. 56

<sup>21</sup> See generally for example: Chapter 14 in Baird, M. R., Rosenbaum, S. E. and Toombs, S. K. (eds.) *Disability: The Social, Political, and Ethical Debate*, at p. 138; Geist, F., et al. (2003) 'Disability Law in Germany: The Historical Development of the Law of Handicapped Persons-from “War Victim Support” to the Ideal of Equal Social Participation', *Comparative Labour Law and Policy Journal*, Vol. 24, at p. 563 -564; Bagenstos, S. R. (2003) 'Comparative Disability Employment Law From an American Perspective', *Comparative Labour Law and Policy Journal*, Vol. 24, at p. 649; Heyer, K. C. (2002) 'The ADA on the Road: Disability Rights in Germany', *Law and Social Inquiry*, Vol. 27, No. 4, at p. 728; Mackelprang, R. W. and Salsgiver, R. O. (1996) 'People with Disabilities and Social Work: Historical and Contemporary Issues', *Social Work*, Vol. 41, No. 1, at p. 7, <http://sw.oxfordjournals.org/content/41/1/7.full.pdf+html>, accessed: 11.2.2014.

<sup>22</sup> Mackelprang, R. W. and Salsgiver, R. O. (1996) *ibid*, at p. 9.

<sup>23</sup> See for example: Devlieger, P. J. (2010), 'At the Interstices of Classification: Notes on the Category of Disability in Sub-Saharan Africa', in S. N. Barnartt (Ed.), *Disability as a Fluid State: Research in Social Science and Disability*, at p. 83; Kabzems, V. and Chimedza, R. (2002) 'Development Assistance: Disability and Education in Southern Africa', *Disability & Society*, Vol. 17, No. 2, at p. 148.

<sup>24</sup> *Convention on the Rights of Persons with Disabilities, General Assembly Resolution 61/106, 2006 (CRPD)*.

noted that the principle of “progressive realization” should not be applied to the prejudice of the obligations of the CRPD which are of immediate application.<sup>25</sup>

One of areas which are dependent on economy is employment. While employment is dependent upon the economy, the right to work is essential as one of the means to ensure persons with disability’s autonomy - to empower them.<sup>26</sup> I regard empowerment as among significant factors for realizing equal rights. It has been found that effective mechanisms in improving opportunities for persons with disability is central, not only in terms of the economic rights of persons with disability, but also their broader social and political rights, which are closely linked to economic empowerment.<sup>27</sup> Such mechanisms must be designed to eliminate barriers hindering persons with disability’s full enjoyment of their rights.<sup>28</sup> It is under these circumstances that I have chosen a topic on persons with disability’s right to work, also considering the fact that work (employment) is one of the areas where persons with disabilities have been experiencing discrimination.

A drive towards profit and survival in business competition could be the main reasons why employers would always hire and maintain employees with the capacity to do the required job, and it is therefore almost “automatic” that employees with necessary competence, or have the capacity to acquire it after suitable training, have an advantage over applicants who cannot.<sup>29</sup> Either because of societal or environmental barriers, employees with disability tend to fall behind others. While ignorance and prejudice may have a part to play in such situations, other factors may often include inability to compete on the basis of

---

<sup>25</sup> Article 4(2), .

<sup>26</sup> Henderson, G. and Bryan, W. V. (2011) *Psychosocial Aspects of Disability*, 4th (edn), Springfield, Illinois: Charles C Thomas Publisher, at p. 73.

<sup>27</sup> ILO (2004) 'United Republic of Tanzania Country Profile: Employment of People with Disabilities - the Impact of Legislation, The Study prepared by the ILO In-focus Programme on Skills, Knowledge and Employability in the Framework of a Project Funded by Development Cooperation Ireland (DCI), ILO, at p. 1,

[http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_107844.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_107844.pdf), accessed: 22.1.2014; ILO (2004) 'Kenya Country Profile: Employment of People with Disabilities - the Impact of Legislation, The Study prepared by the ILO In-focus Programme on Skills, Knowledge and Employability in the Framework of a Project Funded by Development Cooperation Ireland (DCI), ILO, at p. 1,

[http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_107837.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_107837.pdf), accessed: 17.1.2014; ILO (2004) 'Uganda Country Profile: Employment of People with Disabilities - the Impact of Legislation, The Study prepared by the ILO In-focus Programme on Skills, Knowledge and Employability in the Framework of a Project Funded by Development Cooperation Ireland (DCI), ILO, at p. 1, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_107842.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_107842.pdf), accessed: 31.1.2014.

<sup>28</sup> UN (2010) 'Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors, UN, at p. 11, [http://www.ohchr.org/documents/Publications/disabilities\\_training\\_17en.pdf](http://www.ohchr.org/documents/Publications/disabilities_training_17en.pdf), accessed: 17.1.2014.

<sup>29</sup> O'Reilly, A. (2007) 'The Right to Decent Work of Persons with Disabilities, ILO, at p. 85

relevant skills or qualifications, inaccessibility, and the related issues<sup>30</sup> In addition, the so called “jobs for persons with disability” have been diminishing due significant to advancements in science and technology.<sup>31</sup>On the other hand however, science and technology can significantly help persons with disabilities chances to secure and maintain their jobs.

I have already indicated that disability is a human rights issue, and so is work (in different ways). Under the CRPD, the right to work is contained in Article 27. Under this Article, State parties recognise the right of persons with disability to work, on an equal basis with others; which includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties are obliged to safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking a range of steps listed in Article 27 (a) to (k), and Article 27(2). In essence, Article 27 is an extension of the principles stated in previous UN and ILO conventions ratified by various States.

As persons with disability are reported to suffer more acute problems in the developing nations, in the course of this work, I explore various laws, policies and government initiatives aimed at increasing persons with disabilities’ access to employment in Tanzania and selected African States, as among many developing nations faced with problems of extreme poverty and unemployment, and still faced with the problem of negative societal attitudes against persons with disabilities. The work focused mostly on Tanzania, but also drew some comparisons from some other African states in some aspects, since the problems of persons with disability are not peculiar to Tanzania alone, and that there are some other African states which appear to have made some progress in the area of disability rights (at least in terms of law or policy) earlier than Tanzania.

The study is, to a significant extent, influenced by works of various disability and human scholars, and recent developments in international human rights, such as the human rights approach to development, which calls for integration of the norms, standards and principles of the international human rights systems into the plans, policies and processes of

---

<sup>30</sup>*Ibid*, at p. 85, 86.*ibid*, at p. 85; 86

<sup>31</sup>*Ibid*, at p. 86.

development.<sup>32</sup> Thus, I have opted for human rights approach to disability, which means a broader approach to disability grounded on human rights perspectives. Compared to the social model of disability, the human rights approach has the “normative nature of human rights.”<sup>33</sup> In order to strengthen this approach, substantive equality which recognizes the history of persons with disability’s marginalization is essential. Thus, guaranteeing persons with disability the right to work is a part of the broader approach aimed at improving their lives; and that substantive equality is paramount for the realization of persons with disability’s right to work, and survival in the labour market.

## 1.2. Disability as a Human Rights Issue

Disability transcends class, nation and wealth.<sup>34</sup> Around 10 per cent of the world's population, or 650 million people, live with a disability,<sup>35</sup> and this is expected to rise to around 800 million by the year 2015.<sup>36</sup> In Africa, it has been reported that 80 million people are said to experience some form of disability.<sup>37</sup> However, data from some individual African states does not appear to give a certain figure with respect to the number of persons with disability.<sup>38</sup> Based on the formula created by the World Health Organisation (WHO), which estimates that one tenth of a population in any given community will have a disability, it was estimated in 2004 that Tanzania, had

---

<sup>32</sup>Mulumba, M. (2011) *Mainstreaming Disability into the Poverty Reduction Process in Uganda the Role of the Human Rights-Based Approach to the National Development Plan*, Saarbrücken: LAMBERT Academic Publishing GmbH & Co. KG, at p. 17.

<sup>33</sup>*Ibid*, citing Hisayo, C. J. (2007).

<sup>34</sup>Goodley, D. (2011) *Disability Studies: An Interdisciplinary Introduction*, London: SAGE, at p. 1

<sup>35</sup>UN Enable (2006) *UN Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/facts.shtml>, accessed: 1.7.2013;

Despouy, L. (1991) 'Human Rights and Disabled Persons', *Human Rights Studies Series*, No. 6, <http://www.un.org/esa/socdev/enable/dispaperdes0.htm>, accessed: 28.6.2013. According to some other sources, disability affects 15-20% of every country's population. See for example, Gottlieb, A, *et al.* (2012), 'Employment of People with Disabilities', in J. H. Stone and M. Blouin (Eds.), *International Encyclopedia of Rehabilitation*, <http://cirrie.buffalo.edu/encyclopedia/en/Article/123>, accessed: 13.5.2012; UN (2007), *supra*, n. 15, at p. 1.

<sup>36</sup>Goodley, D. (2011), *supra*, n. 34, at p. 1. Disability is concentrated in some parts of the globe more than others, caused by armed conflict and violence, malnutrition, rising populations, child labour and poverty. Every country calculates the number of persons with disability in their country differently. Cultural differences, different disability definitions and different methods of data collection mean that in many cases that there is a likelihood of variation in estimates. ( Rains, S. (2010) *The Number of Persons with Disability Worldwide*, <http://www.rollinggrains.com/readings/2010/03/the-number-of-people-with-disabilities-worldwide.html>, accessed: 13.5.2012).

<sup>37</sup>Biegou, J. (2011), *supra*, n. 20, at p. 53.

<sup>38</sup> For example: In 2008, Kenya’s National Coordinating Agency for Population and Development conducted the National Survey on disability, according to which about 4, 6 % of Kenyans have a disability. However, according to the Kenya National Bureau of Statistics, following the 2009 population census, the number of persons with disability made 3.5% of the population.

approximately 3.5 million persons with disability.<sup>39</sup> These are significant numbers, and for that reason, I agree with the view that persons with disability are an asset whose productive potential cannot be ignored, and that they must be thought of as part of the general population, entitled to the same rights, privileges, services, and consideration enjoyable by man, and the same responsibilities and obligations to themselves, their families, and the Nation.<sup>40</sup> Any exception alien to modern human rights (to the detriment of persons with disability) is unacceptable.

Despite the big numbers and developments in human rights, persons with disability remain disproportionately marginalised in mainstream development, and marginalisation is especially evident when compared with gender or ethnicity.<sup>41</sup> Persons with disability have therefore been described as “the world's largest, but not static, minority.”<sup>42</sup> Because of their marginalization in many parts of the world, persons with disability are likely to suffer socio-economic hardship,<sup>43</sup> the situation which may make it difficult to them to exercise their rights.

The degree to which persons with disability are weighed down in their daily lives by illness or impairment determines the extent to which they experience social inclusion or exclusion,<sup>44</sup> and the relationship between poverty and disability is a vicious circle.<sup>45</sup>

---

<sup>39</sup>LHRC and ZLSC (2009) 'Tanzania Human Rights Report 2008, LHRC; ZLSC, at p. 93. However, it should be noted that official statistics do not show a consistent picture concerning the prevalence of disability in Tanzania. According to the 2002 national census, 3% of the Tanzanian population have a disability. The 2002–2003 Poverty Analysis, however, claims that 10% of the population have a disability (mainly physical or visual impairments), which is roughly equivalent to 3.5 million people ( Fritz, D, *et al.* (2009) 'Making Poverty Reduction Inclusive: Experiences from Cambodia, Tanzania and Vietnam, *Journal of International Development*, at p. 679, <http://onlinelibrary.wiley.com/doi/10.1002/jid.1595/pdf>, accessed: 16.10.2014). According to the National Bureau of Statistics (2008), up to 3.2m Tanzanians (7.8%) of the population aged 7 years and above have some form of activity limitation, and up to 5.4m (13.2%) are affected by one form of disability or the other (United Republic of Tanzania (2010) 'National Disability Mainstreaming Strategy 2010 – 2015, at p. 8.).

<sup>40</sup>Tororei, S. K. (2009) 'The Right to Work: A Strategy for Addressing the Invisibility of Persons With Disability, *Disability Studies Quarterly*, Vol. 29, No. 4, <http://dsq-sds.org/Article/view/973/1174>, accessed: 12.2.2014.

<sup>41</sup>Grech, S. (2009) 'Disability, Poverty and Development: Critical Reflections on the Majority World Debate, *Disability & Society*, Vol. 24, No. 6, at p. 771, citing Albert, *et al.* (2004).

<sup>42</sup> See UN Enable2006 (2006), *supra*, n. 35; UN (2007), *supra*, n. 15, at p. 1; Green, R. J. (2011) 'An Introductory Theoretical and Methodological Framework for a Universal Mobility Index (UMI) to Quantify, Compare, and Longitudinally Track Equity of Access the Built Environment, *Journal of Disability Policy Studies*, Vol. 21, No. 4, at p. 219, citing Hahn (1998) and Zola (1989).

<sup>43</sup>Goodley, D. (2011), *supra*, n. 34, at p. 1.

<sup>44</sup>Wazakili, M, *et al.* (2011), 'Social inclusion of people with disabilities in poverty reduction policies and instruments: initial impressions from Malawi and Uganda: Initial Impressions from Malawi and Uganda', in A. H. Eide and B. Ingstad (Eds.), *Disability and Poverty: A Global Challenge*, at p. 15.

<sup>45</sup>Turmusani, M. (2001), 'Work and Adulthood: Economic Survival in the Majority World', in M. Priestley (Ed.), *Disability and the Life Course: Global Perspectives*, at p. 194.; Quinn, G. (2010) 'The United Nations



Poverty is a potent cause of disability, although disability itself should not automatically lead to poverty. The link between disability and poverty is strong (but not inevitable).<sup>46</sup> Thus, for example Malnutrition of a pregnant woman [would] directly cause an obstruction of the new-born child.<sup>47</sup> Blindness can occur from vitamin A deficiency, and millions of people have learning difficulties and brain damage due to iodine deficiency.<sup>48</sup> It is estimated that persons with disability make up one fifth of the world's poorest,<sup>49</sup> eighty per cent of them live in developing countries, and that twenty per cent of the world's poorest people have some kind of disability, and tend to be regarded in their own communities as the most disadvantaged.<sup>50</sup> Furthermore, it is also been reported that thirty per cent of street youths have some kind of disability, and women with disability are recognized to be multiply disadvantaged, experiencing exclusion on account of their gender and their disability.<sup>51</sup> Persons with disability are more likely to be at the higher risk of being exposed to human rights violations and higher levels of social and economic deprivation.<sup>52</sup> They are “most vulnerable and least vocal member of any society, [and] are often not even perceived.”<sup>53</sup> Numerous barriers leave many young persons with disability in poverty and dependent upon their own families in many countries.<sup>54</sup> Lack of education opportunities (or skills) reduces persons with disability’s employability,<sup>55</sup> and this explains why most persons with disability are among the poorest of the poor.<sup>56</sup>

In Africa, disability exposes people to social economic exclusion, and majority of persons with disability live in dire conditions.<sup>57</sup> The situation is made harder without having the additional means of conforming to mainstream society.<sup>58</sup> Persons with disability have limited livelihood opportunities that consequently lead them into a state of poverty and

---

Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability, *Texas Journal on Civil Liberties & Civil Rights*, Vol. 15, No. 1, at p. 36.

<sup>46</sup>*Ibid.*

<sup>47</sup>Gräber, D. (2007) 'Menschenrechtsverletzungen und Behinderung: eine folgenschwere Verkettung', *Zeitschrift Behinderung und Dritte Welt*, No. 1, at p. 4.

<sup>48</sup>*Ibid*, citing Soria, (2004).

<sup>49</sup>Quinn, G. (2010), *supra*, n. 45, at p. 36..

<sup>50</sup>UN Enable2006 (2006), *supra*, n. 35.

<sup>51</sup>*Ibid.*

<sup>52</sup>Turmusani, M. (2001), *supra*, n. 45, at p. 194.

<sup>53</sup>Ghai, A. (2001), 'Marginalisation and Disability: Experiences from the Third World', in M. Priestley (Ed.), *Disability and the Life Course: Global Perspectives*, at p. 29.

<sup>54</sup>Priestley, M. (2001), 'Introduction: the Global Context of Disability', in M. Priestley (Ed.), *Disability and the Life Course: Global Perspectives*, at p. 9.

<sup>55</sup>Gräber, D. (2007), *supra*, n. 47, at p. 8.

<sup>56</sup>*Ibid*

<sup>57</sup>Biegon, J. (2011), *supra*, n. 20, at p. 53.

<sup>58</sup>*Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*, (2008) 4 BCLR 356 (LC).

vulnerability.<sup>59</sup> Like in most parts of the world, persons with disability in Africa are among the poorest of the poor,<sup>60</sup> more likely than their able-bodied peers to be uneducated, unemployed or under-employed;<sup>61</sup> and it may not be uncommon for potential employers not to employ persons with disability even where they have the necessary qualifications and experience.<sup>62</sup> Of those who are employed, the conditions of work are considerably less advantageous than the general population, as persons with disability are more likely to get lower paying jobs outside of the formal sector of employment.<sup>63</sup>

Discrimination of persons with disability is worsened by the negative cultural perceptions regarding, *inter alia*, the potential role of persons with disability in society.<sup>64</sup> Often, disability is perceived as a problem and a person with disability as unable and dependent.<sup>65</sup> Such perceptions towards disability are viewed as “individualization” or “medicalization” of disability, the approaches which perceive disability as the problem of an individual. Some societies consider disability as curses or punishments for sins committed by persons with disability or their relatives or because of witchcraft.<sup>66</sup> Among significant Sections of the society, there is an overlap between a cultural perceptions and medical conceptualization of disability.<sup>67</sup> These perceptions significantly contribute to the exclusion and discrimination, which have also undermined self-confidence of many persons with disability and their interaction with society; and especially where persons

---

<sup>59</sup>National Policy on Disability in Uganda, 2008

<sup>60</sup>Yao, R. (2001) 'Chronic Poverty and Disability, Action on Disability and Development, at p. 5, [http://www.chronicpoverty.org/uploads/publication\\_files/WP04\\_Yeo.pdf](http://www.chronicpoverty.org/uploads/publication_files/WP04_Yeo.pdf),

<sup>61</sup>Cotter, A. M. (2007) *This Ability: An International Legal Analysis of Disability Discrimination*, Hampshire, Barlington: Ashgate, at p. 138; McClain, C. V. (2002) 'Democracy and Disability in South Africa: Still Three Nations, *Disability World*, Vol. 14, [http://www.disabilityworld.org/06-08\\_02/gov/southafrica.shtml](http://www.disabilityworld.org/06-08_02/gov/southafrica.shtml), accessed: 10.2.2014; *Medium-Term National Development Policy Framework*, 2010 (Ghana Shared Growth And Development Agenda (GSGDA), 2010-2013); Downing, A. (2011) 'Power and Disability in the Global South: A Case Study of Ghana's Disability Rights Movement, MA Dissertation, at p. 27.

<sup>62</sup>Disability Policy, 2008 (Uganda), *supra*, n. 59

<sup>63</sup>Downing, A. (2011) 'Power and Disability in the Global South: A Case Study of Ghana's Disability Rights Movement, MA Dissertation, University of Lund, at p. 27.

<sup>64</sup>Jere, V. (2011), 'The Right to Equality in the Workplace for Persons with Physical Disabilities in Malawi: Does the Conention on the Rights of Persons with Disabilities offer any Hope?', in Du Plessis, I. G. and T. van Reenen (Eds.), *Aspects of disability law in Africa*, at p. 261 - 265.; Kisanji, J. (1995) *Attitudes and Beliefs about Disability in Tanzania*, <http://tenmet.org/Droop/content/attitudes-and-beliefs-about-disability-tanzania>, accessed: 15.01.2014; Monk, J. and Wee, J. (2008) 'Factors Shaping Attitudes towards Physical Disability and Availability of Rehabilitative Support Systems for Disabled Persons in Rural Kenya, *Asia Pacific Disability Rehabilitation Journal*, Vol. 19, No. 1, at p. 93 - 113; Kisanji, J. (1998) *Culture and DisabilityAn Analysis of Inclusive Education Based on African Folklore*, Paper presented at the International Expert Meeting and Symposium on Local Concepts and Beliefs of Disability in Different Cultures, Bonn.

<sup>65</sup>National Policy on Disability, 2004 ((Tanzania Mainland))

<sup>66</sup>CEPD (2013) 'Report on The Campaign Launch, on Improving Attitudes Towards Persons with disability in Ghana, <http://www.cepdghana.org/content/view/44/71/1/0/>, accessed: 10.5.2013.

<sup>67</sup>Downing, A. (2011), *supra*, n. 63, at p. 28., citing Slikker (2009).

with disability' general knowledge about their rights appears to be limited.<sup>68</sup> This also is the consequence of long periods of ignoring or overlooking disability in human rights discourse.

Despite all these problems, there appears to be a low level of "visibility" in the African human rights system, as the existing system has been underused in advancing disability rights.<sup>69</sup> Nevertheless, there are some developments in the area of disability rights among some States, since disability issues now form part and parcel of the several States' laws and policies.

General literature on disability in Tanzania confirms what has been the general observation that persons with disability have been excluded from the society and denied the enjoyment of human rights on equal footing with other members of the society. Despite some improvements in laws and policies with respect to matters related to persons with disability, such improvements do not represent the reality on the ground (marginalization of majority of persons with disability),<sup>70</sup> since persons with disability in Tanzania have continuously been excluded from the society and denied the enjoyment of human rights on equal footing with other citizens.<sup>71</sup> Issues like unemployment and poverty among persons with disability in Tanzania are prevalent, as most of the families with persons with disability live under poverty line and hardly meet the basic needs of life.<sup>72</sup> The exclusion of persons with disability is related to, inter alia, deep-rooted negative attitudes against persons with disability, and low literacy rates, mainly due to inaccessibility of education and skills training facilities, since for most persons with disability, it is difficult to attend school as most school buildings, teaching materials and facilities are not adapted to the special needs of persons with disability.<sup>73</sup>

---

<sup>68</sup>CEPD (2013), *supra*, n. 66

<sup>69</sup>Biegon, J. (2011), *supra*, n. 20, at p. 54.

<sup>70</sup>Feinstein, S. and D'Errico, N. C. (2010) *Tanzanian Women in their own Words: Stories of Disability and Illness*, Lanham, Boulder, New York, Toronto, Plymouth: Lexington Books.; LHRC and ZLSC (2007) 'Tanzania Human Rights Report 2006, LHRC; ZLSC, at p. 77; LHRC and ZLSC (2010) 'Tanzania Human Rights Report 2009, LHRC; ZLSC, at p. 185 - 191.

<sup>71</sup>LHRC and ZLSC (2007), *supra*, n. 70, at p. 77; LRCT (2008) 'Report on the Review of Legal Framework on the Rights of Persons with disability in Tanzania, at p. 123.

<sup>72</sup>LHRC and ZLSC (2013) 'Tanzania Human Rights Report 2012, LHRC; ZLSC, at p. 397.

<sup>73</sup>*Ibid*; LHRC and ZLSC (2012) 'Tanzania Human Rights Report 2011, LHRC; ZLSC, at p. 353; LHRC and ZLSC (2010), *supra*, n. 70, at p. 93., citing HakiElimu (2008); LRCT (2008), *supra*, n. 71, at p. 100..

Because of encountering barriers to the full enjoyment of human rights, which include the right to work, persons with disability are dependent on others for their basic needs and therefore unable to lead independent lives; and they are also vulnerable.<sup>74</sup>

### 1.3. Statement of the Problem

Over the years, Tanzania has adopted policies and laws aimed at addressing the problems facing persons with disability. There have of course been two separate systems of laws and policies operating in different parts of the United Republic. That is, Tanzania Mainland, and Tanzania Zanzibar. For Tanzania Mainland, the laws include: *the Disabled Persons (Employment) Act*,<sup>75</sup> *the Disabled Persons (Care and Maintenance) Act*,<sup>76</sup> and its Regulations, *the Vocational Education and Training Act*,<sup>77</sup> *the National Employment Promotion Service Act*,<sup>78</sup> *the Employment and Labour Relations Act*,<sup>79</sup> and *the Persons with Disabilities Act*,<sup>80</sup> which repealed the first two 1982 disability laws. Policies include: the National Policy on Disability,<sup>81</sup> the National Employment Policies of 1997 and 2008, and the National Strategy for Growth and Reduction of Poverty 2005 to 2010. Laws and policies with similar objectives have been adopted in Zanzibar,<sup>82</sup> as well as other African Countries.

Despite all these efforts, persons with disability in Tanzania still experience problems in accessing employment. While the simple and quick guess to this could be that some laws and policies are new, it is a fact that the new employment laws (which also protect persons with disability) have been in operation for a period of over eight years. In addition, the new disability legislation maintains some of the same means and institutions which were established in the past for purposes of, *inter alia*, enhancing persons with disability's employment opportunities, which means that the new disability legislation is not absolutely new. This does not deny the fact that the new disability legislation has introduced some

---

<sup>74</sup>LHRC and ZLSC (2010), *supra*, n. 70, at p. 89; LHRC and ZLSC (2012), *supra*, n. 73, at p. 353..

<sup>75</sup>*The Disabled Persons (Employment) Act* [Cap 184 R.E. 2002] (Tanzania Mainland, repealed)

<sup>76</sup>*The Disabled Persons (Care and Maintenance) Act* [Cap 183 R.E. 2002] (Tanzania Mainland, repealed)

<sup>77</sup>*The Vocational Education and Training Act, 1994* [Cap 82 R.E. 2002] (Tanzania Mainland) .

<sup>78</sup>*The National Employment Promotion Service Act* [Cap 243 R.E. 2002] (Tanzania Mainland) .

<sup>79</sup>*The Employment and Labour Relations Act, 2004* (Act No. 6 of 2004) (Tanzania Mainland)

<sup>80</sup>*The Persons with Disabilities Act, 2010* (Act No. 9 of 2010 (Tanzania Mainland))

<sup>81</sup>Disability Policy (Tanzania MInd), *supra*, n. 65.

<sup>82</sup>The laws include: *The Labour Act, 1997* (Act No. 3 of 1997) (Zanzibar, repealed) , which was repealed and replaced by *The Employment Act, 2005* (Act No. 11 of 2005) (Zanzibar) ; *The Labour Relations Act, 2005* (Act No. 1 of 2005) (Zanzibar) and *The Persons with Disabilities (Rights and Privileges) Act, 2006* (Act No.9 of 2006) (Zanzibar) . Policies include: *Zanzibar Youth Employment Action Plan, 2007* ; and *Zanzibar Employment Policy, 2009* ((Zanzibar))Job Programme for Zanzibar 2007.

new approaches, and the fact that there are challenges to these new approaches. The new approaches (human rights oriented) to disability have been described as “North-oriented”, whose implementation faces various challenges, which if not seriously addressed, may seriously affect the realization of persons with disability’s rights (including employment) in a developing nations.<sup>83</sup> Therefore, this problem warrants a study into the past and current approaches, and also an analysis of their future challenges and prospects.

#### **1.4. Significance of the Study**

“As long as people with disabilities are denied [their] freedoms, talking points like these remain absolutely indispensable.”<sup>84</sup> While this seems to be a general logical basis for undertaking this study; and while the statement of the problem may have given some hints as to the relevance of the study, still that may not enough to answer these questions: Why should this study be on laws, policies and institutional mechanisms? Why should it be on the right to work? Why should it be predominantly on Tanzania? Why at this time?

##### **1.4.1. The Study on Law and Policies**

In Tanzania, policies are executed through laws, and rights can only be effectively enforced if there are effective legislative stipulations, as well as their effective implementation. Therefore, employment and disability anti-discrimination policies and laws still play a fundamental part in shaping societal attitudes and responses to persons with disability, and it can therefore be a powerful tool in the breaking down of barriers to their inclusion and participation.<sup>85</sup>

##### **1.4.2. The Study on the Right to Work**

I have already indicated that work is significant for individual’s autonomy. Therefore, how disability laws or policies influence employers and persons with disability is crucial for the successful integration of persons with disability into the labour market, since they determine how employers are motivated to employ persons with disability, and how persons with disability to participate actively in the labour market and improve their skills

---

<sup>83</sup>Katsui, H. (2006), 'Human Rights of Disabled People in the South', in A. Teittinen (Ed.), *Vammaisuuden Tutkimus*, at p. 6..

<sup>84</sup>McRuer, R. (2006) *Crip Theory: Cultural Signs of Queerness and Disability*, New York, London: New York University Press, at p. 195.

<sup>85</sup>Lawson, A. (2005), 'Mind the Gap!: Normality, Difference and the Danger of Disablement Through Law', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, at p. 281.

and abilities that increase their employability.<sup>86</sup> Unfortunately, matters related to persons with disability's right to work have not received much attention in Tanzania's human rights research.

#### **1.4.3. The Study on Tanzania and Selected African States**

Tanzania and African States in general are categorized as developing States, where poverty and diseases have been the biggest obstacles towards realization of human rights generally. While there could be a possibility that the relationship between poverty and disability is different in contexts where poverty is a reality for the majority or large segments of the population,<sup>87</sup> significant percentage of the world's persons with disability live in developing nations, and only a fraction of them receive some kind of support; and in addition, to the poverty-disability nexus, persons with disability in developing nations are largely ignored both by the governments and international communities.<sup>88</sup> "The stereotypes [against persons with disability] often go unchallenged and the cycle of exclusion is simply reinforced."<sup>89</sup>

Despite the immense problems of persons with disability in developing nations, disability studies are said to be dominated by western educated academics and promoting generalisation (universal discourse), which runs the pervasive risk of being contextually and culturally inappropriate<sup>90</sup> (I have stated in my statement of the problem that the new approaches to disability in Tanzania have its origins in the West). Under the circumstances, the human rights approach has been criticized as a "globalization of policy making' with the use of western power while various modalities of interventions (development interventions) are criticised for their "cultural imperialism."<sup>91</sup> Despite the fact that the principles such as non-discrimination and equality are universally recognised, it is feared that human rights discourse is not as effective elsewhere as in the developing nations due

---

<sup>86</sup>Hogelund, J. (2003) *In Search of Effective Disability Policy: Comparing the Developments and Outcomes of Dutch and Danish Disability Policies*, Amsterdam: Amsterdam University Press, at p. 11.

<sup>87</sup>Eide, *et al.* (2011), 'Living Conditions Among People with Disabilities in Developing Countries', in A. H. Eide and B. Ingstad (Eds.), *Disability and Poverty: A Global Challenge*, at p. 56..

<sup>88</sup>Katsui, H. (2006), *supra*, n. 83, at p. 2.

<sup>89</sup>Quinn, G. (2010), *supra*, n. 45, at p. 37.

<sup>90</sup>Grech, S. (2009), *supra*, n. 41, at p. 771, 775 - 784.

<sup>91</sup>Katsui, H. (2008) 'Downside of the Human Rights-Based Approach to Disability in Development, Working Paper No. 2, [http://www.tokyofoundation.org/sylff/wp-content/uploads/2008/12/downside\\_of\\_hrba\\_katsui\\_hisayo.pdf](http://www.tokyofoundation.org/sylff/wp-content/uploads/2008/12/downside_of_hrba_katsui_hisayo.pdf), accessed: 17.1.2014.

to its origin in the West:<sup>92</sup> that is, the concept of human rights, as a matter of historical fact, is “an artifact of modern Western civilization”,<sup>93</sup> originated from a Western natural rights perspective.<sup>94</sup> Along this line of argument, in non-western cultural and political environments, substantive human rights issues have been said to be handled almost entirely in terms of duties designed for the protection of human dignity.<sup>95</sup>

To solve “the problem of human rights” in non-western environments, a cultural relative approach to human right had been suggested. Thus, it had been argued that human rights are culturally relative, and the relativity is the relativity is found in the substance of lists of human rights, in the interpretation of individual rights, and in the form in which particular rights are implemented.<sup>96</sup> According to Donnelly, the international recognition of the UDHR and other international human rights instruments supports an approach that views human rights as prima facie universal, but which recognizes culture as a limited source of exceptions and principles of interpretation.<sup>97</sup> Universal human rights therefore leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity.<sup>98</sup> However, Donnelly’s relative approach to human rights had been criticized for being “trapped in unquestioning acceptance of the Western concept in the name of modernization and images of a global (Western) village”.<sup>99</sup>

Donnelly recently wrote a paper in which he held onto his view that human rights are Western, but at the same time he argued that all cultures should adopt the Western concept. He then posited a framework within which there would be a form of ‘weak relativism’ which would recognize a comprehensive set of prima facie universal human rights and allow only relatively rare and strictly limited local variations and exceptions. This sounds fine except that Donnelly does not appear willing to give up a priori his Western cultural bias which leads him to universalize his own narrow definition of human rights. In other words, we are being told cultural

---

<sup>92</sup>*Ibid*, Katsui, H. (2008), *Downside of the Human Rights-Based Approach to Disability in Development*, (Working Paper No. 2) Helsinki: Institute of Development Studies, Helsinki University [http://www.tokyofoundation.org/sylff/wp-content/uploads/2008/12/downside\\_of\\_hrba\\_katsui\\_hisayo.pdf](http://www.tokyofoundation.org/sylff/wp-content/uploads/2008/12/downside_of_hrba_katsui_hisayo.pdf), Accessed 17.1.2014, p. 8, citing Kennedy (2004) and Uvin (2004).

<sup>93</sup>Donnelly, J. (1982) 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights, *The American Political Science Review*, Vol. 76, No. 2, at p. 303.

<sup>94</sup>Cobbah, J. A. M. (1987) 'African Values and Human Rights Debate: An African Perspective, *Human Rights Quarterly*, Vol. 9, No. 3, at p. 311.

<sup>95</sup>Donnelly, J. (1982), *supra*, n. 93, at p. 306

<sup>96</sup>Donnelly, J. (1984) 'Cultural Relativism and Universal Human Rights, *Human Rights Quarterly*, Vol. 6, No. 4, at p. 401.

<sup>97</sup>*Ibid*, at p. 402.

<sup>98</sup>Donnelly, J. (2007) 'The Relative Universality of Human Rights, *Human Rights Quarterly*, Vol. 29, No. 2, at p. 281.

<sup>99</sup>Cobbah, J. A. M. (1987), *supra*, n. 94, at p. 329.

relativism is all right, but it should be carried out only for the benefit of the non-Western cultures.<sup>100</sup>

In addition to the above criticism, Cobbah proposed that the debate should be on whether these cultural values provide human beings with human dignity, rather than assuming an inevitable progression of non-Westerners toward Western lifestyles.<sup>101</sup> Nevertheless, it had earlier been argued that to accept the fact that the concept of Human Rights is not universal does not mean that it should not become so, and that we should not renounce declaring or enforcing Human Rights.<sup>102</sup> In other words, the notion that the “western” concept of human rights is “completely” irrelevant to non-western jurisdictions cannot not be justified.<sup>103</sup>

One thing which we should warn ourselves with respect the general criticism of human rights as a “western concept” is that this view may “over emphasize” the traditional life style in the legal and political systems of non-western States (for purpose of this work, African States). Furthermore, modern African states are very different from pre-colonial African states. The legal and political system now in place in various African States (including those related to the protection and enforcement of human rights) have been very much influenced either by the colonial pasts, or by recent developments in the regional and international human rights systems. Overemphasizing on “strong” cultural relativism approach to human rights may also appear to ignore the fact that even despite the existence of cultural values which place emphasis on human dignity; some cultural practices have been the major source of discrimination of person with disability. Thus, it has been argued that the major factors that have shaped the African concept of human rights have been economics and politics.<sup>104</sup> But this should not be taken to be a total rejection of the fact that “Substantive rights will often get their complexion from the local cultural environment within which they have to be given concrete, practical meaning”.<sup>105</sup> The focus is therefore is not on what rights to be realised, but how the rights should be realized.

It has been argued, that the approach to disability depends on where the people live, considering the prevailing circumstances (e.g. resources and political settings), since the

---

<sup>100</sup>*Ibid*, at p. 329 - 330.

<sup>101</sup>*Ibid*, at p. 331.

<sup>102</sup>Panikkar, R. (1982) 'Is the Notion of Human Rights a Western Concept?', *Diogenes*, Vol. 30, at p. 84, 100.

<sup>103</sup>Donnelly, J. (1982), *supra*, n. 93, at p. 313.

<sup>104</sup>EI-Obaid, A. E. and Atua, A. K. (1996) 'Human Rights in Africa: A New Perspective on Linking the Past to the Present', *Mcgill Law Journal*, Vol. 41, No. 4, at p. 852.

<sup>105</sup> Ncube (1998) as cited in Lord, J. E. and Stein, M. A. (2013), 'Prospects and practices for CRPD implementation in Africa', in *African Disability Rights Yearbook*, at p. 99.



problems of persons with disability in a particular community are largely contingent on broader social-cultural, economic and political environment. For example, “[t]he assertion that [persons with disability] are disproportionately unemployed, must be viewed in the midst of mass unemployment and, in turn, poses challenges for the possibility of enhancing employment for disabled people in isolation from broader socio-economic problems.”<sup>106</sup> In addition, persons with disability in developing countries different and complex barriers, necessitating the need of a long time for intervention to help persons with disability.<sup>107</sup> But this does not exonerate the states from fulfillment of the core treaty obligations, and the question might be on the nature and extent of action which may be considered as appropriate of the respective States. These arguments necessitate a study that is focused on disability rights in a developing nation.

Furthermore, is important to note that while there exist studies which have criticised “old” approaches like employment quotas, there also exist studies according to which anti-discrimination legislation which became effective in certain industrialized countries some years ago have not been particularly effective in improving the employment situation of persons with disability.<sup>108</sup> Tanzania’s new disability legislation includes both “old” and “new” approaches. A more specific study is therefore essential for the purposes of examining the feasibility and desirability of applying these approaches in Tanzania.

#### **1.4.4. Disability Rights Promotion**

I have stated in the background (1.2) that this study leans towards human rights approach to disability. It is generally acceptable that previous disability research was more based on individual approaches, as it had failed to recognise that disability is not simply a medical or welfare issue alone.<sup>109</sup> Taking this concern into account, this study adds to the little existing scholarly literature on disability rights in Tanzania. As a comprehensive account of disability and employment laws, policies and institutional mechanisms, this study has the potential to enlighten all those concerned on the real issues of concern of persons with disability in the area of employment, in Tanzania, and in that case may encourage further research of best practices of application of non-individual model of disability in laws and policies generally in developing nations.

---

<sup>106</sup>Grech, S. (2009), *supra*, n. 41, at p. 775.

<sup>107</sup>Katsui, H. (2008), *supra*, n. 91, at p. 14.

<sup>108</sup>O'Reilly, A. (2007), *supra*, n. 29, at p. 107.

<sup>109</sup>Oliver, M. (2009) *Understanding Disability From Theory to Practice*, Hampshire: Palgrave Macmillan, at p. 108.; Goodley, D. (2011), *supra*, n. 34, at p. 22.

I firmly believe that in order to reach a point where disability is given adequate attention in human rights discourses, efforts must be directed to conscious raising which plays an important role in promotion of human rights. Therefore, this study, although not focused on other broader issues of concern for persons with disability, shall contribute to human rights literature, and in that way promote human rights course.

### **1.5. Study Objectives**

The study of disability and employment laws, policies and institutional mechanisms has the following aims:

- (1) To determine the strengths, weaknesses and potentials of the disability laws and policies in the area of employment, and thereby weighing possible ways of their improvement.
- (2) To contribute to the development of laws and policies aiming at enhancing persons with disability' access to employment, and thereby combating disadvantage and marginalization of persons with disability in Tanzania generally.
- (3) To provide a reference material on understanding of disability laws and policies in the area of employment in Tanzania, and thereby contribute to the existing knowledge of disability laws and policies in developing nations.

### **1.6. Research Questions**

The following research questions address the broader research issues:

- (1) What have been the factors behind recent legislative and policy approaches towards disability issues in the area of employment?
- (2) How do laws and policies address the fundamental challenges affecting persons with disabilities access to employment opportunities? Do they have impact on real experiences of persons with disability?
- (3) Are the institutional mechanisms better placed to implement the existing laws and policies?
- (4) What are the potentials and challenges of human rights approach to disability in the area of employment in Tanzania?

- (5) What has been the experience (progress and challenges) in the area of disability and employment in other African States?

### 1.7. Language Use

Language is important in disability issues. This is due to the fact that improper of terminology may injure the feelings of the intended beneficiaries of research, considering the fact that among various communities, there exist numerous expressions which could carry derogatory expression of disability or persons with disability. Among English speaking societies, the language that is apparently generally considered suitable to describe people with impairments is different from what it was in the past. This has been a result of partly the activities of the organizations which work to promote the interests of persons with disability, and partly the increased public sensitivity to language that might perpetuate stereotypes and prejudices, just the same way societies are working to avoid previously established sexist or racist uses of language.<sup>110</sup> The “people first” language in which the disability is being assigned a secondary role has gained support.<sup>111</sup> The “people first” language is said to humanize persons with disability by putting the **personality** around us.<sup>112</sup> This means that the role of a patient or sufferer, or such terms as “disabled” which tend to assume that someone is “less abled”, should not be ascribed to the person with the disability because they connote stigma.<sup>113</sup> “No person with a disability is automatically ‘suffering’ or ‘afflicted’ except in specific situations where they do indeed ‘hurt’ or ‘in pain’ or feel victimized”.<sup>114</sup> It should be noted however, there has also been support of “disability first” language (disabled persons) because, when used as a social construct, the expression does not imply defectiveness of the person, but oppression of the person, and therefore, “[w]e would not say ‘a person with oppression’ but rather ‘an oppressed (i.e. disabled) person.’”<sup>115</sup> Supporters of the “disability first” language therefore argue that the “disability first” language is a political statement arising from the understanding that disability is ‘done’ to people rather than being something that they ‘have’, and criticize

---

<sup>110</sup> Butterfield, J. (2013) *Oxford A-Z of English Usage*, Oxford: Oxford University Press, at p. 50..

<sup>111</sup> *Ibid*; Olkin, R. (2002) *Could You Hold the Door for Me? Including Disability in Diversity*, at p. 135.

<sup>112</sup> Swain, J, et al. (2003) *Controversial Issues in Disabling Society*, Berkshire, New York: Open University Press, at p. 13.

<sup>113</sup> Butterfield, J. (2013), *supra*, n. 110, at p. 50; Olkin, R. (2002), *supra*, n. 111, at p. 135; Holman E. G. (2005) *Role-Taking vs. Cultural Identity*, at p. 2, [http://digitalcommons.iwu.edu/socanth\\_honproj/7](http://digitalcommons.iwu.edu/socanth_honproj/7), accessed: 5.12.2013.

<sup>114</sup> Zola, I. K. (1993) 'Self, Identity and the Naming Question: Reflections on the Language of Disability, *Social Science & Medicine*, Vol. 36, No. 2, at p. 170.

<sup>115</sup> Olkin, R. (2002), *supra*, n. 111, at p. 135.

“people first” language for *inter alia*, blurring the distinction between impairment and disability, and denying the political nature of disability.<sup>116</sup> From the reviewed literature, the expressions “disabled people”, “persons with disability” and “persons with disabilities” are common, and this is seen in various works.<sup>117</sup>

In Tanzania, where English is not the first language, the native language (Kiswahili), like some other African languages, does not strictly distinguish between impairment and disability.<sup>118</sup> From English-printed official documents (laws and policies), the trend seems to be shifting, abandoning the use of “disabled people”. The current disability legislation is called *The Persons with Disabilities Act*. The “people first” language also appears in the National Policy on Disability.

Since the use of plural form “disabilities” (persons with disabilities) has been criticized as perpetuating the conceptual confusion between impairment and disability, and the use of “persons with disability” is preferred,<sup>119</sup> I adopt the expression “Persons with Disability” in this study, except where the content requires otherwise for a particular purpose, since it is people first, who then live with disability.<sup>120</sup>

## **1.8. Methodology and Design**

Human rights scholarship has been regularly criticized for its lack of attention to methodology, where wishful thinking and sloppy legal analysis have been said to be too common in international human rights law.<sup>121</sup> The lack of methodological rigor in human

---

<sup>116</sup>Swain, J, et al. (2003), *supra*, n. 112, at p. 13, citing Oliver and Barnes (1998).

<sup>117</sup> See for example: Degener, T. (1995), 'Disabled Persons and Human Rights: The Legal Framework', in T. Degener and Y. Koster-Dreese (Eds.), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, at p. 9 - 39.; Clements, L. and Read, J. (2003) *Disabled People and European Human Rights: A Review of the Implications of the 1998 Human Rights Act for Disabled Children and Adults in the UK*, Bristol: The Policy Press.; Traustadóttir, R. (2009), 'Disability Studies, the Social Model and Legal Developments', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, at p. 3 - 16.; van Reenen, T. and Combrinck, H. (2011) 'The UN Convention on the Rights of Persons With Disabilities In Africa: Progress After 5 Years', *SUR - International Journal on Human Rights*, Vol. 8, No. 14, at p. 131 - 165.; Tororei, S. K. (2009), *supra*, n. 40; UN Enable (2012) *Realising the Rights of Persons with disability*, <http://www.un.org/disabilities/default.asp?id=215>, accessed: 5.1.2012.

<sup>118</sup>Devlieger, P. J. (2010), *supra*, n. 23, at p. 17.

<sup>119</sup>Kayess, R. and French, P. (2008) 'Out of Darkness into Light?: Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review*, Vol. 8, No. 1, at p. 21.

<sup>120</sup>Nzagi, I. (2009) 'Securing the Rights of People with Albinism in Tanzania Mainland: The Fight Against Social Exclusion, A Research Paper presented in partial fulfilment of the requirements for obtaining the degree of Masters Of Arts In Development Studies, at p. 10.

<sup>121</sup>Coomans, F, et al. (2010) 'Methods of Human Rights Research', *Human Rights Quarterly*, Vol. 32, No. 1, at p. 181., citing Crook (2003).

rights scholarship is said to have some undesirable consequences, such as undermining the credibility and the validity of the findings described in human rights scholarship.<sup>122</sup>

This part outlines the methodological approach of the study, which is of essence since the methodology addresses questions related to how the information has been obtained, how the information has been organized, and how the results are to be interpreted. Methodology therefore stands for the “approach”, and is crucial for any branch of scholarship because an unreliable method produces unreliable results.<sup>123</sup>

### **1.8.1. Inter-Disciplinary, Comparative and Qualitative Study**

The study is inter-disciplinary, of a comparative design, and adopts qualitative methods. I use the expression “inter-disciplinary” generally to refer to studies where different aspects from different academic disciplines are involved. Disability rights draw a lot from disability studies and social sciences, and the concepts from these fields have been incorporated in the CRPD and modern disability laws and policies. Therefore, this study is not limited to doctrinal legal research. The combination of methods is supported by Coonan’s assessment of “methodological deficit in human rights scholarship”:-

If there is, in fact, a methodological deficit in human rights scholarship, it appears to affect legal research more than research performed by social scientists. This distinction may be caused by the different approaches of these two disciplines. Lawyers are system builders; they rely on logic to determine whether arguments are compatible with an existing normative framework. Human rights may be, but are not necessarily, part of this normative setting. Legal scholarship, therefore, has little to say regarding the impact of legal systems on the ground. It makes implicit assumptions in this regard and runs the risk of remaining disconnected from reality. Social scientists, on the other hand, attempt to understand and explain social phenomena. Their findings can be empirically challenged and verified. However, they risk ignoring or misinterpreting applicable legal standards.<sup>124</sup>

This study is also comparative, as it compares various laws and policies of Tanzania and selected African countries. However, this is not a “one – to one” comparative. Not every aspect discussed in this study is subject to comparison. The main focus is on Tanzania.

The nature of this study makes it almost imperative to opt for qualitative methods. This work has been grounded in the process of selecting and weighing materials, taking into

---

<sup>122</sup>*Ibid*, at p. 174.

<sup>123</sup>Coomans, F, Grunfeld, F. and Kamminga, M. T. (eds.) (2009) *Methods of Human Rights Research*, at p. 14 - 15.

<sup>124</sup>Coomans, F, *et al.* (2010), *supra*, n. 121, at p. 182.

account of hierarchy and authority as well as understanding social context and interpretation, and the identification of relevant legal materials can be seen as analogous to a social science literature review.<sup>125</sup>

#### **1.8.1.1. Qualitative Approach to Human Rights Research**

It has been observed that qualitative research and elite-based interviews are important instruments in addressing human rights issues.<sup>126</sup> Dobinson and Johns (2007) state:-

Problem, policy and law reform research often includes a consideration of social factors involved and/or the social impact of current law and practice... Such research is often referred to as socio-legal research. As a generic category, socio-legal research encompasses a huge range of different types of research... As such, a more general approach is taken to so-called non-doctrinal research, which encompasses both legal and socio-legal studies. Regardless of whether the research done is legal or socio-legal, or a combination of the two, various qualitative approaches should be taken. The researcher's aim should be to reach certain conclusions (or inferences) based on what is found. In this sense, legal research is no different to all other forms of academic or scholarly research.<sup>127</sup>

Since this study seeks to establish matters related to efficiency of laws and policies and the related institutional mechanisms with respect to persons with disability's right to work, it follows that a good legal or human right doctrines will not only have to be tested against other "social" purposes of the said laws or policies, but also compared with their institutional mechanisms and other existing systems. This complex nature of approaches call for more liberal approaches to research, which is a characteristic of qualitative research.<sup>128</sup>

#### **1.8.1.2. Inter-Disciplinary Nature of Disability Rights Study**

Generally, it is through specializations or disciplines that we approach issues. Disciplines differ from the set of concepts used, the methods used, object (the aspect of reality or experience that is studied), problem definition, and goals; and these feature of an academic

---

<sup>125</sup>Dibinson, I. and Johns, F. (2007), 'Qualitative legal Research', in M. McConville and W. Hong Chui (Eds.), *Research Methods for Law*, at p. 41.

<sup>126</sup>Coomans, F, *et al. (eds.)* (2009), *supra*, n. 123, at p. 100.

<sup>127</sup>Dibinson, I. and Johns, F. (2007), *supra*, n. 125, at p. 20.

<sup>128</sup> For a detailed information of the qualitative research, its advantages, disadvantages, and the alternatives, See: Flick, U. (2011a) *Introducing Research Methodology: A beginner's Guide to Doing a Research Project*, London: SAGE.; Flick, U. (2011b) *Introduction to Qualitative Research*, 4th (edn), London: SAGE.

discipline “become apparent when [asking] how the concept of a discipline is related to the concept of scientific research”<sup>129</sup>

Some disciplines are better placed to deal with certain problems, compared to others. Some disciplines, like law, are not meant to determine causes of social problems, although in providing solutions for them, understanding of social behaviours may be relevant. Disability or employment law may set rules for ensuring equality of persons with disabilities in a work place, but that may not work, if the law is designed in such a way that it ignores social negative attitude towards persons with disability. That is, while it is not for the lawyers to ascertain causes of discrimination: e.g. social attitudes, the quality of disability rights laws will be enhanced if the law provides for proper mechanisms for combatting social attitudes promote human rights violations against persons with disability. This example does not ignore the fact that an attempt to understand the concept of inter-disciplinarity is complicated by a considerable difference of opinion about origins of discipline,<sup>130</sup> but it is not the purpose of this work to trace the origins of disciplines. Most important is the fact that “[a]pproaching research questions from the perspective of more than one discipline simultaneously, and thereby bridging disciplines, appears to be [a matured phenomenon].”<sup>131</sup>

It is because of the relationship between disability social studies and disability rights law that I have opted for the inter-disciplinary study which is not limited to legal texts alone. In this sense, I use the “broad” sense of “interdisciplinarity” to refer to types of research that involves another discipline in some way, instead of a strict construction of the term, which would refer to a research that achieve genuine interaction between combined disciplines. In particular, the inter-disciplinary nature of my approach is between the following:-

[T]he first type of interdisciplinary research... non-legal discipline is used merely heuristically, and possibly arbitrarily. The perspective of the research as such remains firmly within legal framework, and the other discipline has no argumentative force of its own and is not necessary to answer the research question. It is, moreover, the legal discipline itself that provides the problem definition and research question, but in answering it, the researcher also looks at other disciplines for material. In the second type of interdisciplinary legal research, the other discipline is not just used additionally, but also

---

<sup>129</sup>. van Klink, B. and Taekema, S, 'Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (Eds.), *Law and Method: Interdisciplinary Research into Law*, at p. 8 - 9.

<sup>130</sup>Klein, T. J. (1990) *Interdisciplinarity History, Theory and Practice*, Detroit: Wayne State University Press, at p. 19.

<sup>131</sup>Robertson, D. W. et al (2003) 'Interdisciplinary Research: Putting the Methods under the Microscope', *BMC Medical Research Methodology*, <http://www.biomedcentral.com/1471-2288/3/20>, accessed: 19.4.2012.

constructively. Again, it is the legal researcher that provides for the problem definition and the research question – the legal perspective is dominant - but in order to be able to answer the research question, the input of another discipline is necessary...<sup>132</sup>

My approach also finds support from the fact that inter-disciplinarity is an indispensable element of human rights research where there is a need not only to clarify the legal framework, but also to assess the situation in the field;<sup>133</sup> and this means that there are more ways of addressing human rights issues, than just to focus on pure legal wording, legal obligations, and court cases.<sup>134</sup> While legislation of human rights is often the best way to implement them, it may not always be sufficient, especially if the legislation provides formal institutionalism without effective protection,<sup>135</sup> or the vice versa.

The study and the practice of human rights are said to have been dominated by lawyers, and this is believed to be a danger on the ground that the excessive attention to human rights law distorts the understanding of human rights, because law alone do not exhaust the human-rights field. The other social sciences are therefore essential to our application of human rights, and this makes human rights “an interdisciplinary concept per excellence.”<sup>136</sup>

Human rights law is also said to bridge the gap between the normative concept of human rights and social science: law is normative in that it prescribes rights and duties, and social science studies why and how human-rights law is made, and why and how it is or is not implemented. Along the lines of this thinking, social science is believed to have substantive interests and research methods that are quite different from those of legal studies, and which can illustrate the practice of human rights because, while lawyers make ‘judgments’ as to whether human rights have been respected or violated, social scientists seek to explain why human rights have been respected or violated.<sup>137</sup>

The question of ‘protection of persons with disability’s rights to employment’ joins issues pertaining to legal protection in terms of the stipulation of the law – the legal doctrine, on

---

<sup>132</sup> Adams, M. (2011), 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law', in M. van Hoecke (Ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, at p. 238 - 239.

<sup>133</sup> Coomans, F, *et al. (eds.)* (2009), *supra*, n. 123, at p. 17.

<sup>134</sup> *Ibid.*

<sup>135</sup> Freeman, M. (2011), *supra*, n. 19, at p. 90. citing Nickel (2007) and Pogge (2005).

<sup>136</sup> Freeman, M. (2009) *Human Rights*, Cambridge: Polity Press, at p. 12.

<sup>137</sup> Freeman, M. (2011), *supra*, n. 19, at p. 91.



one hand; and the institutions of implementations - the administrative structures, and the society within which the rights are operationalized, on the other hand.

Disability studies has developed in response to the increasing interest in the general area of disability and its perceived “problem” in today’s societies. What seems to be new is how disability is being studied and the approach that is critical of traditional ways of understanding disability.<sup>138</sup> From the new understanding of disability, the social, legal, economic, political and environmental conditions that act as barriers to the full exercise of rights by persons with disability need to be identified and overcome.<sup>139</sup> In the larger academic landscape, disability studies belong to a group of new interdisciplinary field of study, such as gender, race and other similar disciplines. What these interdisciplinary fields have in common is that they all emerged from social movement aimed at ending oppression, marginalisation and social exclusion.<sup>140</sup> This explains the inter-disciplinary nature of disability studies.

Despite the inter-disciplinary nature of this study, I side with those who argue that the quality interdisciplinary research is rare because few researchers are fully qualified in more than one discipline, and therefore researchers are advised to work within their own disciplines and not to moonlight in other domains, although an attempt should be made by to make the results of the research accessible to readers outside their field of specialization; and that is important for researchers to make an effort to comprehend the methods of research of those other disciplines.<sup>141</sup> It is for this reason that owing to my legal training background, the study may seem to be leaning towards legal approaches.

#### **1.8.1.3. Weighing the Limits and Benefits of a Comparative Study**

The study compares laws and policies of Tanzania, and selected African Countries to wit: Ghana, Kenya, South Africa, Uganda and Zambia. I have selected these African States in consideration of not only legal development in the area of focus of this study, but also the availability of resources and language issues. It is for this reason that all selected countries are English Speaking. In addition, since most of these rights are stated in legal instruments, another reason for selection of these countries is the similarities in legal

---

<sup>138</sup>Traustadóttir, R. (2009), *supra*, n. 117, at p. 4 - 5..

<sup>139</sup>UN (2010), *supra*, n. 28, at p. 8.

<sup>140</sup>Traustadóttir, R. (2009), *supra*, n. 117, at p. 6.

<sup>141</sup>Coomans, F, *et al. (eds.)* (2009), *supra*, n. 123, at p. 17.

systems of Kenya, Tanzania, Uganda Zambia and Ghana; and also the similarities between South Africa and Tanzania's employment and labour relations law.

Comparative study compares things with a view to discovering something about one or all of the things being compared, and it is essential to basic scientific and philosophic inquiry that is said to have been done for a long time.<sup>142</sup> Nevertheless, comparative study is more than simply looking at the way in which something is different or similar: it involves, for example, thinking about different cultures in order to conceptualise the particular culture in which people do that which is morally right.<sup>143</sup> In this way, comparisons are useful for developing new insights, advancing the knowledge base by testing theory against practice, promoting understanding of how processes operate, heightening awareness of cultural diversity, and learning from exchange of information and experience,<sup>144</sup> especially where experience is sought from States which have made progress before.

Despite its benefits, the risks of a comparative study must be acknowledged, in particular the temptation to seek solutions to national problems in the experience of other countries in a way that ignores the fact that circumstances may theoretically be exportable, but their social, political, and economic environment may not.<sup>145</sup> One should not misuse the comparative method, for example, by transplanting all ideas, rules or institutions into a fundamentally different culture or context and thereby risking rejection.<sup>146</sup> The socio-political environment of compared jurisdictions must be accounted for, as ideas do not have an independent existence outside their own local setting.<sup>147</sup> Therefore, comparatives are beneficial where they help to identify the factors that are specific to some systems, as distinct from being common to all such systems, and thereby providing ideas about what is possible (in particular environments) and at the same time providing the understanding that must precede what would have otherwise been a prescription.<sup>148</sup>

---

<sup>142</sup>Doyle, B. J. (1993) *Disability Discrimination and Equal Opportunities: A Comparative Study of Legal Models Addressing the Employment Rights of Disabled Persons, with Particular Reference to Britain and the United States*, PhD Thesis, University of Oxford, at p. 7.

<sup>143</sup>Alsaif, A. S. (2008), *supra*, n. 1, at p. 8, citing Zweigert and Katz (1998).

<sup>144</sup>Hantrais, L. (2009) *International Comparative Research: Theory, Methods and Practice*, Hampshire: Palgrave Macmillan, at p. 10.

<sup>145</sup>Doyle, B. J. (1993), *supra*, n. 142, at p. 7.

<sup>146</sup>*Ibid.*

<sup>147</sup>*Ibid.*

<sup>148</sup> See an abstract in Klein, R. (1991) 'Risks and Benefits of Comparative Studies: Notes from Another Shore', *The Milbank Quarterly*, Vol. 69, No. 2, at p. 275 - 291.

The above stated benefits of comparative study mean that the need for such a study is made even more urgent in the area of disability rights, considering the recent development in the area. Despite the fact that Tanzania had its first disability laws in 1982, the laws were outdated (as elaborated in the next chapter). Since 2000s, Tanzania has been improving its laws and policies in the area of disability and employment, where some other States appear to have made progress before. Under the circumstances, comparison is expected to promote better comprehension and administration, clarification of fundamental interests and social needs they protect,<sup>149</sup> and at the same time provide suggestions for future developments and provide warnings of possible difficulties.<sup>150</sup>

Although I have chosen to make comparison between Tanzania and selected African States, this work contain some reference from outside Africa, because some of the means used in enhancing persons with disability's employment opportunity do not have their origin in Africa. We are advised that where the legal doctrine plays a major role, the incentive to see the way it has developed elsewhere is reinforced in order to understand how similar legal provisions may have been practiced, and how effective they have been, not simply with respect to the technical doctrinal problems but also with respect to the social and economic problems that lie behind them, or to see what other factors have played a part in deciding outcomes.<sup>151</sup>

I have preferred to select just a few countries for comparison due to the fact that more countries would require more time; and could have resulted into too general comparisons, and therefore make the purpose of comparison less meaningless. Given the time, resources and language barriers (for case of French and Portuguese speaking African State), it would be impossible for a single researcher to compare all African countries.<sup>152</sup> As already stated, not every aspect of laws, policies and institutional mechanisms is subject to comparison, for this is not a strict "one to one" comparative study.

### **1.8.2. Multiple Data Collection Methods**

The inter-disciplinary nature of this study required a combination of data collection methods, which means that this work does more than just picking up the legal sources.

---

<sup>149</sup>Alsaif, A. S. (2008), *supra*, n. 1, at p. 8.citing Zweigert and Katz (1998).

<sup>150</sup>Wilson, G. (2007), 'Comparative Legal Scholarship', in M. McConville and W. Hong Chui (Eds.), *Research Methods for Law*, at p. 87.

<sup>151</sup>*Ibid.*

<sup>152</sup> For more information on the types of comparisons (Countries Comparisons) see Landman, T. (2008) *Issues and Methods in Comparative Politics*, 3rd (edn), London, New York: Routledge.

First, for ascertaining the legal position on persons with disability's right to work, a doctrinal legal research was necessary. In addition, other research methods "common" to social sciences were applied in order to answer questions which required information beyond the legal norm.

The reason and justifications for opting for a combination of research methods is mainly the "shortcomings" of the strict adherence to traditional (doctrinal) legal research, which inquires what the law is on a particular issue, by analyzing the legal doctrine and how it has been developed and applied.<sup>153</sup> This kind of research relies heavily on logic to determine whether arguments are compatible with an existing normative framework, whereas human rights may not necessarily be part of the normative setting.<sup>154</sup> Since the efficacy of human rights legislation depends on considerations beyond its mere existence,<sup>155</sup> traditional legal research offers little regarding the impact of rights legislation on the ground and runs the risk of remaining disconnected from reality,<sup>156</sup> because it is conducted without due consideration of the social, economic and political significance of the legal process.<sup>157</sup>

An argument in favour of the combination of research methods is that they produce more reliable results,<sup>158</sup> as they address broader aspects of research questions, and thereby increase the validity of research by using different methods to cross-check findings.<sup>159</sup> The application of a variety of methods in addressing research problems gives insights capable of producing a more integrated picture of a phenomenon, and reduces (if not eliminating) the risks of drawing erroneous conclusions.<sup>160</sup>

The foregoing reasons mean that there is no a single preferred method for carrying out research in the field of human rights,<sup>161</sup> and others have noted that the practical realities of a

---

<sup>153</sup>Singhal, A. K. and Malik, I. (2012) 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits, *International Research Journal*, Vol. 2, No. 7, at p. 252.

<sup>154</sup>Coomans, F, *et al.* (2010), *supra*, n. 121, at p. 182., citing Smits (2009).

<sup>155</sup>Stein, M. A. and Stein, J. S. P. (2007) 'Beyond Disability Civil Rights, *Hastings Law Journal*, Vol. 58, at p. 1204 - 1240.

<sup>156</sup>Coomans, F, *et al.* (2010), *supra*, n. 121, at p. 182.

<sup>157</sup>Singhal, A. K. and Malik, I. (2012), *supra*, n. 153, at p. 153.

<sup>158</sup>Coomans, F, *et al.* (2010), *supra*, n. 121, at p. 185.

<sup>159</sup>Hantrais, L. (2009), *supra*, n. 144, at p. 109, citing Read and Marsh (2002).

<sup>160</sup>*Ibid*, citing Brannen (1992).

<sup>161</sup>Coomans, F, *et al.* (2010), *supra*, n. 121, at p. 185.

research process do not always adhere to the strict standards of research, although such standards are important.<sup>162</sup> It has been stated that:-

Research methods might usefully be thought of as embodying the “laws” of research process. Presumptions about the mechanics of data collections and analysis are, in important ways, the rules and Regulations of the social science... And just as early sociological scholars exposed the gap between law in the books and law in action, so we might, as a scholarly community, consider the gap that inevitably exists between research methods and realities of research... Although they are normatively important, we would not expect the prescriptions of research methods found in textbooks to be perfectly mired in the research process.<sup>163</sup>

The foregoing statement is not without limits. Despite the messiness of the research,<sup>164</sup> the combination of methods which seem to be more “pragmatic” does not mean that the basic procedure of a systematic inquiry should be ignored. It has been stated that:-

[T]he realities of research on the grounds are not necessarily a reflection of what research method books describe. [However,] methods of “scientific” inquiry should [not] be ignored. [R]esearchers need to be ready to solve complex issues as may arise during research process. [M]aking pragmatic decisions as to research methods are important [only] in order to avoid frustrations of rigid adherence to methods along the paradigms of disciplines.<sup>165</sup>

Perhaps the most important thing while combining methods of data collection is to guard against the risk of ignoring or misinterpreting applicable legal instruments protecting the rights.<sup>166</sup> Therefore, my combination of methods does not mean a compromise on the legal nature of the rights as they appear in the respective instruments (international and domestic).

Most of the information for this study was obtained through library research, and some through interviews. Briefly, I elaborate on these methods:

---

<sup>162</sup> Schmidt, P and Halliday, S. (2009) “Introduction: Beyond Methods – Law and Society in Action” in Halliday, S and Schmidt, P. *Conducting Law and Society Research: Reflections on Methods and Practices*, New York/Melbourne/Madrid/Cape Town/Singapore/Sao Paulo/Delhi: Cambridge University Press, p.2

<sup>163</sup> *Ibid.*

<sup>164</sup> Kritzer, H. M (2009) ‘Conclusion: Research is a Messy Business – An Archeology of the Craft of Sociological Research’, in Schmidt, P and Halliday, S. (Eds.) *Conducting Law and Society Research: Reflections on Methods and Practices*, New York/Melbourne/Madrid/Cape Town/Singapore/Sao Paulo/Delhi: Cambridge University Press, p. 264.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*, at p. 182.

### 1.8.2.1. Library Research

Library research is already an established form of research, as a researcher can use already existing materials: e.g. documents resulting from an institutional process, and which can be analysed depending on research question.<sup>167</sup>

While conducting the research, I was aware of some criticisms against the library research, most of them pointing on the unreliability of secondary information. To avoid the pitfalls of secondary data, we are advised to consider their reliability, suitability and adequacy.<sup>168</sup> On the other hand, to lawyers, legal texts such as statutory law or courts decisions forming case law precedents (especially in common law traditions) are treated as “primary sources”. Under the circumstances, there should not be a more perfect place in modern times to find the law than from the documentary sources. In addition to pure legal sources, I have used numerous scholarly works, reports governmental and non-governmental organisations, which not only provided information on theoretical aspects relevant to the study, but were also an easy way of ascertaining developments in those areas which I could not have been present physically.

In finding the position of the law in the area of disability and employment, the first place was the legislative sources. This was not a difficult task, considering the fact that most of the statutory sources could be accessed directly from relevant institutions’ internet sources. The difficult task was to find some information on judicial information in the area, because the system of law reporting in Tanzania is not up-to date. I therefore had to do a manual work perusing through series of law reports, which included the Appeal for Eastern Africa Law Reports (E.A.L.R) (1934 – 1956), East African Law Reports, (E.A.) (1957 – 1975), High Court Digests (1967 – 1972), Law Reports of Tanzania (L.R.T) (1973 – 1979), and Tanzania Law Reports (TLR) (1980-2006). Finding a case from a law report was made easier by the fact that some reports have been compiled in user-friendly computer programs, and also the fact that the hard copies do contain indexes which make it possible to locate a case according to its respective subject. Despite the fact that the first disability legislation (with respect to employment) came in 1982, information from the old case law was necessary in order to ascertain the judicial approach in the period before 1982.

---

<sup>167</sup>Flick, U. (2011a), *supra*, n. 128, at p. 122; Flick, U. (2011b), *supra*, n. 128

<sup>168</sup>Kothari, C. R. (2011) *Research Methodology: Methods and Techniques*, 2nd (edn), New Dhelhi: New Age International Publishers, at p. 111.

Attempts to find recent case law through law reports in Tanzania were being frustrated the fact that not every judicial decision is in law reports. The latest series of law reports in Tanzania ends in 2006. Considering the fact that the new employment laws (which address disability issues) became operational in 2006 and 2007,<sup>169</sup> most of the decisions related to the interpretation of the current labour laws are not reported. I therefore did a manual work of going through court judgments in specific libraries in order to locate unreported cases. Some of these judgments could also be obtained through the aid of colleagues or court clerks, since court judgments are public records. It was just by coincidence that the Commission for Mediation and Arbitration<sup>170</sup> had prepared the “Case Management Guide”. The guide was prepared with the objective of providing guideline and reference to mediators, arbitrator and workers education officers in the course of executing their duties as provided for by labour laws.<sup>171</sup> Two volumes of the Case Management Guide comprise of about 200 summaries of High Court of Tanzania (Labour Division) decisions between 2007 and 2011. The decisions are based on the reviews and revisions filed in relation to the awards made by the Commission for Mediation and Arbitration, as well as application made to the High Court Labour Division for matters reversed to it by the law. The specific areas of disputes selected are, *inter alia*, constructive termination, discrimination, and termination for sickness.<sup>172</sup>

Since the Case Management Guide contained decisions which went up to the High Court (Labour Division) only, I went to the Court of Appeal (main registry) library for purposes of tracing any decision from the High Court (labour division) connecting both disability and employment which could have reached the court of appeal. Court of Appeal judgments were filed according to years of delivery, and not specific subjects. I manually went through all files from 2006 to the latest year of compilation, which was 2012. Although I could not find any decision of the Court of Appeal with respect to employment

---

<sup>169</sup> The new labour legislation in Tanzania became operational through G.N. No. 24 of November, 2005; and G.N. No. 1 of 5th January, 2007

<sup>170</sup> The Commission for Mediation and Arbitration (CMA) is an independent Government Institution, established under Section 12 of the *Labour Institutions Act, 2004* (Act No. 7 of 2004) (Tanzania Mainland). It is one of the labour institutions established for the purposes of mediating and arbitrating labour disputes, the other one being the Labour Court, a division of the High Court of Tanzania established under section 50(1) of the *Act*, and is vested with, subject to the Constitution, exclusive civil jurisdiction over the application, interpretation and implementation of the labour laws including powers of appeal, review and revision over decisions of all labour institutions.

<sup>171</sup> The guide has been produced with support from the International Labour Organisation program on Improving Labour Law Compliance in the United Republic of Tanzania, and the United States Department of Labour.

<sup>172</sup> See CMA, *Case Management Guide Vol. 2. 2008 – 2011*, p. v.

and disability, it is a fact that courts do continue to give judgements, which means that the judicial jurisprudence is very likely to expand.

In order to get access to foreign cases, I utilized mostly the internet. Kenya Law website<sup>173</sup> is the most up to date online legal information facility for Kenya. The website is run by the National Council for Law Reporting (Kenya), a public body established under the laws of Kenya,<sup>174</sup> its main function being the preparation and publication of the Kenya Law Reports which contain judgments, rulings and opinions of the superior courts of record.<sup>175</sup> For Uganda, the Uganda Legal Information Institute's website was very useful. Like the Kenya Law's, ULII's website publishes legally significant decisions of courts, legislation, treaties and some publicly available secondary legal material created by public bodies for purposes of public access.<sup>176</sup> Legal Information from South Africa and Zambia could be accessed through the website of the Southern African Legal Information Institute, an online repository of legal information from South Africa and other countries, mostly from Eastern and Southern Africa. SAFLII is a project of the South African Constitutional Court Trust and is currently the largest free-access collection of online legal materials from South Africa.<sup>177</sup> Ghana does not have a common online legal resource facility. However, the basic documents, like the constitution and disability and employment legislation could be accessed from the internet. It is obvious that these facilities alone cannot guarantee accuracy. For this reason, also made inquiries to various national human rights institutions through emails, and I used the social media to connect with colleagues in the legal profession, in trying to ascertain the existence of any new court decision which could not have come to my attention through more "conventional" ways of research. Even all these means could have their limitation, but given time and resources, there could have been no better sources of information.

The legal sources above could not have been enough to give information on the efficacy or implementation of the legally protected rights. Various reports and scholarly Articles from different parts of the world provide insight into a number of issues, which are significant to the understanding of the rights of persons with disability.

---

<sup>173</sup> <http://kenyalaw.org>.

<sup>174</sup> Section 2(1), *The National Council for Law Reporting Act, 1994* (Act No. 11 of 1994) (Kenya) .

<sup>175</sup> Section 3(a), *Ibid.*

<sup>176</sup> <http://www.ulii.org/about>.

<sup>177</sup> <http://www.saflii.org/content/about-saflii-0>.



The development of human rights regime (in term of international instruments) boosted the flow of human rights literature, thereby underlining the recognition of human rights not just as a western, but as a universal value with internationally recognised meaning.<sup>178</sup> (I argue that this is subject to the “relativism” as already discussed). There is a shared view among some disability authors/scholars, that while for many years, the international human rights movement has focused almost entirely on matters affecting those referred to as the abled individuals, the existing human rights networks have finally turned from the rights of ‘traditional and visible minorities’, related to gender, ethnicity, race, religion, or refugee status, to the rights of what might be called ‘invisible, under-protected minorities’, which include persons with disability.<sup>179</sup> It appears therefore, that literature and/or research in disability may not be as advanced as the literature on marginalisation on such grounds as race, ethnicity, and gender.<sup>180</sup>

Contemporary publications on disability include various issues cutting across disciplines. Such issues *include*, but are not limited to: inclusion, identity, education, human rights and law, which means that disability raises issues across disciplines. The multi-lateral approach to disability has led into the emergence of what is generally referred to as disability studies, which is a broad area of theory, research and practice that are antagonistic to the popular view that disability equates with personal tragedy.<sup>181</sup> The interest in research in disability is also manifested through various journals - to mention a few: *Disability Studies Quarterly*,<sup>182</sup> *International Journal of Disability, Community and Rehabilitation*,<sup>183</sup> and *Disability, CBR & Inclusive Development*.<sup>184</sup> *African Journal on Disability*<sup>185</sup>

African disability literature is not as extensive as literature from the west. By “African disability literature” I do not restrict myself to “African-produced” literature, but I broaden the expression to include some international disability literature addressing disability issues in Africa.<sup>186</sup>

---

<sup>178</sup>Wiener, R. L. and Keller, S. N. (2011), 'Finding the Assumptions in the Law: Social Analytic Jurisprudence, Disability, and Aging Workers', in R. L. Wiener and S. L. Willborn (Eds.), *Disability and Aging Discrimination: Perspectives in Law and Psychology*, at p. 2.

<sup>179</sup>*Ibid.*

<sup>180</sup>*Ibid.*

<sup>181</sup>Goodley, D. (2011), *supra*, n. 34, at p. xi.

<sup>182</sup><http://dsq-sds.org>.

<sup>183</sup><http://www.ijdcrc.ca>.

<sup>184</sup><http://dcidj.org>.

<sup>185</sup><http://www.ajod.org>.

<sup>186</sup>See for example Eide, A. H. and Ingstad, B. (eds.) (2011) *Disability and Poverty A Global Challenge*,

Disability rights appear to be an “emerging issue” issue in Tanzania, but there is lack of scholarly human rights literature in the area of disability. By the expression ‘human rights literature’, I mean such literature which analyses the problem in accordance with the standard human rights methods, often influenced by principles stated in international human rights instruments, and domestic instruments incorporating such principles.

I have been compelled to look into foreign disability rights literature and some disability-related literature from other disciplines in Tanzania, which have in fact provided useful insights into the understanding of disability rights. Despite the fact that there could be a likelihood that different works from different disciplines or geographical areas could define some terms differently, there is an indication that disability literature has been influenced by global developments in disability rights, and that despite the likelihood of differences in approaches to the problem, most of disability literature have been referring to the same problems. Nevertheless, the most important consideration while referring to some literature outside human rights discipline has been to guard myself against using concepts or methods of analysis which appear contradictory.

#### **1.8.2.2. Interviews**

Some information could not be obtained from the library research, especially on the matter of opinion with respect to efficiency or challenges related to some practical aspects of disability and employment laws or policies. Some interviews were conducted face-to-face, while others were conducted through or telephone conversations. Face-to-face interviews were conducted in Tanzania with the respondents from the following places: Ministry of Labour, Social Welfare Department, CCBRT, Law Reform Commission, the Commission for Human Rights and Good Governance (National Human Rights Institution), Legal and Human Rights Centre (NGO), and the Association of Tanzanian Employers. I had fruitful telephone conversations with the chairperson of the Tanzania Federation of Organisations of Persons with Disability in Tanzania, as well as respondents from Zanzibar, in particular from Zanzibar’s Federation of Persons with Disability, and the Department of Persons with Disability Affairs in the office of the First Vice President. I had also made telephone conversation with some persons whom I had earlier interviewed face-to-face. This was useful for making follow-ups. Telephone conversations were very useful in circumstances where arrangement to meet interviewees face-to-face were impossible because of costs and time factors.

This process was never without challenges. For example, in most cases, most of the information I obtained from face-to-face interviews appeared to be too general, as the respondents appeared to be either busy, unprepared or perhaps (just a mere suspicion) not conversant with some matters of laws related to persons with disability. However, this challenge was overcome as most of the respondents were ready to provide further information through email: almost all phone conversations were supplemented by the information from email correspondences. Another real challenge was that during a face-to-face interview in the Ministry of Labour, one respondent refused to have the voice recorded despite having earlier being assured that the interview was purely for academic purposes. This was a challenge because I was forced to write all the information which I perceived to be important at that particular time. Despite the challenges, I believe that the nature of the information was such that it did not impair the quality of my research, especially due to the fact that some of the information could be reflected in some documentary works, or in the information I received from other interviewees. Furthermore, I had no reason to believe that some information had, or was being hidden from me.

### **1.8.2.3. Questionnaires**

Collecting data through questionnaires is quite popular, since it serves time and resources, and questionnaires are also said to offer greater anonymity, as there is no face-to-face interaction between respondents and interviewers, and in some situations where sensitive questions are asked it helps to increase the likelihood of obtaining accurate information.<sup>187</sup> However, questionnaires may be of limited use since they are accessible only to literate users; and there could be low rate of responses or lack of opportunity to clarify issues, among other limitations.<sup>188</sup>

The mentioned limitations of the questionnaires could not really affect the quality of my work, considering the fact that I had relied on purposive sampling technique, since the nature of the research itself requires respondents, or at least most of them, who are well conversant with issues of laws and policies on disability and employment. Other limitations were minimized by the use of well-structured questionnaires which eliminates ambiguity and the proper follow up. In any case, the use of questionnaires is not the only method of data collection for the research.

---

<sup>187</sup>Kumar, R. (2011) *Research Methodology: A Step-by-Step Guide for Beginners*, 3rd (edn), London: SAGE, at p. 148.

<sup>188</sup>*Ibid*, at p. 149.

Questionnaires were sent to specific (some of whom I had earlier interviewed) persons in the Association of Tanzanian Employers, the Social Welfare Department, the Legal and Human Rights Center, and the Federation of the organisations of persons with disability and other institutions and NGOs outside Tanzania. The questionnaires were intended to provide such information which could not have been obtained through the already mentioned other data collection methods (face-to-face interviews and telephone conversation).

All questionnaires were sent through Emails. The major limitation of this method was that most of the questionnaires were not returned in time, and some respondents (mostly government institutions) never responded at all. For the institutions which never responded, I had to rely upon the information available from their reports, most of which were available on internet.

### **1.8.3. Purposive Sampling**

The fact that this study draws heavily from documentary sources does not mean that the choice of a research respondents. One of the first steps in designing a research project involves the accessibility of potential respondents; which could at times be based on the researcher's personal judgment that the respondent has extensive knowledge on a situation of interest to a researcher.<sup>189</sup>

I had already in mind some persons who I thought could have helpful information for the study, and be willing to do provide the same. This is the primary objective of the purposive/expert sampling.<sup>190</sup> Judgemental sampling is said to be extremely useful when the researcher wants to describe a phenomenon about which only a little is known,<sup>191</sup> and literature review suggests that research on disability, particularly in human rights is still emerging, and this also explains the fact that there were not so many respondents who could provide useful information for the study. Other respondents were obtained through "snowball sampling", where the respondents whom I had interviewed earlier directed me to other respondents whose knowledge was deemed helpful.

---

<sup>189</sup>*Ibid*, at p. 192.

<sup>190</sup>*Ibid*, at p. 207. Kumar differentiates purposive sampling and expert sampling, in that while the former is entirely on the researcher's judgment as to the ability of the respondent to contribute to the study, in case of the later, the respondents must be known to the researcher as experts in the field of interest. My sampling was a combination of both.

<sup>191</sup>*Ibid*.

Selection of only a few people may seem to suggest the method which represent only the opinion of the “elites”, and ignores the “real” persons with disability’s experiences. However, the study is not about the “feelings of persons with disability” at the work place, rather the realisation of the right to work, which means a focus on more other things apart from personal experiences. I admit though, the satisfaction of persons with disabilities at the work place is essential for persons with disability’s right to employment. Some key informants were themselves persons with disability

I had not previously determined a specific number of persons to be interviewed. The number of interviewees depended very much on the quality information I received from them. This approach finds support from the view that the sample size in qualitative research does not play any significant role, because data saturation during collection determines the sample size.<sup>192</sup>This is also another justification for the non-probability sampling designs in qualitative research.<sup>193</sup>These sampling methods proved to be effective, considering the limited time and resources for purposes of carrying out the study.

#### **1.8.4. Data Analysis**

Data analysis entails making sense of the multitude of data in a way that communicates understanding, and it is regarded as one of the most important aspects of qualitative research.<sup>194</sup>The qualitative approach in this study means that the information had to be categorized thematically, and I weighed the information from legal sources based on their authoritative quality.

I had carefully assessed the content of the scholarly works based on the theme, geographical orientation, and also time, considering the fact that approaches to disability has not been universal, and has been changing over the time. While using the information from human rights organisations (governmental and non-governmental), I had in mind the objectives and goals of those institutions. This does not mean that I had any doubts of bias in these reports, but I have always been convinced that it is essential to look at these documents from the neutral perspective.

---

<sup>192</sup>*Ibid.*

<sup>193</sup>*Ibid.*

<sup>194</sup>Mmatli, T. O. (2010) *Empowering the Phoenix: Relevance of the Social Model of Disability for Botswana*, Saarbrücken: LAMBERT Academic Publishing GmbH & Co. KG, at p. 102, citing Kincheloe and McLaren (2000).

In order to be able to determine the authoritative nature of the legal sources, I had to make myself conversant with the judicial structure and legal systems of the counties I used for comparative examples. I therefore ascertained the normative nature of the legal instruments based on the institutions they came from, and also the time in which they were issued, except in circumstances where old legal authorities were necessary in relevant parts of the study. For comparative examples, I opted to go for general content of the relevant legal sources, without spending too much in the specifics, unless the detailed analysis was essential for a particular argument.

### **1.8.5. Participation, Transferability and Ethical Issues**

#### **1.8.5.1. Participation of Persons with Disability**

As it is revealed in other Sections, the traditional approaches to research - those associated with the individual model of disability, had ignored the experiences of persons with disability due to the beliefs that only the researchers have the specialist knowledge and skills, and that only they should control the whole process of research production.<sup>195</sup> While in disability studies the new approaches to disability research calls for the effective involvement of the respondents in the research process, including the process of setting research objectives,<sup>196</sup> this was not the sole ground for involvement of the respondents with disability in this study (through the organisations of persons with disability). I acknowledge the potential criticisms of not adhering fully to the “persons with disability controlled” research, but the grounds stated in this chapter are reasonable enough to justify my approach. The criticisms may also be watered down by the fact that I also qualify as a person with disability under the law and perceptions of my country of origin,<sup>197</sup> and even from societal perceptions in the region from which comparative examples have been sought.

---

<sup>195</sup> *Ibid*, at p. 106, citing Oliver (1992).

<sup>196</sup> *Ibid*, citing Bary (1996) and Oliver (1992).

<sup>197</sup> The human rights approach to disability under the disability legislation in other African States from which the comparisons have been thought may also mean that a person with albinism qualifies as a person with disability under the said laws. In Kenya, there are already proposed amendment to the Kenyan disability legislation (*The Persons with Disabilities Act, 2003* Act No. 14 of 2003 (Kenya) ) to include “albinism” in the legal definition of disability (although the said definition appears to embrace the medical(individual) approach to disability. (Section 2 of the *Persons with Disabilities Amendment Bill, 2010* (Kenya)

### 1.8.5.2. Generalisation (Transferability) of Results

Despite the general experiences of disability across continents, the results of the research, which focuses on the employment of persons with disability in selected States, cannot be generalized across the globe. Under the circumstances, it suffices to hold the view that the study will be of more relevance to developing nations, especially if the soundness of “lessons” is considered rather than other issues,<sup>198</sup> and the individual wishing to transfer the results to a different environment or circumstances should be make the appropriate considerations on how sensible it is to do so.<sup>199</sup>

### 1.8.5.3. Ethical issues

“Being ethical means adhering to the code of conduct that evolved over the years for an acceptable professional practice. Any deviation from this code of conduct is considered as unethical and the greater the deviation, the more serious the breach. For most professions, ethical codes in research are an integral part of their overall ethics.”<sup>200</sup> In research, ethical issues can be looked at with respect to researchers themselves, respondents, or even sponsoring entities.<sup>201</sup> With regard to respondents, ethical issues surround such things as collecting information, seeking consent, providing incentive, seeking sensitive information, or the possibility of causing harm to participants and maintaining confidentiality.<sup>202</sup> Researchers are also expected not to introduce bias, provide or deprive individuals of treatment, use unacceptable research methodology, inaccurate reporting, and inappropriate use of information.<sup>203</sup> Ethical considerations in relation to sponsoring organizations concern restriction imposed on research designs and the possible use of findings.<sup>204</sup>

During data collection process, I adhered to ethical issues by ensuring first ensuring that I had obtained permission to conduct research (where this was officially needed), and also by ensuring that no document or any other piece of information was accessed through the use of incentives or illicit means. I had sought consent from the respondents prior to any interviews, and also made clear to them about the purpose of the study. I guaranteed their

---

<sup>198</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 108, citing Polit and Hungler (1997).

<sup>199</sup>Mulumba, M. (2011), *supra*, n. 32, at p. 50.

<sup>200</sup>*Ibid*, at p. 248.

<sup>201</sup>*Ibid*.

<sup>202</sup>*Ibid*.

<sup>203</sup>*Ibid*.

<sup>204</sup>*Ibid*.

anonymity (for those who did not wish to be exposed) and the limited use of the information they offered.

I had known some of the respondent before, especially those working in government entities and disability organisations. Although being known to the respondent before the research process may influence their opinion, there was no reason for concern with respect to any information I had obtained from the respondents. The later does not mean that respondents' information was in any way altered to sweet the researcher's objective. If there was any advantage, then it was the fact that in none of the places I went I was subject to strict self-identification/introduction formalities. Therefore, despite having worked hard to obtain an introduction letter from my employer, the University of Dodoma, there was no time, during the actual process of data collection, where that letter was needed – a short verbal introduction was enough. This could be due to the fact that I was not a complete stranger to most of the institutions (persons) from which information was sought.

With exception to matters related to professional opinion, or supervisory guidance, I guarantee not to have been under influence of any organisation or person, while making decisions with respect to the outcome of the research for this study.

#### **1.8.6. Researcher's Declared Position**

Qualitative researchers are urged to declare their preconceptions and possible biases at the beginning of the project<sup>205</sup> in order to allow other readers to understand research findings with a proper perspective. It is without doubt that being a lawyer by profession is the major reason for opting for a study on laws, policies and the respective institutional mechanisms. As already stated, that disability rights matters cannot only be looked at from legal perspectives alone; but any attempts to navigate in the fields for which I did not receive training, could severely affect the quality of this study.

I cannot completely rule out that my personality, as a Person with Albinism,<sup>206</sup> could have added a sense of obligation to undertake a study on disability issues. Nevertheless, this study has nothing to do with my employment experiences.

---

<sup>205</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 110, citing Bouma (2000).

<sup>206</sup> For humans, "albinism" is a pigmentation disorder characterized by partial or total lack of the pigment melanin in skin, hair and iris. Albinism is caused by an auto-somal recessive gear and can occur in people of any ethnic background. People with albinism have delicate skin that sunburns and develop skin cancer easily, and they may suffer from eye disorders. Webster's New World (ed.) (2008) *Webster's New World Medical Dictionary*, 3rd (edn), at p. 12..



### **1.8.7. Challenges and Limitations**

I had encountered several challenges (independent of my control) in the course of collecting data for purposes of this study. This means that the planned schedule of data collection process could not always match the practice. One of frustrating issues has been the lack of detailed and up to date information with respect to employment of persons with disability. Another challenge was that some interviewees were not ready to have their voices being recorded. Nevertheless, the entire research process was not difficult, and there were some surprises where things worked out easier than expected.

Due to time, resources, nature of the topic and methodological limitations, the following limitations of the study should be considered:

- (1) It is neither expected to be a hundred percent “cure” for employment problems affecting persons with disability in Tanzania and in any of the countries selected for comparative examples, nor is expected to settle the “debate “on appropriate measures for enhancing persons with disability’s access to employment - for example the debate over segregated employment versus inclusive employment.
- (2) The focus on disability does not mean that this work deal with diversities among persons with disability. This work discusses disability issues generally, and it does not contain detailed information on specific needs for specific situations of disability connected with specific forms of impairments.
- (3) It does not dwell too much into deep sociological or psychological aspects of disability. It provides only a general understanding on disability and employment issues necessary for the promotion of human rights of persons with disability in the area of employment.
- (4) It does not contain discussions on worker compensation measures, with respect to injuries and disabilities acquired in the course of employment. While these can be regarded as measures to prevent impairment or further impairment, they are not, in themselves, designed to ensure persons with disability’s access to employment. Therefore, the work should be perceived based on its methodology and design.

## **1.9. Conclusive summary**

Earlier international human rights instruments after 1945 did not place emphasis on vulnerable groups, and social economic rights, and this helps to explain the reasons behind today's general marginalization of persons with disability in various aspects, including employment. Tanzania and some other African states have been implementing measures with respect to employment generally, and the rights of persons with disabilities in particular, but marginalization of persons with disability in the area of employment still appears to be a problem, hence an interest in researching on the topic: "Persons with Disability's Right to Work in Africa".

Disability issues are now central in many academic disciplines with different philosophical approaches to facts or knowledge, which in the end influence different methods of acquiring such knowledge. For this reason, disability studies are inter-disciplinary. I have opted not to be heavily involved in extreme ends of debates on research methodology in respect of particular academic disciplines. Complexities surrounding acquisition of knowledge in respect of some issues have encouraged other researchers to develop new perspectives to research, and others seem to move towards more pragmatic approaches. Inter-disciplinary research demands pragmatism because of the likelihood of compromises across disciplines. This does not mean that disciplines are ignored completely, since purely legal, political or sociological issues shall always be well addressed in accordance with their respective disciplines. But there is always a point of interaction among these disciplines, since they all serve humans. The effectiveness of laws or programs cannot be evaluated by checking only technical requirement of their preparations and presentations, but what they do on the ground. It is on these grounds that I have adopted a pragmatic approach to research. Nevertheless, it is important to note that there are more other ways in which disability issues could be studied.

## CHAPTER 2

### DISABILITY AND EQUALITY

#### 2.1. Introduction

Viewing disability as equality or human rights issue is a recent phenomenon, despite strong historical parallels of marginalization between disability and gender or race.<sup>207</sup> There has been a long history of viewing disability as a tragedy, and this view is common across continents, in particular when persons with disability are unable to support themselves or their families: they are therefore seen as social dependents, objects of pity or recipients of charity.<sup>208</sup> For a long time, decisions affecting persons with disability have been being made by medical professionals and social workers, often institutionalizing persons with disability in special homes or hospitals as patients or clients who needed curing.<sup>209</sup> Against this view, persons with disability, through their organisations, fought for the formulation and development of non-discriminatory measures, and developed new approaches to disability. They facilitated the diffusion of a disability rights frame, and also built collective identities, and have been working to promote changes in social attitudes.<sup>210</sup>

The old and modern perceptions of disability do not originate from legal instruments. However, the promotion of persons with disability's rights has very much to do with the way disability is perceived in legislation and policy. On the other hand, equality approaches in international and domestic laws have been evolving, increasingly recognizing the diverse nature of human rights. The concepts of equality and disability appear to have been developing independent of each other, and that equality concepts have a longer history than disability in human rights regime. Disability as a concept has a longer history outside human rights regime. Despite these "differences" the modern approaches to

---

<sup>207</sup> Baird, M. R., *et al. (eds.)*, *supra*, n. 21, at p. 13, citing Fredman (2005).

<sup>208</sup> *Ibid.*, at p. 137 - 138..

<sup>209</sup> *Ibid.*

<sup>210</sup> Downing, A. (2011), *supra*, n. 63, at p. 52; DFID Uganda (2009) 'Disability Scoping Study: Disability Scoping Study for DFID Uganda: Final Report, DFID Uganda, [http://www.ucl.ac.uk/lc-ccr/downloads/06052009\\_Disability\\_Scoping\\_Study\\_Uganda.pdf](http://www.ucl.ac.uk/lc-ccr/downloads/06052009_Disability_Scoping_Study_Uganda.pdf), accessed: 17.1.2014; Disability Rights Promotion International (2013) *Overview of Disability Rights in Kenya*, <http://drpi.research.yorku.ca/Africa/resources/KenyaRep07/Section3>, accessed: 19.4.2013; SAFOD (2013) *Zambia Federation of the Disabled*, [http://www.safod.org/about%20safod/Countries/zambia\\_web.htm](http://www.safod.org/about%20safod/Countries/zambia_web.htm), accessed: 30.4. 2013; Ghana Federation of the Disabled (2013) *History of GFD*, <http://www.gfdgh.org/history.html>, accessed: 10.5.2013.

both disability and equality re-enforce each other, and the human rights approach to disability should be viewed not only in terms of how disability is defined, but also on how other equality measures take disability into consideration. In other words, “a clear perception of the values that underlie the human rights ... is [crucial] to understand the nature and significant of human rights perspective on disability”.<sup>211</sup>

In this chapter, I trace the development of disability rights framework in international (UN) and regional (AU); and the general concepts of equality and disability.

## **2.2. Development of Disability Rights Framework**

### **2.2.1. United Nations**

Before the adoption of the CRPD, the UN had promulgated human rights conventions, none of which specifically included disability as one of the “suspect forms of classification that are explicitly listed in their non-discrimination and equality clauses.”<sup>212</sup> I refer to these as the prohibited grounds of discrimination. Theoretically though, core human rights conventions adopted before the CRPD also apply to persons with disability, but they have been rarely applied in practice.<sup>213</sup> The attempts by the Committee on Economic, Social and Cultural Rights (CESCR), for example of issuing the *General Comment No. 5 (Persons with Disabilities)*<sup>214</sup> to clarify the application of the ICESCR to persons with disability appeared to have been hampered by definition issues and lack of clarity when it came to the specific interests of person with disability and their relationship to human rights structures.<sup>215</sup> Other reasons for the limited success of the human rights conventions adopted before the CRPD with respect to the protection of the rights of persons with disabilities appear to be the question of the categorization of rights. I discuss this in Chapter 5.

---

<sup>211</sup>Quinn, G. and Degener, T, 'The Moral Authority for Change: Human Rights Values and Worldwide Process of Disability Reform', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, at p. 9.

<sup>212</sup>O'cinneide, C. (2009), 'Extracting Protection for the Rights of Persons with Disabilities from Human Rights Framework: Established Limits and New Frameworks', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, at p. 171, 172.

<sup>213</sup>Stein, M. A. and Lord, J. E. (2009), 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, at p. 18 - 40.

<sup>214</sup>*General Comment No. 5: Persons with Disabilities* E/1995/22, 1.1.1995 .

<sup>215</sup>O'cinneide, C. (2009), *supra*, n. 212, at p. 172.

While the first binding convention for persons with disability had to wait until 2006, there have been a number of resolutions addressing disability issues. The General Assembly and the Economic and Social Council (ECOSOC) adopted a number of resolutions from 1950s onwards, dealing in the main with prevention and rehabilitation,<sup>216</sup> but it is from 1970s, the UN started to adopt more significant resolutions with respect to persons with disability, ushering the era of “soft laws” in the area of disability rights. The year 1971 saw the first UN instrument directed to persons with disability, – the *Declaration on the Rights of Mentally Retarded Persons* (DRMRP).<sup>217</sup> Although this was not a declaration of general application to all persons with disability, it was soon followed, in 1975, by the first *Declaration on the Rights of Disabled Persons* (DRDP).<sup>218</sup> Six years following the DRDP, the UN proclaimed 1981 as the International Year of Disabled Persons<sup>219</sup> and embarked upon the development of a World Program of Action, which restructured disability policy into three distinct areas: prevention, rehabilitation and equalization of opportunities.<sup>220</sup> The implementation would entail long-term strategies integrated into national policies for socio-economic development, preventive activities that would include development and use of technology for the prevention of disability, and legislation eliminating discrimination regarding access to facilities, social security, education and employment. At the international level, Governments were requested to cooperate with each other, the UN and NGOs.<sup>221</sup> In order to provide a time frame during which Governments and organizations could implement the activities recommended in the World Programme of Action, the General Assembly proclaimed 1983-1992 the UN Decade of Disabled Persons.<sup>222</sup> Together, the Programme and the International Year had launched a new era--one that would seek to define disability as the relationship between persons (with disability) and their environment, and the imperative to remove societal barriers which

---

<sup>216</sup>Quinn, G. and Degener, T, 'The Application of Moral Authority: The Shift to the Human Rights Perspective of Disability through United Nations 'Soft' Law', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, at p. 19..

<sup>217</sup>*Declaration on the Rights of Mentally Retarded Persons*, General Assembly Resolution 2856 (XXVI) of 20 December 1971 (DRMRP).

<sup>218</sup>*The Declaration on the Rights of Disabled Persons*, General Assembly Resolution 3447 (XXX) of 9 December 1975 (DRDP)

<sup>219</sup>*Implementation of the World Programme of Action concerning Disabled Persons*, General Assembly Resolution A/RES/37/53, 3 December 1982 .

<sup>220</sup>UN Enable (2012) *History of United Nations and Persons with Disabilities*, <http://www.un.org/disabilities/default.asp?id=131>, accessed: 10.5.2012

<sup>221</sup>*Ibid.*

<sup>222</sup>Priestley, M. (2001), *supra*, n. 54, at p. 4.

impede the full participation by persons with disability became increasingly recognized.<sup>223</sup> The definition of “equalization of opportunities” by the World Program of Action marked the beginning of a significant shift away from an individual approach to disability.<sup>224</sup> The term was defined as:-

the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.<sup>225</sup>

The implementation of this long-term strategy at national, regional and global levels also coincided with the adoption of the *Standard Rules on Equalization of Opportunities for Disabled Persons (Standard Rules)*<sup>226</sup> in 1993. The rules have been viewed as ‘compensatory alternative’ since “the proposal to adopt a *UN Convention on the Elimination of All Forms of Discrimination Against Disabled Persons* had failed in 1987 supposedly because of ‘treaty fatigue’<sup>227</sup> because Member States are already burdened by and unable to fulfill their existing reporting obligations.<sup>228</sup>

Despite the lack of binding force, the *Standard Rules* could attain the binding character as international customary rules if applied by a great number of States with the intention of respecting a rule in international law, and they had served as a strong moral and political commitment on behalf of States to take action for the equalization of opportunities.<sup>229</sup> Since the International Year of Disabled Persons and the introduction of the *Standard rules*, more

---

<sup>223</sup> *Ibid.*

<sup>224</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 15.

<sup>225</sup> Paragraph 12, *World Programme of Action concerning Disabled Persons*, General Assembly Resolution A/RES/37/ 52, 1982 (World Program of Action)

<sup>226</sup> *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities*, General Assembly Resolution A/RES/48/96, 20 December 1993 (Standard Rules). The rules address participation in eight specific areas of life: accessibility, education, employment, income maintenance and social security, family life and personal integrity, culture, recreation and sports, and religion. ( Priestley, M. (2001), *supra*, n. 54, at p. 5.). About six months before the adoption of the *Standard Rules*, the World Conference on Human Rights held in Vienna on 25th June 1993 adopted the Vienna Declaration and Programme of Action which inter alia, reaffirmed the universal nature of human rights, and thus unreservedly include persons with disability, and any direct discrimination or other negative discriminatory treatment of a persons with disability is therefore a violation of their rights (Paragraph 63). Among other matters, the Conference emphasized on persons with disability’s active participation in all aspects of society (Paragraph 21); and guarantee of equal opportunity through the elimination of all socially determined barriers (including physical, financial, social or psychological) (Paragraph 64). The Conference also called on governments, where necessary, to adopt or adjust legislation to assure access to these and other rights for persons with disability (Paragraph 63). Significantly, the conference called upon the General Assembly and the ECOSOC to adopt the draft standard rules on the equalisation of opportunities for persons with disabilities, at their meetings in 1993 (Paragraph 65).

<sup>227</sup> Biegon, J. (2011), *supra*, n. 20, at p. 57, citing Degener, T. (2000).

<sup>228</sup> Degener, T. (2000) 'International Disability Law: A New Legal Subject on the Rise, *Berkeley Journal of International Law*, Vol. 18, at p. 193.

<sup>229</sup> Degener, T. (1995), *supra*, n. 117, at p. 13.

and more States had introduced anti-discriminatory legislation.<sup>230</sup> Nevertheless, not being legally binding was still a major downfall of the previous disability rights mechanisms; and also was the fact that the old mechanisms were still influenced by limited (individual) approaches to disability, which meant that they could not address the specific barriers faced by persons with disability in the realization of their human rights, for example, regarding -discrimination in the workplace.<sup>231</sup> “Consequently, prior to the adoption of the CRPD, the human rights of persons with disabilities were in theory covered by human rights treaty obligations and addressed in non-binding resolutions and declarations, but in practice were protected by neither.”<sup>232</sup>

These weaknesses necessitated the thematic (disability) convention. Light gives a “summary” of reasons legitimizing the need for a new convention. These were:-

First, [the requirement of] tangible acknowledgement of humanity [of persons with disability].... Second, it would [have been] iniquitous to allow abuse to continue unchecked.... Third, [the need to] move beyond the ubiquitous rhetoric, reports and resolutions, [as] there [was] a compelling case for the international community to implement measures of substance. Finally, whatever political horse-trading is necessary to achieve a convention, the *process* of elaborating such a convention has intrinsic value.<sup>233</sup>

The CRPD brings a human rights dimension to disability issues<sup>234</sup> by re-stating the existing human rights (appearing in general human rights convention) and then creating incidental rights to ensure that existing rights are realised.<sup>235</sup> It also creates a disability rights discourse in the way in which it empowers persons with disability to be formally involved in the convention process.<sup>236</sup> It is the first internationally binding human rights instrument of the twenty-first century in the area of disability rights, and is therefore a significant instrument for persons with disability around the world.<sup>237</sup> It was adopted by the UN General Assembly on December 13, 2006. As of 24<sup>th</sup> February 2014, the CRPD acquired 158 Signatures, and 141 ratifications/accessions. The Convention signifies a shift of

---

<sup>230</sup> *Ibid.*

<sup>231</sup> Stein, M. A. and Lord, J. E. (2009), *supra*, n. 213, at p. 19, 22.

<sup>232</sup> *Ibid.*, at p. 19.

<sup>233</sup> Light, R. (2005), 'Disability and Human Rights: The Persistent Oxymoron', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, at p. 13.

<sup>234</sup> Beco, G. de (2011) 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: ?: Another Role for the National Human Rights Institutions, *Netherlands Quarterly of Human Rights*, Vol. 29, No. 1, at p. 84. (184?)

<sup>235</sup> Harper, P. (2012) 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities, *Disability & Society*, Vol. 27, No. 1, at p. 2.

<sup>236</sup> *Ibid.*, at p. 2

<sup>237</sup> Kanter, A. S. (2007) 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities, *Syracuse Journal of International Law and Commerce*, Vol. 34, at p. 288.

emphasis from “the most urgent needs”, towards more right-based approach, in which disability is viewed as a human rights issue,<sup>238</sup> thereby elevating the importance of disability in international human rights, and providing an excellent opportunity to inquire into the protection accorded to persons with disability.<sup>239</sup> The shift is also with respect to the institutional changes which States are to undertake in order to facilitate its implementation.<sup>240</sup> The CRPD is said to be a “potential catalysts” for progressive change, for its ability to trigger expressive value, prompt national level action, and advance the social integration of persons with disability.<sup>241</sup>

### 2.2.2. African Union

African States have signed and/or ratified several international and regional instruments, including the CRPD the *Banjul Charter* and several ILO Conventions, such as the *Discrimination (Employment and Occupation) Convention*,<sup>242</sup> and the *Vocational Rehabilitation and Employment (Disabled Persons)*.<sup>243</sup> These international instruments are intended to be implemented domestically, irrespective of various ways through which international law operates within individual states.<sup>244</sup> Therefore, the development of disability rights in Africa should be discussed within the context of development of human/disability rights under both the UN and the African Union (AU) (successor to the Organisation of African Unity - OAU).<sup>245</sup>

In its earlier years, the OAU prioritised the struggle against oppression (in particular colonialism and apartheid), and other matters related to the preservation of territorial integrity and non-interference in the internal affairs of States, rather than the prioritisation of human rights.<sup>246</sup> This position changed with the subsequent transition to the AU, because human rights and democratic values are now more clearly articulated as the

---

<sup>238</sup>Fritz, D, *et al.* (2009), *supra*, n. 39, at p. 673.

<sup>239</sup>Dimopoulos, A. (2010) *Issues in Human Rights Protection of Intellectually Disabled Persons: Medical Law and Ethics*, Liverpool: Ashgate, at p. 217.

<sup>240</sup>Beco, G. de (2011), *supra*, n. 234, p. 85.

<sup>241</sup>Stein, M. A. and Lord, J. E. (2009), *supra*, n. 213, at p. 39.

<sup>242</sup>*Discrimination (Employment and Occupation) Convention*, ILO Convention No. 111 of 1958

<sup>243</sup>*Vocational Rehabilitation and Employment (Disabled Persons) Convention*, ILO Convention No. 159 of 1983

<sup>244</sup>Lord, J. E. and Stein, M. A. (2008) 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities', *Washington Law Review*, Vol. 83, at p. 450. generally Stein (2007).

<sup>245</sup>Biegon, J. (2011), *supra*, n. 20, at p. 55, 56..

<sup>246</sup>van Reenen, T. and Combrinck, H. (2011), *supra*, n. 117, at p. 135., citing Citing Ojo and Sesay (1986); Naldi (2008).



foundational principles of the AU.<sup>247</sup> However, when it comes to disability rights, AU seems to have a slower pace, compared to European and Inter-American counterparts.<sup>248</sup>

Gross human rights violations occurring in Central African Republic, Equatorial Guinea and Uganda in the 1970s pushed the OAU towards focusing on human rights,<sup>249</sup> and in 1981, for the first time Africa adopted the continental human rights charter – the *Banjul Charter*. Although the *Banjul Charter* is the “Africa’s Bill of Rights”, it has only one “cursory” reference to the rights of persons with disability.<sup>250</sup> The *Banjul Charter* came into force in 1987, the same year in which the African Rehabilitation Institute, a specialized agency of the OAU was established.<sup>251</sup>

Matters concerning human rights of persons with disability in Africa began to feature in 1990s,<sup>252</sup> as several human rights instruments adopted after this period paid some attention on disability rights. Disability issues also started to feature in the agenda of treaty bodies and in the activities of some regional economic communities.<sup>253</sup> It is unfortunate that most of the earlier measures, just like in the UN mechanisms before the CRPD, did not receive the needed attention in binding human rights instruments.

The *Grand Bay Declaration and Plan of Action* of 1999 (*Grand Bay Declaration*),<sup>254</sup> which is said to have “elevated human rights to a cross-cutting height in African affairs,”<sup>255</sup> recognized, *inter alia*, the rights of persons with disability,<sup>256</sup> and affirmed the principle of universality, indivisibility, interdependence and inter relatedness of rights,<sup>257</sup> which are crucial to persons with disability’s realization of human rights.<sup>258</sup> Almost a year after the *Grand Bay Declaration*, the Labor and Social Welfare Commission adopted a

---

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> Biegon, J. (2011), *supra*, n. 20, at p. 56.

<sup>250</sup> *Ibid.*, at p. 57.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*, at p. 55.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Grand Bay (Mauritius) Declaration and Plan of Action*, Adopted by the 1st OAU Ministerial Conference on Human Rights, Grand Bay, Mauritius, 16 April, 1999 (Grand Bay Declaration).

<sup>255</sup> Nmehiell, V. O. (2004) 'Development of the African Human Rights System in the Last Decade, *Human Rights Brief*, Vol. 11, No. 3, at p. 9, available online at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1368&context=hrbrief>, retrieved on 10<sup>th</sup> June 2013.

<sup>256</sup> Paragraph 7, Grand Bay Declaration, *supra*, n. 254

<sup>257</sup> Paragraph 1, *ibid.*

<sup>258</sup> The principle is also stated in the CRPD’s preamble.

*Declaration of the African Decade of Disabled Persons (1999-2009) (African Decade)*,<sup>259</sup> which was later endorsed by the OAU's Council of Ministers and Assembly of Heads of State and Government respectively, in July 2000.<sup>260</sup> This was done with a view to giving fresh impetus to the implementation of the World Programme of Action concerning persons with disability in Africa beyond 1992 and strengthening regional cooperation to resolve issues affecting the achievement of the goals of the World Programme of Action, especially those concerning the full participation and equality of persons with disability, as well as those contained in the *Standard Rules* which relates to education, training and employment.<sup>261</sup> Thus the *African Decade* was "essentially a reaction to the perceived failure of the UN Decade to deliver tangible gains for persons with disability on the continent."<sup>262</sup> States were urged review the situation of persons with disability with a view to developing measures that enhance the equality and their full participation as well as their empowerment.<sup>263</sup> It was noted that throughout the continent, opportunities for full participation, equality and empowerment for persons with disability, especially in the fields of rehabilitation, education, training and employment, continued to decrease - largely because negative social attitudes leading to exclusion of persons with disability from an equal share in their entitlements as citizens.<sup>264</sup> The *African Decade* was predominantly founded on a social welfare perspective, but its three principles of equality, full participation and empowerment of persons with disability had a human rights tinge.<sup>265</sup> In 2002, the OAU Assembly of Heads of State and Government adopted a Plan of Action for the African Decade", which was generally intended to provide guidance to African States in achieving the goal of the Decade – the full participation, equality and empowerment of persons with disability in Africa.<sup>266</sup> Matters related to employment were covered in several parts of the Plan of Action. Objective No. 2 of the Plan was to promote the participation of persons with disability in the process of economic and social development.<sup>267</sup> This could be achieved through, *inter alia*, development and implementation of a strategy to promote

---

<sup>259</sup> *Declaration of the African Decade of Disabled Persons (1999-2009)*, Adopted by the 23rd Session of the Labour and Social Affairs Commission in Algiers .

<sup>260</sup> The 72<sup>nd</sup> Session of the OAU Council of Ministers, and 36<sup>th</sup> Assembly of Heads of State and Government respectively, Lome, Togo, July 2000, Decision CM/De.535 (LXXII) Rev. 1.

<sup>261</sup> See Paragraph 1, *ibid*

<sup>262</sup> Biegon, J. (2011), *supra*, n. 20, at p. 58.

<sup>263</sup> Paragraph 2, Declaration of the African Decade, April 2000, *supra*, n. 259

<sup>264</sup> Paragraph 3, *ibid*.

<sup>265</sup> Biegon, J. (2011), *supra*, n. 20, at p. 58.

<sup>266</sup> See the foreword and preface, *AU's Continental Plan of Action for the African Decade of Persons with disability 1999 – 2009*, .

<sup>267</sup> Objective 2: Paragraph 21, *ibid*.

the recruitment of women and men with disabilities by employers of all kinds;<sup>268</sup> Objective No. 5 recognised the precarious situation of persons with disability likely to be “doubly jeopardized.” The objective was for the promotion of special measures for children, youth, women and elderly persons with disability through, *inter alia*, implementation of special measures to facilitate full and equal participation of youth with disabilities in training, employment, science and technology.<sup>269</sup> Objective No. 6 was on improving access to, *inter alia*, employment.<sup>270</sup> Under this objective, States were urged to:-

- a) Ratify and implement the ILO Convention No.159 concerning Vocational Rehabilitation and Employment (Disabled Persons) to ensure entry to the labour market of persons with disability;
- b) Promote learnerships or apprenticeships to facilitate the employment of youth with disabilities;
- c) Develop and implement strategies to promote employment of persons with disability, including tax rebates and incentives.<sup>271</sup>

For the goal of the *African Decade* to be achieved, the Plan of Action called for its implementation not only by governmental institutions, but also a range of other entities, such as persons with disability organizations, non-governmental organizations, organizations of employers and workers, and other organizations.<sup>272</sup> Disability issues gained further support from the *Kigali Declaration* of 2003, which not only re-iterated the principle that all human rights are universal, indivisible, inter-dependent and inter-related,<sup>273</sup> but also urged Member States to provide adequate support to the African Rehabilitation Institute,<sup>274</sup> and to develop a Protocol on the protection of the rights of persons with disability and the elderly persons.<sup>275</sup> In 2008, the *Windhoek Declaration on Social Development*<sup>276</sup> extended the African Decade to 2019 (Second African Decade), and called for the evaluation of the first African Decade and its Plan of Action (1999-2009),

---

<sup>268</sup> Objective 2, *ibid.*

<sup>269</sup> Objective 5: Paragraph 27(c), *ibid.*

<sup>270</sup> See Paragraph 28, *ibid.*

<sup>271</sup> Paragraph 29 (iv) (a), (b) and (c), *ibid.*

<sup>272</sup> Paragraph 28, *ibid.*

<sup>273</sup> Article 1, *The Kigali Declaration*, Adopted by the 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting in Kigali, Rwanda, 8 May 2003

<sup>274</sup> Article 19, *ibid.*

<sup>275</sup> Article 20, *ibid.*

<sup>276</sup> *Windhoek Declaration on Social Development*, Adopted by 1st AU Ministerial Conference of Ministers in Charge of Social Development Development, Windhoek, Namibia, 31 October 2008 (Windhoek Declaration).

among others. The Continental Plan of Action for the extended African Decade was adopted by the African Union in 2013.<sup>277</sup>

In binding instruments, fragmented provisions with respect to some aspects of persons with disability appear in several treaties of the AU. The first of these is the *Constitutive Act of the African Union*,<sup>278</sup> which despite not being a human rights treaty itself, lists protection of human and peoples' rights as one of its objectives.<sup>279</sup> The AU functions in accordance with a number of principles, including promotion of social justice to ensure balanced economic development.<sup>280</sup> Furthermore, the Executive Council of the AU coordinates and takes decisions on policies in areas of common interest to the Member States, such as social security; including the formulation policies relating to the persons with disability, (the phrase used in the Constitutive Act is "disabled and the handicapped").<sup>281</sup> In performing its functions, the Executive Council may delegate any of its powers and functions mentioned above to the Specialized Technical Committees.<sup>282</sup> Policy matters related to disability are assigned to the Committee on Health, Labour and Social Affairs.<sup>283</sup>

In addition to the *Banjul Charter*,<sup>284</sup> AU inherited all human rights treaties adopted by its predecessor, the OAU, and has itself adopted several human rights documents with provisions related to persons with disability. These include the *African Charter on the Rights and Welfare of the Child* (ACRWC),<sup>285</sup> the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, (*Maputo Protocol*)<sup>286</sup> *African Youth Charter* (AYC)<sup>287</sup> and the *African Charter on Democracy, Elections and Governance* (ACDEG).<sup>288</sup>

---

<sup>277</sup> AU's *Continental Plan of Action for the Extended African Decade of Persons with disability (2010 – 2019)*, Adopted by the 22nd Ordinary Session of the Executive Council and 20th Ordinary Session of Assembly of the African Union, Addis Ababa, 23 - 28 January 2013 .

<sup>278</sup> *The Constitutive Act of the African Union*, Adopted in at the Lome Summit (Togo) .

<sup>279</sup> Article 3(h), *ibid.*

<sup>280</sup> Article 4(n), *ibid.*; also see van Reenen, T. and Combrinck, H. (2011), *supra*, n. 117, at p. 135.

<sup>281</sup> Article 13(1)(k), *The Constitutive Act of the African Union*, 2000, *supra*, n. 278.

<sup>282</sup> Article 13(3) *ibid.* The Specialised Technical Committees shall be composed of Ministers or Senior Officials responsible for sectors falling within their respective areas of competence. Among the functions of the Specialised technical committees are: preparation of projects and programmes of the Union, and submit the same to the Executive Council; and to ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union; and ensure the coordination and harmonisation of projects and programmes of the Union (See Articles 14(3) and 15(a), (b) and (c), *ibid.*

<sup>283</sup> Article 14(1)(f), *ibid.*

<sup>284</sup> *Banjul Charter*, *supra*, n. 14.

<sup>285</sup> *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), 1990 (ACRWC).

<sup>286</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, CAB/LEG/66.6, 2003 (Maputo Protocol).

The principal human rights instrument in the AU is the *Banjul Charter*, whose non-discrimination Article 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, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>289</sup>

Despite the fact that disability is not expressly stated as a prohibited ground of discrimination, the words “or other status” may be interpreted to cover disability, considering the fact that it is now acceptable in international human rights that discrimination on grounds of disability is illegal. The only provision in Banjul Charter which directly mention persons with disability is Article 18(4), according to which “[t]he aged and the disabled shall also have the rights to special measures of protection in keeping with their physical or moral needs.” Surely, the provision seems to be learning towards the welfare approach to disability.

In 1990, the ACRWC became the first regional binding instrument (in Africa) with more detailed disability rights provisions than those stipulated in the *Banjul Charter*. Nevertheless, the application ACRWC is limited only to children. Article 13 Provides:-

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.
2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.
3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to

---

<sup>287</sup>*African Youth Charter*, Adopted by the Seventh Ordinary Session of the Assembly, held in Banjul, The Gambia, 2nd July 2006, 2006 (AYC).

<sup>288</sup>*African Charter on Democracy, Elections and Governance*, Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia,, 30th January 2007 (ACDEG).

<sup>289</sup> Article 2, Banjul Charter, *supra*, n. 14.

Theocracy came into force in 1999, and the following year, the *Maputo Protocol* also included disability provisions. According to Article 23 of The *Maputo Protocol*, States Parties undertake to:-

- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- (b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

The *Maputo Protocol* came into force in 2005, and further disability provisions appeared in the AYR and ACDEG (2006 and 2007 respectively). The AYR provides for the right of every young person to gainful employment, and requires States to take all appropriate measures with a view to achieving full realisation of this right to gainful employment and shall in particular:-

Ensure equal access to employment and equal pay for equal work or equal value of work and offer protection against discrimination regardless of ethnicity, race, gender, disability, religion, political, social, cultural or economic background.<sup>290</sup>

The ACDEC requires States to adopt legislative and administrative measures to guarantee the rights of people considered vulnerable, including persons with disability.<sup>291</sup> States are also required to adopt and implement policies, strategies and programmes required to generate productive employment, mitigate the impact of diseases and alleviate poverty and eradicate extreme poverty and illiteracy.<sup>292</sup>

The existing AU human rights framework with respect to disability rights has two major problems. Firstly, in binding instrument, disability provisions are fragmented. Absence of such issues like the definition of disability and co-ordinated measures means less effective protection of persons with disability's rights, despite all good intentions. Secondly, the most detailed strategies - the *African Decades* and the respective plans of action are not legally binding instruments, and some organs in charge of organizing or promoting the said strategies have been lacking the authoritative force upon member States of the AU. Initially, the responsibility for organizing the African Decade was given to the African

---

<sup>290</sup> Article 15, AYR, *supra*, n. 287.

<sup>291</sup> Article 8 (2), ACDEG, *supra*, n. 288.

<sup>292</sup> Article 40, *ibid*.

Rehabilitation Institute (ARI),<sup>293</sup> and in 2003, the African Regional Consultative Conference resolved to establish a continent-wide NGO to continue and deepen the work of the African Decade (the Secretariat of the African Decade).<sup>294</sup> Neither the ARI nor the Secretariat of the African Decade has the required authoritative power over AU members to ensure that they implement the respective continental plans of *African Decades*, since that responsibility falls to the African Union (AU). But as already stated, since the *African Decades* have not been legally binding, it is difficult for the AU to monitor their progress.<sup>295</sup> It has been suggested that a potential way forward for the second African Decade would be to focus on the role the African Commission on Human and Peoples' Rights (ACHPR) could play, especially in interpreting the CRPD.<sup>296</sup>

In 2009, the ACHPR established a Working Group on the Rights of Older Persons and People with Disabilities, which replaced the former focal point on the rights of older persons in Africa.<sup>297</sup> The mandate of the focal point has been recently renewed for up to 2015,<sup>298</sup> and its current process is on-going to develop a *Protocol on the Rights of Persons with Disabilities in Africa*. The Draft Protocol is already out. It draws heavily from CRPD.

### 2.3. Evolving Equality Concepts and Anti-Discrimination Measures

The principle of equality forms the very core of human rights, and never was it the intention of human rights that the enjoyment and exercise of rights should be enjoyed only by groups in society which are perceived as "normal".<sup>299</sup> Equality concepts have been debated for centuries,<sup>300</sup> and this work cannot give an exhaustive account of equality

---

<sup>293</sup> Article 2, *Agreement for the Establishment of the African Rehabilitation Institute (ARI)*

<sup>294</sup> Chalklen, S., et al., 'Establishing the Secretariat for the African Decade of Persons with Disabilities', in B. Watermeyer, et al. (Eds.), *Disability and Social Change: A South African Agenda*, at p. 94.

<sup>295</sup> Flynn, E. (2011) *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities*, New York: Cambridge University Press, at p. 90.

<sup>296</sup> *Ibid.*, at p. 91.

<sup>297</sup> Paragraph (a), *Resolution on Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on The Rights of Older Persons and People with Disabilities in Africa*, Adopted in the 45th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 27 May 2009.

<sup>298</sup> *Resolution on the Renewal of the Mandate of the Working Group on the Rights of Older Persons and People with Disabilities in Africa*, Adopted in the 54th Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia, 5 November 2013.

<sup>299</sup> Hendriks, A. (1995), 'The Significance of Equality and Non-discrimination or the Protection of the Rights and Dignity of Disabled Persons', in T. Degener and Y. Koster-Dreese (Eds.), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, at p. 46.

<sup>300</sup> Lawson, A. (2008) *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, Oxford, Portland: Hart Publishing, at p. 19.

concepts. Suffice it to state that the development of international and regional human rights standards has in some ways been influenced by the struggle for more equality of marginalized groups. Apparently, there is lenience towards more substantive forms of equality. In the field of disability rights, evolving approaches to disability are themselves a manifestation of the evolving equality concepts.

The fundamental purpose of equality measures is to challenge the equation of difference or discrimination;<sup>301</sup> and the concept of discrimination may be deduced from its statutory definition of disability-based discrimination, and the scope of coverage of its discrimination prohibitions.<sup>302</sup> In ordinary language, 'discrimination' has more than one meaning:-

It can be used neutrally to mean 'distinction' or 'differentiation' simpliciter, or in the complimentary sense of an accurate or discerning distinction. On the other hand, 'to discriminate against' has always meant 'to make an adverse distinction'. But the word 'discriminate' alone is also commonly used in the restricted sense of an unfair, improper, unjustifiable or arbitrary distinction, and it is this meaning that has come to be employed in international law.<sup>303</sup>

Suffice it to state that “any difference of treatment is discriminatory if it has no objective and reasonable justification... [or] if it does not pursue a legitimate aim [in respect of which] there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized”,<sup>304</sup> and when it comes to disability, this may also include making unjustified distinction between persons with different impairments.<sup>305</sup> Discrimination may be direct or indirect. Direct discrimination may involve an inquiry into the motivation for a decision. For example, if the employer makes an employment decision purely because of an employee’s status (not related to legitimate employment requirement), the decision is directly discriminatory.<sup>306</sup> A case of indirect discrimination requires an inquiry into the effect and purpose of an employment rule or

---

<sup>301</sup>Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 8.

<sup>302</sup>Degener, T. and Quinn, G. (2002), 'Disability Anti-Discrimination Law: The state of the World', in M. L. Breslin and S. Yee (Eds.), *Disability Rights Law and Policy: International and National Perspectives*, at p. 44.

<sup>303</sup>McKean, W. A. (1970) 'The Meaning of Discrimination in International and Municipal Law, *British Year Book of International Law*, Vol. 44, at p. 177, 178.

<sup>304</sup>Ackson, T. (2008) 'Disability Benefits and Workers with HIV/AIDS: Coverage issues and challenges in the United Republic of Tanzania, *International Social Security Review*, Vol. 61, No. 4, at p. 87., citing Jorens (1997).

<sup>305</sup>Hendriks, A. C. (2002), 'Different Definition - Same Problems - One Way Out?', in M. L. Breslin and S. Yee (Eds.), *Disability Rights Law and Policy: International and National Perspectives*, at p. 212.

<sup>306</sup>Willborn, S. L. (1986) 'Theories of Employment Discrimination in the United Kingdom and the United States, *Boston College International and Comparative Law Review*, Vol. 9, No. 2, at p. 245..



purpose,<sup>307</sup> since some measure could be of the effect that the proportion of a particular group of people who can comply with a particular job requirement is considerably smaller than the proportion of the other group.<sup>308</sup>

The principle of non-discrimination primarily seeks to prevent the unfair or less favourable treatment of people because of immutable characteristics that are either inherent or uncontrollable, characteristics that are either inherent or uncontrollable (such as sex and race) or characteristics which only can be changed or suppressed at the detriment of one's identity, or grounds relating to personal characteristics of the individual or group.<sup>309</sup> It follows therefore that offering priorities based on genuine requirements essential for a particular function may not be discriminatory. Policy or laws may be designed in such a way as to protect jobs for citizens; and certain types of functions, such as driving a car, would require some physical or mental abilities, although the developments in science technology have been increasingly reducing the dependency on physical abilities of humans.

In order to eliminate discrimination, disability measures must be designed to ensure the equality of all persons, with or without disability. It should be noted however, while there is consensus about the essence of equality in domestic as well as in international law, there are variations with respect to the interpretation or implementation of equality principles.<sup>310</sup> I proceed to discuss the there are three approaches to equality: sameness approach; specific differences approach and the substantial (holistic) approach to equality. It should be noted however, that these approaches do not mean a total shift from sameness approach to substantial approach. The substantial approach to equality is aimed at ensuring that those with long history of marginalisation (and other marginalised groups) are placed in such situation that they can equally compete with others.

### **2.3.1. Sameness Approach**

There are several ways of describing this approach (or similar ones) to equality. Some scholars have described it as formal equality,<sup>311</sup> universal sameness,<sup>312</sup> juridical equality<sup>313</sup>

---

<sup>307</sup>*Ibid*, at p. 251.

<sup>308</sup>*Ibid*, at p. 252.

<sup>309</sup>Hendriks, A. C. (2002), *supra*, n. 305, at p. 208 - 212.

<sup>310</sup>*Ibid*, p. 7.

<sup>311</sup> See for example: Rovner, L. L. (2004) 'Disability, Equality, and Identity', *Alabama Law Review*, Vol. 55, No. 4, at p. 1043 - 1099; Hannett, S. (2003) 'Equality at the InterSections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *Oxford Journal of Legal Studies*, Vol. 23, No. 1, at p. 65 -

or libertarian approach to equality.<sup>314</sup> This approach dominated roughly the era of the first generation human rights – the period between the proclamation of the UDHR and 1970s.<sup>315</sup> “It is based on a notion of equal treatment of persons under universally applicable laws.”<sup>316</sup> That is to say, “similarly situated people should be treated in the same way despite irrelevant differences in their circumstances.”<sup>317</sup> Its main characteristic is on requiring identical treatment;<sup>318</sup> the reference to the key norms of universality and sameness through “open-model non-discrimination clauses.”<sup>319</sup> It assumes that “all individuals are able to compete equally if treated equally.”<sup>320</sup> An example of the “classic” support for the formal equality is the following extract from Del Vecchio (1966):-

The recognition of the juridical personality of each human being, without any exception whatsoever, in such a way as to assure the fundamental equality of each individual, one to another, is a principle that we must retain as absolutely valid. Understood and applied rationally, this principle should be the basis of a society’s human generis, such that humanity forms a single state.<sup>321</sup>

Formal equality approaches do not generally perceive non-discrimination as an independent substantive right, but only as necessary to guarantee equal enjoyment of the “real” substantive rights. Equality is therefore “normatively empty.”<sup>322</sup> It promotes equal treatment of persons under universally applicable laws,<sup>323</sup> and therefore unintentionally

---

86; Mayerson, A. B. and Yee, S. (2001) 'The ADA and Models of Equality, *Ohio State Law Journal*, Vol. 62, at p. 535 - 554; or Matzzie, C. G. (1994) 'Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act, *The Georgetown Law Journal*, Vol. 82, at p. 193 - 285.

<sup>312</sup> See for example: Arnardóttir, O. M. (2009), 'A Future of the Multidimensional Disadvantage Equality', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, at p. 47 - 49; Sturm, S. P. (1994) 'Sameness and Subordination: The Dangers of Universal Solution, *University of Pennsylvania Law Review*, Vol. 143, No. 1, at p. 201 - 219, <http://www.jstor.org/stable/3312520>, accessed: 14.2.2014

<sup>313</sup> See for example: Fukuyama, F. (2011) 'Dealing with Inequality, *Journal of Democracy*, Vol. 22, No. 3, at p. 79; Del Vecchio, G. (1966) 'Equality and Inequality in Relation to Justice, *Natural Law Forum*, at p. 37 - 47.

<sup>314</sup> See for example: Oakes, W. T. (2005) *Perspectives on Disability, Discrimination, Accommodations, and Law: A Comparison of the Canadian and American Experience*, New York: LFB Scholarly Publishing LLC, at p. 11 - 12. Fineman, M. A. (2009) 'The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law and Feminism*, Vol. 20, at p. 2. “Equality in the liberal model is the expression of the idea that all human beings are by nature free and endowed with the same inalienable rights.” (See *ibid*).

<sup>315</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 47; Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 47.

<sup>316</sup> Fukuyama, F. (2011), *supra*, n. 313, at p. 79; Rovner, L. L. (2004), *supra*, n. 311, at p. 1045; Westen, P. (1982) 'The Empty Idea of Equality, *Harvard Law Review*, Vol. 95, No. 3, at p. 539.

<sup>317</sup> Lawson, A. (2008), *supra*, n. 300, at p. 19.

<sup>318</sup> *Ibid*.

<sup>319</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, pp. 47, 49.

<sup>320</sup> Mayerson, A. B. and Yee, S. (2001), *supra*, n. 311, at p. 538.

<sup>321</sup> Del Vecchio, G. (1966), *supra*, n. 313, at p. 37.

<sup>322</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 48.

<sup>323</sup> Fukuyama, F. (2011), *supra*, n. 313, at p. 79.

“ignores” such differences like disability:<sup>324</sup> i.e. “To achieve equality, disability does have to be taken into account when it comes to providing access to accommodations such as architectural changes or program adjustments.”<sup>325</sup> “It would insist that employers offer promotion to identically situated people on the same basis regardless of such differences.”<sup>326</sup> The danger is, this approach “absolves the mainstream from responsibility to listen, to question assumptions, to change, to adjust, or to compromise... [hence] plac[ing] less powerful groups in a high-risk position.”<sup>327</sup>

Formal equality measures have been the feature of core human rights instruments, i.e. the UDHR, the ICCPR and the ICESCR, which do not contain disability related provisions.<sup>328</sup> “The cultural discounting of persons with disability was in fact reflected in the intellectual structure of these treaties especially in the way they were interpreted.”<sup>329</sup> These instruments also placed more emphasis on care or rehabilitation, which was a characteristic of individual approaches to disability.<sup>330</sup> The absence of an explicit, disability-related provision in the core human rights conventions can be attributed to the “systemic failure of ‘normal’ politics to address disability,”<sup>331</sup> which could have been due to lack of awareness of the importance of addressing disability issues explicitly, rather than only by implication, at the time of the drafting of the covenants.<sup>332</sup> This invisibility may have been one of the reasons that “bad [disability] laws [and policies] were enacted in the past.”<sup>333</sup>

Outside legal perspectives, formal equality (or discrimination for that matter) has also enjoyed some form of support. For example, some economists believe that the unregulated market (without positive steps to achieve equality) will eliminate discrimination.<sup>334</sup> They argue that:-

If many employers discriminate, the wages of their respective labour forces will rise. Then non-discriminating competitors will be free to exploit those in the labour force who face discrimination at lower wages and thereby gain a competitive advantage over the employers that discriminate. Over time, it is argued, those employers engaging in discriminatory practices will either be

---

<sup>324</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 49.; Degener, T. and Quinn, G. (2002), *supra*, n. 302, at p. 8.

<sup>325</sup> Degener, T. (2000), *supra*, n. 228, at p. 182..

<sup>326</sup> Lawson, A. (2008), *supra*, n. 300, at p. 19.

<sup>327</sup> Sturm, S. P. (1994), *supra*, n. 312, at p. 211.

<sup>328</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 12.

<sup>329</sup> Quinn, G. (2010), *supra*, n. 45, at p. 38.

<sup>330</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 13.

<sup>331</sup> Quinn, G. (2010), *supra*, n. 45, at p. 37.

<sup>332</sup> Paragraph 6, General Comment No. 5 (Persons with Disabilities), *supra*, n. 214.

<sup>333</sup> Quinn, G. (2010), *supra*, n. 45, at p. 47..

<sup>334</sup> Oakes, W. T. (2005), *supra*, n. 314, at p. 12.

forced out of business or will find it necessary to manage their operations in a nondiscriminatory fashion.<sup>335</sup>

To persons with disability, formal equality posed a significant problem, since while granting equal access to all members of societies requires acknowledging the differences that exist among these members, ignoring such differences, much as may help to prevent stereotypes and stigmatization, is at the price of failing to do justice to the reality of difference,<sup>336</sup> by dismembering a person with disability from such factors as his community or historical structures of power,<sup>337</sup> and in that way fails to change the status quo, however disadvantageous it could be to other historically disadvantaged groups.<sup>338</sup> That is to say:-

... formal equality fails to recognise that much discrimination cannot be attributed to individual acts by specific perpetrators 'but flows, instead, from the institutions and structures of society'. It also assumes that individual merit can be quantified in an objective way, abstracted from the social context in which it is located, when 'in fact, of course, merit is itself a social construct', in other words, formal equality assumes a benign social norm, and focuses on the elimination of perverse personal behaviour. It does not seek to change the fundamental structure of the norm. The central premise of formal equality's disregard of difference is particularly problematic in a disability context for another reason. Perhaps more so than for any other disadvantaged group, treatment of persons with disability 'equality' will often require specific recognition and accommodation of their difference; that is, 'different' treatment.<sup>339</sup>

By not focussing on a critical examination of the social and physical obstacles in the workplace, and in all aspects of public life, equality remains "an empty premise".<sup>340</sup> The omission of impairment, "by either neutralization or erasure," prevents the community from the knowing and responding to the suffering caused to persons with disability:<sup>341</sup> that is, the unjustifiable differential treatment or unjustifiable like treatment, the latter being indirect discrimination.<sup>342</sup> Therefore, formal equality only offers a continuation of past inequalities.<sup>343</sup>

---

<sup>335</sup> *Ibid*, at p. 13 - 14.

<sup>336</sup> Degener, T. and Quinn, G. (2002), *supra*, n. 302, at p. 8.

<sup>337</sup> Soldatic, K. (2013) 'The Transnational Sphere of Justice: Disability Praxis and the Politics of Impairment', *Disability & Society*, Vol. 28, No. 6, at p. 749.

<sup>338</sup> Hannett, S. (2003), *supra*, n. 311, at p. 83.

<sup>339</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 8, citing Fredman (2005).

<sup>340</sup> Matzzie, C. G. (1994), *supra*, n. 311, at p. 197.

<sup>341</sup> Soldatic, K. (2013), *supra*, n. 337, at p. 751..

<sup>342</sup> Craig, R. (2007) *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*, Leiden, Boston: Martinus Nijhoff Publishers, at p. 28; Mayerson, A. B. and Yee, S. (2001), *supra*, n. 311, at p. 544.

<sup>343</sup> Oakes, W. T. (2005), *supra*, n. 314, at p. 11.

Despite its shortcomings, formal equality is important, at least for insisting that persons with disability are in no way less equal compared to other persons. It is also important to note that the negative impact of formal equality as discussed here should be treated in the context of disability or other situations of marginalised groups. In other words, formal equality is still of use where disability is not a factor to be taken into consideration: e.g. where an employee is facing charges of misappropriating the employers' property.

### **2.3.2. Specific Differences and Equality of Results**

This approach is based on the premise that “discrimination law intervenes in an otherwise simple and neutral situation where the two individual compared are alike in all relevant respects other than with regard to one specific identity marker singled out as ‘the difference to be corrected for.’”<sup>344</sup> By focusing on specific prohibited grounds of discrimination, this approach recognizes that some differences must be taken into consideration in order to facilitate inclusion and achieve equality, and therefore, such grounds (mostly biological) can be inserted into anti-discrimination provisions.<sup>345</sup> In other words, “discrimination [may] also take place if differently situated persons are, without objective and reasonable justifications, treated the same instead of differently, in proportion to the unlikeness of their situation... [and therefore] neglecting differences can be as detrimental as overemphasizing inter-human variation.”<sup>346</sup>

In recognizing differences, affirmative action can be means of recognizing differences, and ensuring equality of results.<sup>347</sup> Affirmative measures are viewed as “positive steps” to enhance opportunities for a disadvantaged group with a view to bringing them into the mainstream of civic and economic life.<sup>348</sup> They embody both negative liberties (non-discrimination) and the progressive, historical realization of material equality among disadvantaged groups.<sup>349</sup> The idea behind affirmative action measures is that most of the old equality provisions were based on the notion of juridical equality, thereby ignoring such matters as history, tradition or custom, which ought to be considered forth purpose of redressing imbalances which exist against persons with disability and other categories of

---

<sup>344</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 53.

<sup>345</sup> *Ibid.* pp. 49 – 53.

<sup>346</sup> Hendriks, A. C. (2002), *supra*, n. 305, at p. 209.

<sup>347</sup> *Ibid*

<sup>348</sup> Ginsburg, R. B. and Merritt, D. J. (1999) 'Affirmative Action: An International Human Rights Dialogue, *Cardozo Law Review*, Vol. 21, at p. 254 - 255.

<sup>349</sup> Romany, C. and Chu, J. B. (2004) 'Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions, *Connecticut Law Review*, Vol. 36, at p. 286.

persons sought to be protected.<sup>350</sup> It has been argued that “the way to combat discrimination is not to deny its existence or its systemic roots. Neither is it to trivialise its impact.”<sup>351</sup> Furthermore, by recognition of differences, the specific differences approach also aims at producing equality of results of targeted groups, hence an outcome analysis that is likely to ignore other factors: e.g. societal attitudes and accessibility.<sup>352</sup> That is, the focus is on such matters as equal remuneration or securing jobs for persons with disability, which ignores other factors underlying low number of persons with disability in the work place.<sup>353</sup>

In an attempt to “deal with invisibility problem,” generated by the formal equality approach, the United Nations had either used the equality provisions and tried to interpret and apply existing core human rights instruments to persons with disability or developed a series of lesser policy and programmatic documents (general comments) focused on the needs and rights of persons with disability.<sup>354</sup> These general documents re-developed non-discrimination and equality concepts. In 1989, the Human Rights Committee adopted *General Comment No. 18 (Non Discrimination)*,<sup>355</sup> which extends the principle of equality to include affirmative action. It states that:-

[T]he principle ... sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>356</sup>

Later in 1994, the CESCR adopted *General Comment No. 5 (Persons with disability)*, which recognized that the central importance of the ICESCR in relation to the human rights of persons with disability had frequently been underlined by the international

---

<sup>350</sup> See for example: South Africa’s *The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* (Act No. 4 of 2000) (South Africa) ; Article 32(1) *The Constitution of the Republic of Uganda, 1995* (as amended) ; Article 17(4)(d), *The Constitution of the Republic of Ghana, 1992* (as amended)

<sup>351</sup> McClain, C. V. (2002), *supra*, n. 61.

<sup>352</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 53.

<sup>353</sup> Degener, T. and Quinn, G. (2002), *supra*, n. 302, at p. 8.

<sup>354</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 13.

<sup>355</sup> *General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights (Right to Work)* E/C.12/GC/18, 6.2.2006 .

<sup>356</sup> Paragraph 10, *ibid*.

community.<sup>357</sup> According to *General Comment No. 5*, the requirement contained in Article 2 (2) of the ICESCR that the rights enunciated therein will be exercised without discrimination of any kind based on certain specified grounds or other status, clearly applies to discrimination on the grounds of disability.<sup>358</sup>

The weakness of equality of results approach is exposed when segregated work settings for persons with disability might be deemed legitimate if they provide the same results (employment) as in inclusive work settings.<sup>359</sup> Another problem to this approach relates to the question of the kind of differences to be accommodated.<sup>360</sup> It should also be noted that disability, as a prohibited ground of discrimination, has been absent in the many international human rights instruments.<sup>361</sup> There are also issue of responsibilities: that is, the question as to whether the state or the private sector is responsible for meeting the needs of persons with disability (especially in employment), amid the view that equality of results may require a strong welfare state, which may interfere with the ideology of a free market system.<sup>362</sup>

### 2.3.3. Substantial Equality

Expressions such as holistic approach to equality, inclusion, or multi-dimensional disadvantage might be used to refer to this approach. Substantial equality approach has resulted from an increased awareness of complex and multi-dimensional nature of factors behind discrimination.<sup>363</sup> The starting point may be that “equality.... exists where everyone is accorded the [real equal chance] to develop his or her capabilities and to be acknowledged for personal accomplishments regardless of characteristics... which are not related to personal performance”,<sup>364</sup> and independent of that individual’s will. Provision of “real equal chance “should allow a consideration of such things as the history of discrimination, and accommodating people's differences<sup>365</sup> by recognizing stereotypes and

---

<sup>357</sup> Paragraph 1, General Comment No. 5 (Persons with Disabilities), *supra*, n. 214.

<sup>358</sup> Paragraph 5, *ibid*.

<sup>359</sup> Degener and Quinn give an example of segregated education: “Segregated education for students with disability, for example, might be deemed legitimate if special schools for students with disability provide the same educational opportunities and degrees as regular schools.” ( Degener, T. and Quinn, G. (2002), *supra*, n. 302, at p. 8 - 9.).

<sup>360</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 50..

<sup>361</sup> *Ibid*, at p. 54.

<sup>362</sup> Degener, T. and Quinn, G. (2002), *supra*, n. 302, at p. 8.

<sup>363</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 54.

<sup>364</sup> Burger, K. (2013) *Early Childhood Care and Education and Equality of Opportunity: Theoretical and Empirical Perspectives on Social Challenges*, Wiesbaden: Springer Fachmedien, at p. 219.

<sup>365</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 290.

structural barriers as obstacles to inclusion. That is, stigma must be dealt with, and impairment must be taken into account in order to eliminate or minimize structural and social barriers. This approach facilitates both equality of opportunity or even equality of outcome.<sup>366</sup>

Substantial equality does not see tools and techniques to achieve equality as exception from the main rule of equal treatment, but necessarily required to eliminate discriminatory social and political structures.<sup>367</sup> That is, equalising measures are justified on grounds of justice as well as social integration and harmony.<sup>368</sup> These equalization measures ought to take the form of holistic approach, involving a number of policy and institutional measures. Such measures may include, but are not limited to, affirmative action policies to increase minority group participation, and the imposition of a requirement to make structural adjustments to accommodate personal needs.<sup>369</sup> Holistic measures find support from the view that “it is more fruitful to conceive of disability as fluid, continuous, and holistic... not a fixed status but a continuously changing and evolving set of characteristics.”<sup>370</sup>

With respect to equality at work places, *CESCR General Comment No. 18 (Right to Work)*<sup>371</sup> recalled the principle of non-discrimination in access to employment by persons with disability, and stated:-

The ‘right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’ is not realized where the only real opportunity open to disabled workers is to work in so-called ‘sheltered’ facilities under substandard conditions. States parties must take measures enabling persons with disability to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society.<sup>372</sup>

---

<sup>366</sup> Lawson, A. (2008), *supra*, n. 300, at p. 19.

<sup>367</sup> Arnardóttir, O. M. (2009), *supra*, n. 312, at p. 54.

<sup>368</sup> Parekh, B. (2000) *Rethinking Multiculturalism Cultural Diversity and Political Theory*, London: Macmillan Press, at p. 210 - 211.

<sup>369</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 8.

<sup>370</sup> Zola, I. K. (1993) ‘Disability Statistics: What we Count and What It Tells Us’, *Disability Policy Studies*, Vol. 4, No. 2, at p. 24.

<sup>371</sup> General Comment No. 18 (The Right to Work), *supra*, n. 355.

<sup>372</sup> Paragraph 17, *ibid*. This appears to reform the content of Paragraphs 25 of the General Comment No. 5 (Persons with Disabilities), *supra*, n. 214, whose content appeared to treat sheltered employment as a ‘normal’ alternative to persons with disability by stating that “the right to ‘the enjoyment of just and favourable conditions of work’ applies to all disabled workers, whether they work in sheltered facilities or in the open labour market.



*General Comment No. 18* also recognised issues concerning physical accessibility as a dimension of accessibility to employment as explained in Paragraph 22 of *CESCR General Comment No. 5 (Persons with Disability)*.<sup>373</sup> The said Paragraph 22 recognised the importance of removal of the artificial barriers to integration in general, and to employment in particular, for the purposes of enabling persons with disability to have equal opportunities for productive and gainful employment in the labour market.

The substantial approach to equality has been recognized by the CRPD,<sup>374</sup> and Kayess and French (2008) term this approach as “universalist approach to equality” based on the assumption that all characteristics will be encountered.”<sup>375</sup> The CRPD complements a number of other existing human rights instruments adopted by the UN or developed by different civil society initiatives dating back several decades,<sup>376</sup> and marks the new era in of international human rights and disability law<sup>377</sup> - a ‘paradigm shift’, in human rights generally, and in attitude and approaches to persons with disability in particular, as it blurs the first and second generation rights,<sup>378</sup> and also takes to a new level the movement from viewing persons with disability as ‘passive recipients’ of charity, to persons with the same human rights as others.”<sup>379</sup> Through Article 1 of the CRPD, the principle of equality is given a central place.<sup>380</sup> In other words, the CRPD furthers the holistic approach to equality. Not only is its scope “unprecedented,”<sup>381</sup> but also is the fact that the CRPD has been hailed as a “great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights,”<sup>382</sup> a “Declaration of Independence for persons with disability throughout the world.”<sup>383</sup> “It is regarded as having finally empowered the world’s largest minority to claim their rights, and to participate in international and

<sup>373</sup> Paragraph 12(b)(ii), General Comment No. 18 (The Right to Work), *supra*, n. 355.

<sup>374</sup> “[D]isability is an evolving concept and ... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others;” “a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disability will make a significant contribution to redressing the profound social disadvantage of persons with disability and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries.” (Paragraphs (e) and (y), Preamble to the CRPD, *supra*, n. 24. Also see Stein, M. A. and Lord, J. E. (2009), *supra*, n. 213, at p. 24, 25.

<sup>375</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 11.

<sup>376</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 306.

<sup>377</sup> Lord, J. E. and Stein, M. A. (2008), *supra*, n. 244, at p. 450, citing Stein (2007) generally.

<sup>378</sup> Quinn, G. (2010), *supra*, n. 45, at p. 41.

<sup>379</sup> Parnes, P., *et al.* (2009) ‘Disability in Low-Income Countries: Issues and implications, *Disability Rehabilitation*, Vol. 31, No. 14, at p. 1171, citing Jason (2001).

<sup>380</sup> Lawson, A. (2008), *supra*, n. 300, at p. 27.

<sup>381</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 289.

<sup>382</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 1.

<sup>383</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 314, citing Quinn, G (2005).

national affairs on an equal basis with others who have achieved specific treaty recognition and protection.”<sup>384</sup> Through the use of nondiscrimination principles, the CRPD has only restated and reformulated equality principles, and made the rights more relevant to persons with disability, although other may argue that it has come very close to creating new substantive rights.<sup>385</sup>

## 2.4. General Approaches to Disability

In disability rights, the definition of disability plays a crucial role in the general approach to equality of persons with disability. When the UN adopted the CRPD, which has adopted a broad concept of disability, the international community had already moved into substantial equality. Although approaches to disability and equality in binding international instruments have been developing independent of each other, how disability is defined tends to reflect the focus of laws and policies, and in that way, influences the nature of equality status of persons with disability.

The meaning of disability is currently one of the most controversial issues in disability studies and related fields.<sup>386</sup> This has been a result of variations in perceptions, different classification systems of disability and variations in understandings in different national and cultural contexts.<sup>387</sup> As a complicated multidimensional concept, and because of its extensive variety, a global definition of disability that fits all circumstances is in reality nearly impossible.<sup>388</sup> Social theorists have developed several theoretical paradigms to explain how disability has been conceptualized historically, albeit mostly in Western societies.<sup>389</sup> From these perspectives, disability definitions have been the subject of debates on causes of disability, (medical conditions, environmental factors, social structures and/or

---

<sup>384</sup>Kayess, R. and French, P. (2008), *supra*, n. 119, abstract.

<sup>385</sup>Quinn, G. (2010), *supra*, n. 45, at p. 42; Flynn, E. (2011), *supra*, n. 295, at p. 19, citing Mégret, F. (2008).

<sup>386</sup>Traustadóttir, R. (2009), *supra*, n. 117, at p. 8.

<sup>387</sup>Parnes, P., *et al.* (2009), *supra*, n. 379, at p. 1171, citing McColl M, and Bickenbach J. (1998).

<sup>388</sup>Altman, B. M. (2001), 'Disability Definitions, Models, Classification Schemes and Applications', in Albrecht, G. L., Seelman, K. D. and M. Bury (Eds.), *Handbook of Disability Studies*, at p. 97, citing Slater *et al.* (1974).

<sup>389</sup>Berg, P. E. (2000) 'Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law, *Yale Law and Policy Review*, Vol. 18, at p. 5.

individual or collective behaviors and attitudes)<sup>390</sup> and for that matter, “better” ways to deal with disability. These debates among theorists have been criticized as “sterile”.<sup>391</sup>

The criticisms of disability definition’s debate notwithstanding, there are some practical issues surrounding the definitions. Disability being a concept of a sociological nature, implies that empirical representations of such concepts can be a rather delicate task, since theoretical innovations are not always developed to be applied in an empirical context,<sup>392</sup> and that the official definitions of disability reflect the organisational requirements of governments, their institutions and key welfare professionals;<sup>393</sup> while, on the other hand, anti-discrimination or disability rights instruments would require an accurate definition for practical purposes.<sup>394</sup> In addition, the development of science and technology may have contributed to the new approaches to disability, and perhaps some new “challenges”. An extract from Francis (2009) helps to illustrate the point:-

No one questions whether ‘I’ am seeing because I wear glasses, although they may of course question the quality of my sight or whether I should be permitted to drive a car or whether it is employment discrimination not to hire me to pilot an airplane. No one questions whether ‘I’ am running if I have a prosthetic foot, although they may question whether it is fair for me to enter a track competition if my foot is an ‘enhancement’ or claim an Olympic medal if I run on prosthetic legs. On the other hand, there are forms of assistance from others in cases of physical disability in which it might be questioned whether the characteristic in question is in any sense ‘mine’: do ‘I’ see with the eyes of others if I experience the visual world only as they describe it to me? Do ‘I’ move my hand if someone else picks it up from the bed and places it across my chest, without any associated nervous stimulation of ‘my’ musculature?<sup>395</sup>

Thus, it have been argued that efforts to produce (empirically) clear-cut concepts from theoretical advancements may run the risk of being considered as both narrowed and rigid, and additionally, having limited use for theoretical and empirical research.<sup>396</sup> Furthermore, modern definition(s) of disability cannot fit all cultures, since they (definitions) emerged in particular historical circumstances. The perceptions of disability are thus contested across

---

<sup>390</sup>Degener, T. (2006) 'The Definition of Disability in German and Foreign Discrimination Law', *Disability Studies Quarterly*, Vol. 26, No. 2, <http://dsq-sds.org/Article/view/696/873>, accessed: 10.1.2012.

<sup>391</sup>e Kahane, G. and Savulescu, J. (2009), 'The Welfarist Account of Disability', in K. Brownlee and A. Cureton (Eds.), *Disability and Disadvantage*, at p. 52.

<sup>392</sup>Grönvik, L. (2007) 'The Fuzzy Buzz Word: Conceptualisations of Disability in Disability Research Classics', *Sociology of Health & Illness*, Vol. 29, No. 5, at p. 754.

<sup>393</sup>Goodley, D. (2011), *supra*, n. 34, at p. 5.

<sup>394</sup>Grönvik, L. (2007), *supra*, n. 392, at p. 750..

<sup>395</sup>Francis, L. P. (2009), 'Understanding Autonomy in Light of Intellectual Disability', in K. Brownlee and A. Cureton (Eds.), *Disability and Disadvantage*, at p. 205.

<sup>396</sup>Grönvik, L. (2007), *supra*, n. 392, at p. 750.

socio-cultural environments.<sup>397</sup> For example, what are today known as medical or charity approaches to disability were only instituted in developing countries through colonial humanitarian models, which are criticized for having destroyed traditional ways of caring for persons with disability in other places in the world. The modern (social) approaches have also been criticized of articulating the concerns educated western academics.<sup>398</sup> The later view is however weakened by various research works depicting cultural practices perpetuating the stigmatization of persons with disability, and the acceptance by African governments and disability rights advocates of the human rights approach to disability.

Despite all the controversy, defining disability remains an important task for various purposes.<sup>399</sup> The fact that there is no universally acceptable definition of disability makes a legal definition of the term important, because the definition serves a “gatekeeping function,” since it identifies the class of people entitled to special benefits, or the class of people entitled to reasonable accommodations and protections against discrimination.<sup>400</sup>

Disability is being described according to approaches (models). Approaches to disability offer a theoretical framework to understand different ways people view beliefs about disability and help to explain their perspectives.<sup>401</sup> Perhaps the most general categorization of models is that of individual (medical) and social approaches to disability. Between these approaches, there are differences in emphasis, which have consequences for the efficacy and effects on the perception of disability among persons with disability and the public at large.<sup>402</sup> The categorization of disability provides an understanding of the differences in these two approaches and highlights the new social understanding of disability.<sup>403</sup> However, it should be noted that settling on this way of classifying approaches to disability has been viewed by some scholars as an over-simplification, and therefore does not do justice to the complexity of disability.<sup>404</sup> It has been argued that disability issues cannot be solely attributed to these approaches only, since there are much more complex issues, and they require a deeper understanding of the various intrinsic and extrinsic factors determining (and hindering) the independent functioning and society participation of

---

<sup>397</sup> Grech, S. (2009), *supra*, n. 41, at p. 722, citing Whyte and Ingstad (1995).

<sup>398</sup> *Ibid.*, citing Ingstad (2001).

<sup>399</sup> *Ibid.*

<sup>400</sup> Bagenstos, S. R. (2003), *supra*, n. 21, at p. 656.

<sup>401</sup> McDonald, A. S. (2012) 'Cultural Beliefs about Disability in Practice: Experiences at a Special School in Tanzania, *International Journal of Disability, Development and Education*, Vol. 59, No. 4, at p. 394.

<sup>402</sup> Bagenstos, S. R. (2003), *supra*, n. 21, at p. 657.

<sup>403</sup> Traustadóttir, R. (2009), *supra*, n. 117, at p. 8..

<sup>404</sup> *Ibid.*

individual.<sup>405</sup> This part is not intended to provide extensive detail nor an academic position—rather a snapshot of prevalent models of disability as commonly described, since there have always been different views of what exactly disability is.<sup>406</sup>

### 2.4.1. Individual Approaches

Individual approaches to disability locate “the problem” in the person concerned. That is, disability is perceived as “something wrong” in the body of the concerned individual. The main focus is on the bodily, sensory or cognitive “abnormality”, and the functional limitations that are presumed to arise from such “abnormality”.<sup>407</sup> In contrast with social approaches to disability, the individual approach to disability is not grounded on physical and social environment surrounding a person with disability.<sup>408</sup>

There are several types of individual approaches to disability, and the “medical model” is perhaps the most used term. Focusing upon an individual, disability may be viewed in terms of: (a) medical problems (classical medical model); (b) the individual’s productivity ability: e.g. loss of earnings (economic model);<sup>409</sup> or (c) beliefs (moral model);<sup>410</sup> The medical approach is said to have been the dominant model in the formulation of disability policy,<sup>411</sup> and this could have been due to the fact that disability and its theoretical underpinnings have not received the same degree of scrutiny as other aspects of identity, such as race or gender.<sup>412</sup> Under the medical approach, disability is viewed as a physical or mental condition that is inherent in the body of a person with disability,<sup>413</sup> and is largely unrelated to the physical and social environment in which people live.<sup>414</sup> Thus under the medical model, disability is perceived as a “personal tragedy,” affecting individual’s

---

<sup>405</sup>Hendriks, A. C. (2002), *supra*, n. 305, at p. 202., citing Groce and Zola (1993), and Pinder (1995).

<sup>406</sup>Priestley, M. (2001), *supra*, n. 54, at p. 5.

<sup>407</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 61., citing Aberley (1993).

<sup>408</sup>Hendriks, A. C. (2002), *supra*, n. 305, at p. 199.

<sup>409</sup>Langtree, I. (2010) *Definitions of The Models of Disability*, <http://www.disabled-world.com/definitions/disability-models.php#ixzz1vxfsp4y>, accessed: 26.5.2012.

<sup>410</sup>Goodley, D. (2011), *supra*, n. 34) describes various models, attaching them to different time spans and geographical regions. He divides the models into two main categories: (i) where disability is not distinguished from impairment and (ii) description of disability from ‘disability studies perspectives.’ These models are moral, and medial models (belonging to the first category); and social, minority, culture and relational models (belonging to the second category). One should note that in some places in Africa, disability is linked “myths” tied to local beliefs: e.g. curse, evil spirits, e.t.c. ( Goodley, D. (2011), *supra*, n. 34, at p. 7; Goodley, D. (2011), *supra*, n. 34).

<sup>411</sup>Gottlieb, A, *et al.* (2012), *supra*, n. 35, Citing Blanck (2001); Myhill and Blanck (2009).

<sup>412</sup>Areheart, B. A. (2008) ‘When Disability Isn’t ‘Just Right’: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma, *Indiana Law Journal*, Vol. 83, No. 1, at p. 183., citing Albrecht, G. L. (2002).

<sup>413</sup>Bagenstos, S. R. (2003), *supra*, n. 21, at p. 656.

<sup>414</sup>Gottlieb, A, *et al.* (2012), *supra*, n. 35.

functional ability - productivity or ability to work,<sup>415</sup> and a biological exception, rather than an ordinary part of human experience, and the answer to the “problem” requires medical or rehabilitation adjustments.<sup>416</sup> In addition to medical intervention, coping strategies that enable the individual to fit in with the academic environment may be encouraged.<sup>417</sup> Therefore, the first alternative is to heal or find a cure for disability. Where the cure is unsuccessful, losses in the individual’s productivity can be compensated for either by remedying the injuries by way of offering rehabilitation, or by adopting the work or work environment, or by bridging the income gap through welfare support and projects.<sup>418</sup> The individual is therefore condemned to “the mercy and charity of society.”<sup>419</sup> - seen as deserving public sympathy, and worthy of healing and care as a matter of moral duty.<sup>420</sup> That stated, the medical approach to disability promotes culture of dependence among persons with disability.<sup>421</sup>

The classic example of the medical approach to disability could be found from the DRDP and later the WHO 1980’s *International Classification of Impairments, Disability and Handicaps* (ICIDH).<sup>422</sup> The DRDP defined a person with disability (original phrase “disabled person”) to mean:-

any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.<sup>423</sup>

The ICIDH, which was a companion classification to the *International Classification of Diseases* (ICD), provided a conceptual framework for disability described in three dimensions: impairment, disability and handicap:-

#### Impairment

---

<sup>415</sup>Myhill, W. N. and Blanck P. (2009) 'Disability and Aging: Historical and Contemporary Challenges, *Marquette Elder's Advisor*, Vol. 11, at p. 60.

<sup>416</sup>Kearney, P. M. and Pryor, J. (2004) 'The International Classification of Functioning, Disability and Health (ICF) and Nursing, *Journal of Advanced Nursing*, Vol. 46, No. 2, at p. 163.; Cameron, C. (2010) *Does Anybody Like Being Disabled? A Critical Exploration of Impairment, Identity, Media and Everyday Experience in a Disabling Society*, PhD Thesis, Margaret University, at p. 6..

<sup>417</sup>Kearney, P. M. and Pryor, J. (2004), *supra*, n. 416, at p. 163.

<sup>418</sup>Hendriks, A. C. (2002), *supra*, n. 305, at p. 200.

<sup>419</sup>Myhill, W. N. and Blanck P. (2009), *supra*, n. 415, at p. 60.

<sup>420</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 62.

<sup>421</sup>Bagenstos, S. R. (2004) 'The Future of Disability Law, *The Yale Law Journal*, Vol. 114, at p. 15.

<sup>422</sup>WHO (1980) 'International Classification of Impairments, Disabilities and Handicaps, WHO.

<sup>423</sup>Article 1, *Declaration on the Rights of Disabled Persons*, General Assembly Resolution A/RES/30/3447, 1975 (DRDP).

In the context of health experience, impairment is any loss or abnormality of psychological, physiological, or anatomical structure or function.<sup>424</sup>

#### Disability

In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.<sup>425</sup>

#### Handicap

In the context of health experience, a handicap is a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual.<sup>426</sup>

Individual approaches to disability have significantly influenced laws and policies over the years, since the definition of disability has been "a part of a larger cultural discourse... establish[ing] and uphold[ing] dominant notions of health, illness, and disability."<sup>427</sup> The approach "gained the support of some of the most powerful institutions in society, such as the health system, the legal system and the social services system."<sup>428</sup> In developing countries, doctors, social workers, and educators work to "rehabilitate" the individual to be able to function within society through training and education.<sup>429</sup> While the former definition of disability in Tanzania followed the individual model,<sup>430</sup> the influence of the model is still evident in African countries.

It is also important to note that what influences societal attitudes towards persons with disability are cultural beliefs (moral model), among other factors. In Tanzania for example, cultural beliefs on disability have been prevalent, and they have been influencing general perceptions on disability, which are generally "individualistic".<sup>431</sup> Since local perceptions have often led to either discrimination of persons with disability and feeling of helplessness among persons with disability themselves; or societal view that persons with

---

<sup>424</sup>WHO (1980), *supra*, n. 422, at p. 27.

<sup>425</sup>*Ibid*, at p. 28.

<sup>426</sup>*Ibid*, at p. 29.

<sup>427</sup>Berg, P. E. (2000), *supra*, n. 389, at p. 4.

<sup>428</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 67.; also see generally: Schweik, S. M. (2009) *The Ugly Laws: Disability in Public*, New York, London: New York University Press. The book is about discriminatory laws which, inter alia, prevented persons with disability from appearing in public places. Such laws had not only promoted the "defect" picture, but also expressed among the worst forms of stereotypes against persons with disability.

<sup>429</sup>McDonald, A. S. (2012), *supra*, n. 401, at p. 394.

<sup>430</sup>See for example, Section 2 of [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>431</sup>McDonald, A. S. (2012), *supra*, n. 401, at p. 394, 395.

disability are persons who only need to be taken care of.<sup>432</sup> Among the beliefs in some African communities is that “disability is a curse or punishment from the gods.”<sup>433</sup> Understanding the belief prevalent at community is critical in order to understand appropriate ways of promoting inclusive practices in workplace.<sup>434</sup> Majority of current disability or equality laws placed emphasis on raising community awareness on disability issues.

Since individual approaches to disability do not take into consideration external disabling factors, and focus only on cure and rehabilitation, disability is not viewed as the “human rights” concern in the right sense. Instead, the medical approach justifies segregation of persons with disability, and thereby limits their opportunities to participate actively in community life.<sup>435</sup> The assumption is that, rather than making mainstream institutions accessible, the needs of persons with disability are better served in separate facilities that can be constructed to meet very specialized needs.<sup>436</sup> This permits states to continue ignoring disability needs as equal to those of other welfare needs, knowing that these will be served in separate institutions;<sup>437</sup> and segregation is not seen as discriminatory, but as a natural outcome of their medical limitations.<sup>438</sup> Therefore, the individual approach to disability impairs the notion of equality by systematically entrenching the idea that persons with disability are in some “real” sense different from people without disabilities.<sup>439</sup> This reinforces existing prejudices among employers about the inability of persons with disability to do a job as well as individuals without disability.<sup>440</sup>

While the restrictive approach of individual models of disability may have largely been responsible for their rejection by disability scholars, activists and disability movement,<sup>441</sup> it should be noted that the medical model is viewed as having helped “the promotion of faith in medical intervention. It has been argued that “medical and technological advances in key services of welfare state have improved the lives of persons with disability,”<sup>442</sup> and

---

<sup>432</sup> *Ibid.*, at p. 405.

<sup>433</sup> Biegon, J. (2011), *supra*, n. 20, at p. 53.

<sup>434</sup> McDonald, A. S. (2012), *supra*, n. 401, at p. 405.

<sup>435</sup> Gottlieb, A, *et al.* (2012), *supra*, n. 35, citing Blanck (2008) and Shapiro (1994); Goodley, D. (2011), *supra*, n. 34, at p. 7; Mmatli, T. O. (2010), *supra*, n. 194, at p. 62.

<sup>436</sup> Heyer, K. C. (2002), *supra*, n. 21, at p. 727.

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> Bagenstos, S. R. (2003), *supra*, n. 21, at p. 659.

<sup>440</sup> Gottlieb, A, *et al.* (2012), *supra*, n. 35, , citing Blanck (2008) and Shapiro (1994).

<sup>441</sup> Mmatli, T. O. (2010), *supra*, n. 194, at p. 69..

<sup>442</sup> Goodley, D. (2011), *supra*, n. 34, at p. 2.



that medical perspectives have not been unaware of the social consequences of disability.<sup>443</sup>

#### **2.4.2. The Human Rights Approach**

The human approach which I adopt has its origins in the social approach (social model) to disability. The social approach to disability is a generic term for a broad theory of disability that began to emerge in from the mid-1960s in the United Kingdom out of dissatisfaction with the individual approach.<sup>444</sup> Disability movement and disability scholars have challenged the taken for granted understanding of disability, which were focused solely on individual's impairment, and based upon able-bodied assumption of normality. They struggled to re-define the meaning of disability,<sup>445</sup> and focused on how social processes and cultural meanings greatly influence persons with disability' lives and opportunities.<sup>446</sup> Disability was therefore viewed as social oppression.<sup>447</sup>

Social approaches to disability places emphasis on such matters as structural barriers, social attitudes and cultural practices (which also takes into consideration the history of discrimination) and such other several factors which are outside the body. This developed in response to a growing recognition and acknowledgement of the possibility that at least some things previously thought to be located within the individual are, in fact, created, exacerbated, promoted, and supported by the social and physical environment.<sup>448</sup>

According to Degener and Quinn (2002): -

[E]xclusion and segregation of people with disability do not logically follow from the fact of impairment, but rather result from political choices based on false assumptions about disability. Inaccessibility problems are not inevitably raised by mobility, visual or hearing impairments, but instead are corollary of political decisions to build steps but not ramps, to provide information in printed letter version only, or to forgo sign language or other forms of communication.<sup>449</sup>

---

<sup>443</sup>Grönvik, L. (2007), *supra*, n. 392, at p. 752.

<sup>444</sup>Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 6; Hendriks, A. C. (2002), *supra*, n. 305, at p. 201.

<sup>445</sup>*Ibid*, at p. 201; Traustadóttir, R. (2009), *supra*, n. 117, at p. 8.

<sup>446</sup>Traustadóttir, R. *ibid*.

<sup>447</sup>Kayess, R. and French, P. (2008), *supra*, n. 119, citing Oliver (1996); Finkelstein, (1980); Abberley (1987); and Quinn (1999).

<sup>448</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 69., citing Rothman, (2003).

<sup>449</sup>Degener, T. and Quinn, G. (2002), *supra*, n. 302, at p. 5.

Thus the social approach to disability is against social mechanisms which produce marginalization which aims at redirecting the public's assumptions of disability.<sup>450</sup> In this way, disability is regarded as a societal and political issue: the barriers to participation, unequal rights, discrimination and oppression can be adjusted by social action.<sup>451</sup> Intervention measures are no longer focused on rehabilitation or cure, but must also be focused on the elimination of attitudinal, physical, and institutional barriers. When this is done, it is argued, that many persons with disability will be viewed as having different abilities and greater opportunity to participate in society, rather than having disability and the inability to participate.<sup>452</sup> The social approach to disability has therefore been effective for generating a clear agenda for social change, for liberating persons with disability through identification of barriers, and for improving the self-esteem of persons with disability and building a positive sense of collective identity.<sup>453</sup>

The expression "social approach" does not mean a single approach, but a "family of social-contextual approaches" to disability.<sup>454</sup> While the British Social Model might be the "trade mark" of international disability movement,<sup>455</sup> it is suggested that "there are many other, more robust, ways of conceptualising disability, which retain a commitment to equality and justice for persons with disability,"<sup>456</sup> and that it is dangerous to assume that progressive approaches are impossible in the absence of social model, for "there are many approaches to disability which stress [on equality and justice]. The social model is [therefore] not unique."<sup>457</sup> New approaches have developed over time and in different geographical areas, owing to different social political circumstances.<sup>458</sup>

The human rights approach is an improved version of the "narrow" minority rights (civil rights) approach which developed in North America. The minority rights approach did not attempt to redefine disability as a social oppression, but it focused on the "means" to

---

<sup>450</sup>Mueller, P. K, *et al.* (2010), 'Regarding Disability: Perceptions of Protection under the Americans with Disabilities Act', in S. N. Barnartt (Ed.), *Disability as a Fluid State: Research in Social Science and Disability*, at p. 163.

<sup>451</sup>Kearney, P. M. and Pryor, J. (2004), *supra*, n. 416, at p. 163.

<sup>452</sup>Gottlieb, A, *et al.* (2012), *supra*, n. 35, at p. 34.

<sup>453</sup>Shakespeare, T. (2006), 'The Social Model of Disability', in L. J. Davis (Ed.), *The Disability Studies Reader*, 2nd (edn), at p. 199 - 200.

<sup>454</sup>Traustadóttir, R. (2009), *supra*, n. 117, at p. 9.

<sup>455</sup>Hendriks, A. C. (2002), *supra*, n. 305, at p. 201.

<sup>456</sup>Shakespeare, T. (2006) *Disability Rights and Wrongs*, London, New York: Routledge, at p. 27.

<sup>457</sup>*Ibid.*

<sup>458</sup>See for example, Goodley, D. (2011), *supra*, n. 34; Traustadóttir, R. (2009), *supra*, n. 117.

achieve equality of persons with disability as a minority group through civil rights.<sup>459</sup> The similarities between disability and minority is the fact that discrimination based on disability, race or gender are attributed to individual characteristics. In this case, disability could be viewed a minority, just as a particular racial group, which has suffered from a history of discrimination, relatively powerless politically and who are socially excluded.<sup>460</sup> Nevertheless, while the minority approach may had the advantage of emphasizing the political and social aspect over the medical model, the minority had one fundamental problem among others, that it depended on viewing disability as a group-defining characteristic, while in fact, persons with disability do not form a discrete and insular group at all, considering such things as variations in reactions to different forms of impairments.<sup>461</sup> There is therefore a view that the complex nature of impairment means that achieving equality of persons with disability is a more complex and difficult process than achieving equality for the minorities.<sup>462</sup> The minority approach had also been criticized for “unintentionally reinforce[ing] the medical conception of disability, [by] necessitating a view of disability as fixed and dichotomous; either one has a disability or one does not.”<sup>463</sup> The human rights approach “encompasses all people and all human rights in an equal manner,”<sup>464</sup> “respects difference and widens the range of the normal”,<sup>465</sup> and its focus is on inter-relationship of rights - civil and political rights, as well as economic, social and cultural rights, because the full inclusion of a socially marginalized group requires invoking both negative and positive rights.<sup>466</sup> Stain states:-

“Tying first- and second-generation rights together illustrates how the disability human rights paradigm can be applied to other people. The social attitudes underlying disability-related exclusion manifest more overtly than those causing isolation of other groups. Applying a disability paradigm highlights the effect of social exclusion, and points out the need of ensuring that the human rights of all socially marginalized groups are protected. As a result, the disability human rights paradigm reaffirms that established human

<sup>459</sup>Shakespeare, T. (2006), *supra*, n. 456, at p. 24.

<sup>460</sup>Fredman, S. (2005), 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, at p. 204, 205.

<sup>461</sup>*Ibid*, at p. 205, 206.

<sup>462</sup>Shakespeare, T. (2006), *supra*, n. 456, at p. 65.

<sup>463</sup>Fredman, S. (2005), *supra*, n. 460, at p. 206.

<sup>464</sup>MacNaughton, G. and Frey, D. F. (2011) 'Decent Work for All: A Holistic Human Rights Approach', *American University International Law Review*, Vol. 26, No. 6, at p. 461.

<sup>465</sup>Fredman, S. (2005), *supra*, n. 460, at p. 206..

<sup>466</sup>Stein, M. A. and Stein, J. S. P. (2007), *supra*, n. 155, at p. 2205, 2209; Stein, M. A. (2007) 'Disability Human Rights', *California Law Review*, Vol. 95, No. 1, at p. 77, 78.; Ellis, K. (2005) 'Disability Rights in Practice: The Relationship between Human Rights and Social Rights in Contemporary Social Care', *Disability & Society*, Vol. 20, No. 7, at p. 694. citing Clements and Read (2003).

rights protections, like those extending to women, require indivisible application of first- and second-generation rights as envisioned by the third-generation human right to development...”<sup>467</sup>

Since the boundaries between socio-economic rights on the one hand and civil and political rights on the other are “artificial”, it is preferable to conceive of claims to disability rights as dependent upon a dynamic interplay between civil and economic rights.<sup>468</sup> The classical social approach is said to have been proscribed to a rigid concept of traditional equality (civil rights approach), which has failed to take into consideration broader issues with respect to marginalization of persons with disability,<sup>469</sup> and the fact that at times, it is not the discriminatory acts which limit the opportunities of persons with disability, but such matters as the lack of personal-assistance services, assistive technology, and accessible transportation.<sup>470</sup>

It is important to note, however, that perceiving the human rights approach only in the legal perspective is deemed to be narrow, although the linkage to international law is a powerful tool depending on ratification of international human rights instruments.<sup>471</sup> The wider conception includes variety of measures outside legal processes. According to Bickenbach, J.E. (2001):-

To [...] put the human rights agenda on a firmer footing, one must give considerable thought to identifying the attitudinal, social, and political obstacles to the goals of disability advocacy, as well as to developing the tools needed to move the debate from the piecemeal reaction to inequality to a sustained development of equality in all areas of human participation. Sound social scientific understanding of the historical and economic forces that have created our understanding of human rights and our current legal and policy techniques for securing these rights is urgently required.<sup>472</sup>

In this way, human rights approach is a holistic approach, and includes, in addition to the legal protection, such other measures as empowerment, participation, awareness or accountability with the priority on persons with disability or other targeted groups.<sup>473</sup> The

---

<sup>467</sup> Stein, M. A. (2007), *supra*, n. 466, at p. 78.

<sup>468</sup> Ellis, K. (2005), *supra*, n. 466, at p. 694.

<sup>469</sup> Stein, M. A. and Stein, J. S. P. (2007), *supra*, n. 155, at p. 1210.

<sup>470</sup> Bagenstos, S. R. (2004), *supra*, n. 421, at p. 23.

<sup>471</sup> Katsui, H. (2008), *supra*, n. 91, at p. 6, 7.

<sup>472</sup> Bickenbach, J. E. (2001), 'Disability Human Rights, Law, and Policy', in Albrecht, G. L., Seelman, K. D. and M. Bury (Eds.), *Handbook of Disability Studies*, at p. 581, 582.

<sup>473</sup> *Ibid*, citing Lundström-Sarelin and Mustaniemi-Laakso (2007).

focus on matters external to the individual's body means that the human rights approach and the classical (British) social approach are continuum and mutually reinforcing.<sup>474</sup>

The international acceptance of human rights norms means that the human rights approach does not only connect persons with disability into the discourse,<sup>475</sup> but also recognise disability as an inclusive concept, and embraces disability as a universal human variation rather than an aberration.<sup>476</sup> It acknowledges that variation exists among all individuals, and that despite this human diversity or variation of needs, all individuals with disabilities are entitled to human rights measures combined with equality measures.<sup>477</sup> Consequently, the human rights approach opposes such measures as employment quotas, since they are viewed as “yet another stigmatized form of special treatment.”<sup>478</sup>

The human rights approach to disability necessitates the participation of persons with disability (along with other stakeholders) in the process of societal reconstruction so that they may claim their rights. To comply with this framework, States must collaborate in policy design, implementation, enforcement, and monitoring with persons with disability, their families, advocates, and organizations, as well as other aspects of civil society. This will ensure a sense of ownership among those citizens targeted by the process. Including persons with disability also makes it more likely that the policies enacted will accurately reflect their social conditions, and have greater impact on their daily lives.<sup>479</sup>

The CRPD furthers the human rights approach to disability.<sup>480</sup> This can be seen from the multi-lateral approach of the convention, and the express stipulation in Article 1 – the Article of purpose. The Article provides:-

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability, and to promote respect for their inherent dignity.

---

<sup>474</sup>Katsui, H. (2006), *supra*, n. 83, at p. 2., citing Bickenbach, (2001) and Katsui, (2005).

<sup>475</sup>*Ibid.*

<sup>476</sup>Stein, M. A. (2007), *supra*, n. 466, at p. 76, 77 and 121.

<sup>477</sup>Stein, M. A. and Stein, J. S. P. (2007), *supra*, n. 155, at p. 1240.

<sup>478</sup>Heyer, K. C. (2002), *supra*, n. 21, at p. 727..

<sup>479</sup>Stein, M. A. and Stein, J. S. P. (2007), *supra*, n. 155, at p. 1240.

<sup>480</sup>Perlin, M. L. (2009) 'A Change is Gonna Come: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law, *Northern Illinois Law Review*, Vol. 29, No. 3, at p. 490.; Lord, J. E. and Stein, M. A. (2008), *supra*, n. 244, at p. 460. It should also be noted that paragraph 5 of the introductory part of the Standard Rules, *supra*, n. 226) recognizes the social approach to disability. It states: “Towards the end of the 1960s organisations of persons with disability in some countries started to formulate a new concept of disability. That new concept indicated the close connection between the limitation experienced by individuals with disabilities, the design and structure of their environments and the attitude of the general population.”

Persons with disability include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

There is a view that because these conceptual norms are set forth in the “Article of purpose,” it follows that States cannot enter permissible reservations to the normative contents of this Article.<sup>481</sup>

The CRPD does not define disability. It defines “a person with disability”, and recognizes disability as an evolving concept.<sup>482</sup> The reason for this was due to the disagreement within the Ad Hoc Committee<sup>483</sup> regarding whether or not the Convention should include a definition of disability.<sup>484</sup> It was the “among the most controversial dealt with by the Ad Hoc Committee.”<sup>485</sup> There was a concern that without including a specific definition of disability in the Convention, States would feel free to exclude people with certain disabilities from their laws' protections, thereby putting at risk the entire purpose of the Convention.<sup>486</sup> On the other hand, the definition of disability was objected on the basis that any definition would inevitably derive from the medical model - that any definition would necessarily include some people and not others.<sup>487</sup> There was also a view that over time, the definition may change to give room for the inclusion of people who may not now be considered as persons with disability, and therefore the incorporation of a definition of disability runs the risk of either being inflexible (“time-locking the convention”), and thereby significantly impair new evolutions from taking place, or at least from being recognized by the law or policy.<sup>488</sup> The definition would also risk ignoring variations among societies – by “imposing a western view of disability on non-western cultural systems,”<sup>489</sup> “compelling [States] to recognise... a large number of impairment groups not traditionally understood as persons with disability within their societies.”<sup>490</sup> Therefore, by

---

<sup>481</sup> See footnote 47 in Lord, J. E. and Stein, M. A. (2008), *supra*, n. 244, at p. 460; Kanter, A. S. (2007), *supra*, n. 237, at p. 291.

<sup>482</sup> Paragraph (e) of the Preamble, CRPD, *supra*, n. 24.

<sup>483</sup> Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with disability, established by UN General Assembly Resolution 56/168 of 19<sup>th</sup> December 2001.

<sup>484</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 291.; Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 23.

<sup>485</sup> *Ibid.*

<sup>486</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 292.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*; Hendriks, A. C. (2002), *supra*, n. 305, at p. 206.

<sup>489</sup> Kanter, A. S. (2007), *supra*, n. 237, at p. 292.

<sup>490</sup> Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 23.

not defining disability, the CRPD seems to allow more flexibility in the conceptualisation of disability.

The human rights approach to disability is not without challenges, especially considering the fact that under certain circumstances, the distinction between the impact of impairment and the impact of social barriers is hard in practice,<sup>491</sup> and that phenomenological aspects of functional limitations cannot be ignored.<sup>492</sup> I discuss these challenges in chapter 5 of this work. At this juncture, it is important to note that the CRPD has been criticized for, *inter alia*, “entrenching contemporary conceptual confusion between impairment and disability”, and failing to accord human rights protection for persons with impairment who are apparently not suffering from discrimination, but who may be at risk of it.<sup>493</sup> This concern is expressed by Kenny and French (2008) as follows:-

[A]ccording to the social model, ‘disability’ is the limitation that results from discrimination and social oppression. Impairment is a characteristic, feature or attribute of an individual (for example, blindness, deafness, spinal cord injury). There is no deterministic relationship between persons with an impairment and disability, because a society free from discrimination and oppression can exist, at least theoretically. However, it is only persons with impairments who may be subject to disability. The CRPD typically uses the term ‘persons with disability’ where conceptually ‘persons with impairments’ is meant, and additionally, it uses the term ‘disabilities’, instead of ‘disability’, including in its title, which is incorrect from both an ontological and phenomenological perspective...

It also logically means that the human rights protection provided by the CRPD is not triggered by impairment, but disability; that is, protection is post-facto - only available to those persons with impairments who are already subject to discrimination and oppression, rather than those persons who may be at risk of it. This latter group would logically include those persons with impairments who do not experience disability because of the nature of their present social environment or because appropriate adjustments are available to them. For example, Article 14 provides that ‘disability shall in no case justify a deprivation of liberty’. Presumably, the intention is to prevent deprivation of liberty on the basis of a personal characteristic, such as intellectual impairment, whether or not that person is experiencing disability. Similarly, Article 23 provides that ‘in no case shall a child be separated from parents on the basis of disability of either the child or one or both of the parents’ where again, presumably, the intention must be to prevent family separation merely because of a personal characteristic, such as a parent’s psycho-social impairment.<sup>494</sup>

---

<sup>491</sup>Grech, S. (2009), *supra*, n. 41, at p. 770.

<sup>492</sup>*Ibid.*, at p. 769, 770 and 776; Mmatli, T. O. (2010), *supra*, n. 194, at p. 78, citing French (1993); Bagenstos, S. R. (2004), *supra*, n. 421, at p. 4, 84.

<sup>493</sup>Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 21.

<sup>494</sup>*Ibid.*

I should also make clear that although rights-approach embraced by the CRPD has its origins from the social approach to disability,<sup>495</sup> I have taken a cognisance not everyone considers the disability perspectives of the CRPD to be social (or at least wholly social).<sup>496</sup> For example, Berg et al (2011) states:-

Although the CRPD does not define disability, it does state in Article 1 that: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”. In summary, interactions take place between impairments and barriers, not between person and environments, and participation is hindered by impairments. This contrasts with the preamble of the CRPD, which says that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society’. It is no wonder that some consider the disability perspective of the CRPD to be social while others maintain that it is medical (Leonardi et al. 2006; Equal Rights Trust 2008; Stein and Lord 2009).<sup>497</sup>

In Chapter 5, I explain some limitations of the human rights approach to disability, and I am convinced that the human rights approach to disability should not be perceived as totally rejecting some medical solutions to impairment related issues. This notwithstanding, it is easy to notice (as in several scholarly works referred to in this work), that the human rights approach to disability is preferred to the old individual approaches. The new approach is capable of producing the required changes in the area of disability rights.<sup>498</sup>

## **2.5. Approaches Disability and Equality in Tanzania**

### **2.5.1. Separate Legal and Policy Regimes**

The United Republic of Tanzania, was formed in 1964, following the Union of the then Republic of Tanganyika and the People’s Republic of Zanzibar (Zanzibar). The Union has a unique structure, in which all matters falling under Tanganyika (Tanzania Mainland) are handled by the union government, while Zanzibar retains its autonomy for all affairs considered as “non-union matters”. For the union matters, respective laws, policies and institutions operate in Tanzania Mainland as well as Zanzibar. Under this constitutional arrangement, employment and disability matters fall under “non-union matters”, meaning

---

<sup>495</sup>Harper, P. (2012), *supra*, n. 235, at p. 3.

<sup>496</sup>Borg, J, *et al.* (2011) The Right to Assistive Technology: For Whom, for What, and by Whom?, *Disability & Society*, Vol. 26, No. 2, at p. 153.

<sup>497</sup>*Ibid.*

<sup>498</sup>Quinn, G. (2010), *supra*, n. 45, at p. 34; Light, R. (2005), *supra*, n. 233, at p. 15.



that Tanzania Mainland and Zanzibar have two separate systems of laws, policy and institutional mechanisms on employment and disability.

When it comes to the application of human rights generally, two Bills of Rights exist: the one under the *Constitution of the United Republic of Tanzania*,<sup>499</sup> and the other under the Constitution of Zanzibar.<sup>500</sup> The *Constitution of the United Republic of Tanzania* is itself a union matter, which means that the Bill of Rights is also a union matter. This is the reason why, the *Basic Rights and Duties Enforcement Act*<sup>501</sup> which is the law setting the procedure for the judicial enforcement of the Bill of Rights, apply to Tanzania Mainland as well as Zanzibar, and so do the operations of the Commission for Human Rights and Good Governance,<sup>502</sup> the national human rights institution. This arrangement has not been without challenges. Earlier, there was a contention whether human rights fall under the union matters in the *Articles of the Union of 1964* and the various amendments to the *Constitution of the United Republic of Tanzania* (which have themselves been disputed).<sup>503</sup> Nevertheless, the issue was resolved since 2006, and it is now understood that human rights is falling under the list of the union matters.<sup>504</sup>

This part examines the approaches to equality and disability under the *Constitution of the United Republic of Tanzania* and the *Constitution of Zanzibar*,<sup>505</sup> as well as under employment and disability laws and policies of both sides of the union.

## **2.5.2. Disability and Equality in Tanzania Mainland**

### **2.5.2.1. Overview**

In giving account of the development of disability and equality concepts in Tanzania Mainland, consideration has to be taken of the development of human rights generally within the country, and the international influence in the area of disability rights.

---

<sup>499</sup>*The Constitution of the United Republic of Tanzania, 1977* [Cap 2 R.E. 2002] (as amended)

<sup>500</sup>*The Constitution of Zanzibar, 1984* (as amended)

<sup>501</sup>*The Basic Rights and Duties Enforcement Act* [Cap 3 R.E. 2002] (United Republic of Tanzania)

<sup>502</sup>Section 1(2), *ibid*; and Section 3, *The Commission for Human Rights and Good Governance Act* [Cap 391 R.E. 2002] (United Republic of Tanzania)

<sup>503</sup>For more about the union see for example: Oloka-Onyango, J. and Nassali, M. (2003) 'Constitutionalism and Political Stability in Zanzibar: The Search for a New Vision, Kituo Cha Katiba; Haule, R. R. (2006) 'Torturing the Union?: An Examination of the Union of Tanzania and its Constitutionality, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 66, pp. 215-233; or Nchalla, B. M. (2013), 'Tanzania's Experience with Constitutionalism, Constitution-Making and Constitutional Reforms', in M. K. Mbondenyei and T. Ojenda (Eds.), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, pp. 15 – 51.

<sup>504</sup>LHRC and ZLSC (2013), *supra*, n. 72, at p. 418.

<sup>505</sup>*The Constitution of Zanzibar* (as amended), *supra*, n. 500.

Before 1984, Tanzania Mainland had no Bill of Rights, although it was in the early 1980s that the first disability legislation was introduced. In 1982, the parliament enacted two key disability laws, the *Disabled Persons (Care and Maintenance) Act*,<sup>506</sup> and the *Disabled Persons (Employment) Act*.<sup>507</sup> The two pieces of legislation were a result of the Cabinet Paper No. 19 of 1981,<sup>508</sup> and they made the first disability legislation in the country. The government had a general obligation under the law to promote the equality of persons with disability.<sup>509</sup> These were indeed significant changes, but the general approach of the two pieces of legislation leaned towards care and maintenance. It appears that the approach to equality, as far as persons with disability were concerned, was predominantly “formal equality”

In 1984, there were significant improvement in human rights generally following the introduction of the Bill of Rights, but still a little could be inferred of the protection of persons with disability. It was from 2004 that equality measures were significantly improved to address disability. More recent developments came with the enactment of the new disability legislation in 2010, and the 1012’s constitutional review process.

## **2.5.2.2. Development of Equality Measures**

### **(a) Formal Equality in the Absence of the Bill of Rights**

From Independence (of the then Tanganyika) until 1984, Tanzania Mainland had no Bill of Rights. The Presidential Commission which was formed in 1964 for purposes of considering some constitutional changes concluded *inter alia* that “an attempt to protect individual freedom by a bill of rights would in the circumstances of Tanganyika [at the time] be neither prudent nor effective.”<sup>510</sup>

Following the *Arusha Declaration* in 1967,<sup>511</sup> Tanzania adopted the policy of Socialism and Self Reliance (known in Kiswahili as ‘Ujamaa na Kujitegemea’). The *Arusha Declaration* contained some general pronouncements, which were also applicable for

<sup>506</sup>[Cap 183 R.E. 2002] (Tz MInd, repealed), *supra*, n. 76

<sup>507</sup>[Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>508</sup>Disability Policy (Tanzania MInd), *supra*, n. 65

<sup>509</sup>Section 6, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>510</sup>Frank, B. (1972) ‘The Tanzanian Permanent Commission of Inquiry: The Ombudsman’, *Denver Journal of International Law and Policy*, Vol. 2, at p. 261, citing *Report of the Presidential Commission on the Establishment of a Democratic One Party State*, 1965, para. 104.

<sup>511</sup>*The Arusha Declaration and TANU’s Policy on Socialism and Self-Reliance, 1967* ((Arusha Declaration))

persons with disability.<sup>512</sup> Among the principles listed in the *Arusha Declaration* were equality, respect of human dignity, and a just return for his labour. Specifically, among the principal aims and objects of the *Arusha Declaration* as stated in part one thereof were:-

(b) To safeguard the inherent dignity of the individual in accordance with the UDHR;

(h) To see that the Government gives equal opportunity to all men and women irrespective of race, religion or status;

(i) To see that the Government eradicates all types of exploitation, intimidation, discrimination, bribery and corruption.

These were indeed very general stipulations, based on the formal concept of equality. There was no focus on special needs of persons with disability.

With the absence of the Bill of Rights, judicial progress in equality was just a coincidence. In 1968, the High Court gave an important decision with respect to equality of women generally, but this decision was also of importance for persons with disability (although not much had been made of the decision in the field of disability rights). This was in case of *Ndewawiosia Ndeamtzo v. Imanuel Malasi*,<sup>513</sup> which involved a woman with visual impairment. Disability was not an issue in this case, as the dispute concerned the discriminatory tradition, according to which women were disabled from inheriting the property of their fathers in order that such property would stay within the clan. Against this tradition, the Court stated, *inter alia*, that:-

The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour.

The significance of this case is that neither gender, nor disability was found as a barrier for the enjoyment of a “right”. However, since then, there were nothing much in terms of developments in equality concept generally and equality of persons with disability in particular, until the proclamation of 1981 as the *International Year of Disabled Persons*, which gave the necessary impetus to the government which then placed emphasis on the objective of service provision as the protection of persons with disability’ dignity.

#### **(b) The Bill of Rights and the Transition from Formal Equality to the Recognition of Differences**

---

<sup>512</sup>Disability Policy (Tanzania MInd), *supra*, n. 65

<sup>513</sup>*Ndewawiosia Ndeamtzo v. Imanuel Malasi* [1968] H. C. D. pp. No. 127.

The Bill of Rights<sup>514</sup> was introduced through the *Constitutional Amendment Act*, (Fifth Amendment),<sup>515</sup> whose Section 6 introduced Article 13, which provides for equality, and prohibited discrimination. Discrimination was defined under Article 13(5) as follows:

For the purposes of this Article the expression “discriminate” means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station [*sic*] [*recte* status,] in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications

Although the provision does not expressly include disability as a prohibited ground of discrimination, and that the list of grounds provided in the provision has been said not to be as “open-ended” as the other provisions from African constitutions, the clause does arguably allow for “reading in” of additional grounds.<sup>516</sup>

In 2000, through Section 5 of the *Constitutional Amendment Act* (Thirteenth Amendment),<sup>517</sup> the provision was amended to: include “sex” as a prohibited ground of discrimination; and to provide an exception that:-

the word “discrimination” shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society.

The above stipulation marked a significant shift of approach to equality, as it would imply the application of such steps as affirmative measures, which are normally taken to increase the representation of marginalized groups in areas of employment, education, politics, or economy from which they have been historically excluded.<sup>518</sup> However, the area where these measures have had a much earlier and significant impact in Tanzania Mainland is in the area of governance, and of course, with respect to gender.<sup>519</sup> It should also be noted that the Article 13(5), much as it allows the government to take “purposeful steps aimed at

---

<sup>514</sup> The part of the Constitution which provides for, guarantees and protects civil liberties and freedoms, irrespective of the description used, has invariably been called “a Bill of Rights” (Luoga, F. D. A. M. (1998), 'The Tanzanian Bill of Rights', in C. M. Peter and I. H. Juma (Eds.), *Fundamental Rights and Freedoms in Tanzania*, at p. 37.). Tanzania’s Bill of Rights contains 13 articles: that is to say, articles 12 to 24 of the Constitution of Tanzania, *supra*, n. 499.

<sup>515</sup> *The Constitutional Amendment Act, 1984* (Act No. 15 of 1984) (United Republic of Tanzania)

<sup>516</sup> van Reenen, T. and Combrinck, H. (2011), *supra*, n. 117, at p. 151.

<sup>517</sup> *The Constitutional Amendment Act, 2000* (Act No. 3 of 2000) (United Republic of Tanzania)

<sup>518</sup> Fullinwider, R. (2013), 'Affirmative Action', in E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*.

<sup>519</sup> Article 66(1) of the Constitution of Tanzania, *supra*, n. 499) provided for at least thirty percent women representation in the parliament.

rectifying disabilities in the society”, does not in itself, create the obligation to undertake affirmative action measures, and it is limited in its application – that it applies to the government only.

The absence of disability in the Bill of Rights in the *Constitution of the United Republic of Tanzania* meant that persons with disability had to rely only on the equality clauses read together with other rights stated in the constitution. I have already pointed the shortcoming of the formal approaches to equality.

Despite the absence of disability in the Bill of Rights, under the Constitution’s Directive Principles of State Policy, the government is required to make appropriate provisions for, among other things, the realisation of a person’s right to social welfare at times sickness or disability and in other cases of incapacity. Article 11(1) provides:

“The state authority shall make appropriate provision for the realization of a person’s right to work, to self-education and to social welfare at times of old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood.

The above provisions should be read together with the relevant provisions of Paragraphs of Article 9:-

9. The object of this Constitution is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism and Self Reliance, which emphasises the application of socialist principles while taking into account the conditions prevailing in the United Republic. Therefore, the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring:-

- (a) that human dignity and other human rights are respected and cherished;
- (e) that every person who is able to work does work, and work means any legitimate activity by which a person earns a living;
- (f) that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights;
- (g) that the Government and all its agencies accord equal opportunities to all citizens, men and women alike without regard to their colour, tribe, religion, or station in life.

Article 11(1) therefore invokes the obligation to the state to take appropriate measures to ensure realization of persons with disability’ rights, although leaning towards social welfare.

The provisions of Directive Principles of State Policy have a political significance, but unlike the Bill of Rights, and except in appropriate cases as an aid to construction, they are unenforceable before the Courts, as provided for by Article 7(2) of the Constitution which states:-

The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law judgment complies with the provisions of this Part of this Chapter.<sup>520</sup>

Although the Directive Principles of State Policy are none—justiciable, it has been argued that it is not an “overstretched interpretation” to presume that the drafters had in mind the fact that economic rights are comprised in the UDHR, the compliance of which is recognized by Article 9 of the constitution.<sup>521</sup>

The practice (among common law jurisdictions) of distinguishing between the Bill of Rights and the Directive Principles of State Policy is linked to the view that a constitution is enacted for the sole purpose of establishing structures of government and its institutions and prescribing judicially enforceable rules of law; and as such, statements of national goals and directive principles should not be part of the constitution because they are programmatic in nature.<sup>522</sup> A closer look at the distinction between the Bill of Rights on one hand, and the Directive Principles of State Policy on the other, reveals the practice of “categorization of rights” between civil and political rights, which are to be realized “immediately”; and social and economic rights, whose implementation is said to depend on the State's economic capacity to provide them.<sup>523</sup> The “categorization of rights” has been viewed as one form of expression of the tensions between the liberal notion of individual rights (predominant in the west) and the poor economic conditions (among others) in Africa (and developing countries generally).<sup>524</sup>

---

<sup>520</sup> The part referred to is Part II of Chapter One of the Constitution, (the Directive Principles of State Policy), in Articles 6 to 11.

<sup>521</sup> Wambali, M. K. B. (2009), *supra*, n. 13, at p. 75.

<sup>522</sup> Kabudi, P. J. (2006), 'The Directive Principles of State Policy in Tanzania', in W. Binchy and C. Finnegan (Eds.), *Human Rights, Constitutionalism and The judiciary: Tanzanian and Irish perspectives*, at p. 23. Examples of the distinction between the Bill of Rights and the Directive Principles of State Policy (from some African countries) include: Articles 110(2), 111 and 112 (f), *e The Constitution of Zambia, 1991* (Chapter 1) (as amended) ; and Objectives 1(i) and XVI, *The Constitution of Uganda, supra*, n. 350.

<sup>523</sup> Chenge, A. J. (1998), 'The Government and Fundamental Rights and Freedoms in Tanzania', in C. M. Peter and I. H. Juma (Eds.), *Fundamental Rights and Freedoms in Tanzania*, at p. 4.

<sup>524</sup> Shivji, I. G. (1999), *supra*, n. 6, at p. 260. According to Shivji, Post-independence African states were mostly concerned with developing and pulling their peoples out of poverty; to pull their peoples out of poverty, and developmentalism was used as an ideological cover to rationalise and justify the development of strong,

The omission in Tanzania's Bill of Rights, of the second generation rights has been criticised as a "visible weakness" considering the fact that the Bill of Rights as entrenched in the Constitution long after Tanzania had already acceded to the ICESCR, and had also actively participated in the promulgation of the *Banjul Charter*.<sup>525</sup>

Despite the fact that the Directive Principles of State Policy are non—justiciable, still under Article 7(1) of the Constitution, it shall be the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of, observe and apply the provisions of the Directive Principles of State Policy are intended to guide the Legislative and Executive organs of the State, without giving rise to the possibility of claims in the courts by individuals or groups of individuals.<sup>526</sup> They are aimed at fixing certain social and economic goals for immediate attainment by bringing about a non-violent social revolution, through which, the constitution seeks to fulfill the basic needs of the common man and to change the structure of the society. Without faithfully implementing the Directive Principles of State Policy, it is not possible to achieve the welfare state contemplated by the Constitution.<sup>527</sup> For example, the passing of Tanzania's new disability legislation in 2010 was perceived as among the ways of implementing the Directive Principles of State Policy, as well as equality provisions under the Constitution.<sup>528</sup>

Considering the fact that most of the stipulations of the Directive Principles are what could be generally termed as economic, social and cultural rights, judicial organs of States parties should consider international human rights laws such as the ICESCR as an interpretative aid to domestic law and ensure that domestic law is interpreted and applied in a manner consistent with the provisions of international human rights instruments ratified by the State. From the perspective of international law, the underlying principle is that courts should avoid decisions that place their State in the position of violating the terms of a treaty it has ratified.<sup>529</sup>

---

authoritarian states by the ruling elites in Africa. Under the circumstances, an abstract advocacy of rights would have little meaning to the vast majority (p. 257).

<sup>525</sup>Wambali, M. K. B. (2009), *supra*, n. 13, at p. 71..

<sup>526</sup>Kabudi, P. J. (2003) 'Legal Challenges of Bioprospecting in Tanzania', *Eastern Africa Law Review*, Vol. 28 – 30, at p. 105.

<sup>527</sup>Kabudi, P. J. (2006), *supra*, n. 522, at p. 25.

<sup>528</sup>Hansard, 13 April 2010 (*first session*), p. 41.

<sup>529</sup>OHCHR (2005) 'Economic, Social and Cultural Rights: A Handbook for National Human Rights Institutions, UN, at p. 26.

The Directive Principles of State Policy have played a significant role in the development of human rights jurisprudence in Tanzania. The attitude of both the High Court and Court of Appeal towards the Application of the fundamental objectives and directive principles of state policy in relation to the furtherance of the rights and freedoms of the individual has so far been positive.<sup>530</sup> It has been argued that courts are expected to take judicial notice of treaties to which Tanzania is a signatory,<sup>531</sup> and which contain the rights of persons with disability. Courts are to interpret local laws in conformity with the country's treaty obligation, since the principles enunciated in these instruments are standards below which any civilized nation will be ashamed to fall.<sup>532</sup> In the case of *Director of Public Prosecution v. Ally Haji Ahmed and Others*<sup>533</sup> the Court of Appeal of Tanzania affirmed that the UDHR is part of the *Constitution of the United Republic of Tanzania* by virtue of Article 9(f) of the Constitution. Therefore, the omission of economic rights from the Bill of Rights does not render them completely impossible to enforce, especially if one applies the liberal interpretation of the Bill's provisions to include all rights and legal principles recognized by the Constitution as a whole.<sup>534</sup>

### (c) From Recognition of Differences to Substantial Equality

For the first time in Tanzania Mainland, a framework policy on disability was adopted in 2004 to provide guidelines and set parameters for services delivery. This was the *National Policy on Disability*,<sup>535</sup> which is perhaps the most referred policy in matters of disability in Tanzania to date. It is said to be built on a Tanzanian cultural perspective with a strong focus on the development, rights and dignity of people with disabilities.<sup>536</sup> It was in the same year that the Parliament enacted the *Employment and Labour Relations Act*,<sup>537</sup> which, among other things, mentions disability as one of the prohibited grounds of discrimination,<sup>538</sup> and also introduced affirmative action measures.

---

<sup>530</sup> *Ibid.*, at p. 37.

<sup>531</sup> Mapunda, B. T. (2003) 'Treaty Making and Incorporation in Tanzania', *Eastern Africa Law Review*, Vol. 28 – 30, at p. 161.

<sup>532</sup> *Bernado Ephraim v. Holaria Pastory*, High Court of Tanzania at Mwanza, Civil Appeal No. 70 of 1989 [1990] LRC pp. 757. Also see *Transport Equipment Ltd. and Reginald John Nolan v. Devran P. Valambhia*, Court of Appeal of Tanzania, at Dar es Salaam, Civil Application No. 19 of 1993.

<sup>533</sup> *Director of Public Prosecution v. Ally Haji Ahmed and Others*, Court of Appeal of Tanzania, Criminal Appeal Case Nos. 44 and 45 of 1985.

<sup>534</sup> Wambali, M. K. B. (2009), *supra*, n. 13, at p. 75.

<sup>535</sup> Disability Policy (Tanzania MInd), *supra*, n. 65.

<sup>536</sup> *Ibid.*

<sup>537</sup> Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>538</sup> Section 7(4) (I), *ibid.*



International and national developments in terms the field of disability, together with inadequacies of the then existing disability legislation, meant that pressure was building up to review the disability legislation.<sup>539</sup> In 2006, the Law Reform Commission of Tanzania (LRCT) decided on its own motion, to review various pieces of legislation affecting persons with disability in Tanzania, because of the need to ascertain the extent to which such laws were in conformity with the provisions of *The Constitution of the United Republic of Tanzania*, the *National Policy on Disability*, norms and standards set out in various regional and international instruments concerning persons with disability.<sup>540</sup>

In 2010, the Parliament passed the *Persons with Disabilities Act*,<sup>541</sup> which repealed the former framework disability legislation. The Act is a “framework” legislation that provides for the range of matters related to the social welfare of persons with disability in Tanzania Mainland, in particular health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment or work protection and promotion of basic rights for the persons with disability. It is intended to cure the weaknesses of the previous disability legislation, to with respect to equality of persons with disability in various aspects.<sup>542</sup> The equality standards provided in the Act are minimum standards.<sup>543</sup> Under Section 61 of the Act, the Minister responsible for matters related to persons with disability made *Persons with disability (General) Regulations*,<sup>544</sup> to facilitate the implementation of the main legislation.

It is important to note that judicial developments in human rights generally and disability matters in particular, have also reflected the slow pace of the legislative and policy development in the area of disability rights. Nevertheless, the judiciary in Tanzania has managed to come up with clear activism and have stood by the rights of the people considered to be vulnerable and marginalised Sections of the population,<sup>545</sup> as Judges have made decisions strongly supporting the rights of children against abuse and neglect and also on gender equality.<sup>546</sup> Despite these developments, there has not been judicial activism

---

<sup>539</sup>LRCT (2008), *supra*, n. 71, pp. 5 – 6.

<sup>540</sup>*Ibid*, pp. 1 – 3.

<sup>541</sup>Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80.

<sup>542</sup>Hansard, 13 April 2010 (1), *supra*, n. 528, pp. 41 – 43.

<sup>543</sup>Section 5(4), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80.

<sup>544</sup>*The Persons with Disability (General) Regulations, 2012* (GN No. 152 of 2012) (Tanzania Mainland)

<sup>545</sup>Peter, C. M. (2007) 'Human Rights of Indigenous Minorities in Tanzania and the Courts of Law, *International Journal on Minority and Group Rights*, Vol. 14, at p. 483.

<sup>546</sup>*Ibid*, at p. 484..

by persons with disability, or their organisations either perhaps of the limited nature of legal protection, or the nature of disability movement itself.

In 2012, the constitutional review process presented another opportunity to improve equality measures for persons with disability, since the process have accommodated views given by all Tanzanian who participated in various meetings organized by the commission, or through writing. Three “drafts” have been presented so far. The *Draft Constitution* is said to contain “some very novel rights”,<sup>547</sup> which include the rights of persons with disability. The draft re-affirms the rights to equality and dignity,<sup>548</sup> and prohibits discrimination on various grounds, including disability.<sup>549</sup> In addition, under the *Draft Constitution*, it is not discrimination to take measures intended to rectify “specific problems” in the community.<sup>550</sup> This may be construed as permitting affirmative measures. According to Article 55, a person with disability is entitled to respect, recognition, and dignity;<sup>551</sup> education and participation in social and national affairs;<sup>552</sup> accessible (barrier-free) environment;<sup>553</sup> sign language, braille, and the related (barrier-free) means of communication;<sup>554</sup> and also the right to work.<sup>555</sup> Other provisions are with respect to the right to health and rehabilitation.<sup>556</sup>

The Draft Constitution also incorporates the Directive Principles of State Policy,<sup>557</sup> whose content with respect to disability is not very different from the content of the Directive Principles of State Policy currently in force. Under the *Draft Constitution*, the Main Objective is to safeguard, strengthen and sustain fraternity, peace, unity and prosperity of the citizens of the United Republic in regard to prosperity of the citizens and building a free Nation which cherishes democracy, good governance and self-reliance.<sup>558</sup> In the

---

<sup>547</sup>Peter, C. M. (9.6.2013) 'Draft Constitution: A Silent Revolution?', *This Day*, <http://www.ippmedia.com/frontend/?l=55690>, accessed: 17.1.2014.

<sup>548</sup> Articles 32(1) and (2); and the whole of Article 34 of the *Draft Constitution of the United Republic of Tanzania, 2014* (3rd Draft) .

<sup>549</sup> Article 25(5), *ibid*. Disability as a prohibited ground of discrimination was included in the second draft. The first draft did not mention disability as a prohibited ground of discrimination. Disability as a prohibited ground of discrimination could be inferred from the general phrase “status of life”

<sup>550</sup> Article 34(6), *ibid*

<sup>551</sup> Article 55 (a), *ibid*

<sup>552</sup> Article 55 (b) and (e), *ibid*

<sup>553</sup> Article 55 (c), *ibid*

<sup>554</sup> Article 55 (d), *ibid*.

<sup>555</sup> Article 55 (e), *ibid*.

<sup>556</sup> Article 55(f), *ibid*.

<sup>557</sup> Article 11 – 15, *ibid*.

<sup>558</sup> Article 11(1), *ibid*.

execution of the national social objectives, the government is to take appropriate measures in order to ensure, *inter alia*: -

- (a) that human dignity is preserved and cherished in regard to the Universal Declaration of Human Rights and other international agreements to which Tanzania has ratified;
- (b) that the Government and all public organs offer equal opportunities to all the citizens, without discrimination on the bases of race, tribe, religion, affinity, person's status or where he is;
- (c) that assistance and social protection are provided to people who cannot sustain themselves, the elderly, the sick, children and people with disability.<sup>559</sup>

The above objectives (together with others included in Articles 11 to 15) of the *Draft Constitution* shall be the guide to the Government and to every citizen for use or interpretation of the conditions of this Constitution or any other law and for the implementation of policy decisions.<sup>560</sup> The objectives in Article 11 should also be read together with the relevant provisions of Article 8(2), according to which the government and its organs shall, in the execution and implementation of its duties, be based on its object of strengthening national unity and maintain national integrity,<sup>561</sup> and for the purpose thereof, the state and its organs are obligated to direct their policies and duties to ensure *inter alia* that:-

- (a) dignity, respect and all other human rights are preserved and maintained with regard to Tanzanian culture and traditions and different international agreements to which the united republic has ratified;
- (f) every person who is capable of working works, and work is any legal activity which provides a person with his income;
- (g) equal opportunities and rights to all the people, women and men, without discrimination on the basis of colour, tribe, affinity, disability, religion, or a person's status; and
- (h) all kinds of injustice, threats, discrimination, subjugation, graft, oppression or nepotism are removed from the country.

To ensure the implementation of these objectives, the Government is required report to the Parliament, not less than once every year, about the steps taken by to implement the

---

<sup>559</sup> Article 14(2)(a), (b) and (c), *ibid*.

<sup>560</sup> Article 19(1), *ibid*.

<sup>561</sup> According to Article 8(1), of the Draft Constitution, the structure of the government of the united republic and its organs in the execution and implementation of its duties shall be based on its object of strengthening national unity and maintain national integrity.

directive principles.<sup>562</sup> This requirement does not exist in the current constitution. However, the objectives are not intended to be justiciable in a court of law.<sup>563</sup>

### **2.5.2.3. Equality Measures under the Current Disability and Employment Legislation**

In this section, I discuss equality and anti-discrimination measures under employment and disability laws. These provisions seek to re-enforce the inadequacies of the constitutional provisions, and in effect have re-shaped the approach to equality, which this time seems to be leaning towards substantive approach to equality.

Non-discrimination is one of the basic principles of the *Persons with Disabilities Act*.<sup>564</sup> The Act imposes some general obligations upon the government to take steps to eliminate discrimination on the ground of disability. These are what can be described as “positive duties”,<sup>565</sup> which were not contained in the *Employment and Labour Relations Act*.<sup>566</sup> According to Section 6 of the *Persons with Disabilities Act*, the government shall:-

- (a) ensure that all persons with disability are equal, and are fully entitled without any discrimination to the equal protection and benefits of this Act;
- (b) prohibit all forms of discrimination on the basis of disability and guarantee the persons with disability equal and effective legal protection against discrimination on all grounds; and
- (c) for purposes of promoting equality and elimination of all forms of discrimination, take all appropriate measures to ensure that reasonable changes are provided to persons with disability of all ages and gender.

In addition to these general provisions against discrimination, the Minister responsible for the implementation of the Act is obliged, *inter alia*, to combat stereotypes, prejudices and harmful practices relating to persons with disability in all aspects of life,<sup>567</sup> and to promote awareness of the abilities, talents and contributions of persons with disability in order to enhance the level of awareness in the society about persons with disability’ skills, merits, abilities and contribution of persons with disability to the workplace and the labour market.<sup>568</sup>

---

<sup>562</sup> Article 19(2), *ibid*.

<sup>563</sup> Article 21(2), *ibid*.

<sup>564</sup> Section 4(b) and (d), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80.

<sup>565</sup> For a detailed explanation on positive duties in a disability legislation, see O’cinneide, C. (2005), ‘A New Generation of Equality Legislation?: Positive Duties and Disability Rights’, in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, pp. 219 – 248.

<sup>566</sup> Act No. 6 of 2004 (Tz Mlnd), *supra*, n. 79.

<sup>567</sup> Section 7(b), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80.

<sup>568</sup> Section 7(c)(i)(cc), *ibid*

The *Persons with Disabilities Act* adopts the definition of discrimination enshrined in Article 2 of the *CRPD*, with minimal differences. Section 3 of the Act defines discrimination to mean:-

any distinctions, exclusion or restriction on the basis of disability which has the purpose, effect [*sic*] [*recte* purpose or effect] of impairing or nullifying the recognition, enjoyment or exercise on equal basis, of human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation.<sup>569</sup>

Discriminatory acts include words, gestures or caricatures that demean, scandalize or embarrass persons with disability by:-

- (a) treating such a person less favourably from a person without disability
- (b) treating such a person with one type of disability less favourably from a person with another type of disability;
- (c) requiring such a person to comply with a requirement or condition which a person without disability may have an advantage over; or
- (d) failure to effect affirmative action.<sup>570</sup>

The *Employment and Labour Relations Act* does not expressly define discrimination. In the case of *Anthony Francis Munyigo v Total Tanzania L.T.D and Others*,<sup>571</sup> the Labour Court adopted the definition of discrimination from the *Discrimination (Employment and Occupation) Convention*,<sup>572</sup> and stated further that in the case of employment discrimination, the employee must establish the following ingredients to prove the claim:-

- (a) That there is differentiation in treatment between the [...] employees who are doing similar work and are similarly situated. That would entail establishing comparable similarity in qualification, job experience and productivity.
- (b) That the said differentiation is based on prohibited grounds/traits enumerated under Section 7 (4).
- (c) That the complainant is discriminated on such grounds or possession of such traits.

The *Employment and Labour Relations Act* prohibit both direct and indirect discrimination. Direct discrimination occurs where an employee is treated prejudicially on the basis of the

---

<sup>569</sup> This is also the definition adopted by the Zambian's *The Persons with Disabilities Act, 2012* (Act No. 6 of 2012) (Zambia) save with some modifications (Section 2).

<sup>570</sup> Section 3, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>571</sup> *Anthony Francis Munyigo v Total Tanzania L.T.D and Others*, High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Complaint No. 30 of 2009.

<sup>572</sup> Article 1(1) (a) and (b), ILO Convention No. 111 of 1958, *supra*, n. 242.

prohibited grounds under the law, while indirect discrimination occurs where a requirement or condition which on the face of it appears to be neutral, has the effect of discriminating against a person or category of persons on the prohibited grounds; and both indirect and indirect discrimination are prohibited.<sup>573</sup> The *Persons with Disabilities Act* does not expressly use the terms “direct” and “indirect” discrimination. Nevertheless, the list of the mentioned acts is not exhaustive.

Harassment of an employee on the ground of disability (or other prohibited grounds of discrimination) is regarded as a form of discrimination, and therefore prohibited under *Employment and Labour Relations Act*.<sup>574</sup> Neither the *Persons with Disabilities Act*, nor The *Employment and Labour Relations Act* provide a legal definition of harassment in the context of disability or employment. In the case of *Anthony Francis Muniyigo v Total Tanzania L.T.D and Others*, the labour court stated that harassment is actionable only where the same is based on discrimination; or where the conduct is so outrageous as to create hostile/intolerable environment.<sup>575</sup>

Employers’ duty under Section 34(1) (d) of the *Persons with Disabilities Act* is that they should not only resist discriminating, but also ensuring that persons with disability are not discriminated by other persons. Although it might be argued that the law is not expected to prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious,<sup>576</sup> in an environment where stigma of persons with disability is prevalent, a distinction

---

<sup>573</sup> Section 7(4)(l), 8(1)(a), (b) and (c), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79; Regs. 29 (1), (2) and 31(2) and (3), *The Employment and Labour Relations (Code of Good Practice) Rules*, 2007 GN No. 42 of 2007 (Tanzania Mainland)

<sup>574</sup> See Section 7(5), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79; Reg. 29 (3), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>575</sup> Two examples from Kenya may give some indication as to what actions may be considered as harassment. In the case of *Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme*, Industrial Court of Kenya, Cause No. 665 of 2011, the complainant had testified *inter alia*, that the Trust Secretary discriminated against her due to her physical disability. That upon his appointment the claimant had congratulated him but he threatened to get her dismissed. That he frustrated her by assigning her tasks which involved going up and down staircases knowing well that the claimant was physically challenged. The court found that the claimant was discriminated against on account of disability as she was subjected to demeaning and embarrassing treatment. In another case of *Silas Rukungu Karanja v Teachers Service Commission*, Industrial Court of Kenya, Cause No. 567 of 2012, the claimant testified, *inter alia* that even after being recognized by the Disability council, the employer refused to abide by the statutory provisions which provide for the retirement age of persons with disability to be 60 years, and upon producing the letter to the responsible officer of the respondent, he was told: “Even if you go to who or who, the Commission’s decision is final.” The court found that such attitude and behaviour on the part of the officer of the respondent was discriminatory as it was derogatory and calculated to harass and embarrass the claimant being a person with visual impairment and who was genuinely pursuing his rights.

<sup>576</sup> Schneid, T. D. (2012) *Discrimination Law: Issues for Safety Professionals*, Florida: Taylor and Francis Group, at p. 113. Although this book is about the American with Disabilities Act (ADA), it is reasonable to assume that such non serious events may not constitute harassment.

between teasing and harassment can be tricky to ascertain. Generally though, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).<sup>577</sup> The wording of Section 34(1) (d) is so general, that persons with disability are to be protected from harassment in the work place, irrespective of where that harassment comes from.). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or even someone who is not an employee of the employer.<sup>578</sup> To what extent the duty of the employer extends to include persons not under his authority, is the question of facts. However, it should at least be made clear (by employers) to clients that harassment of persons with disability at the respective work place won't be tolerated.

Under Section 33 (1) of the *Person with Disabilities Act*, an employer shall not treat a person with disability differently from a persons without disabilities in relation to: (a) advertisement of employment; (b) recruitment of persons for employment;(c) offering terms or conditions of employment; (d) creation, classification or abolition of jobs or posts; (e) determination or allocation of wages, salaries, leave or accommodation, and any other similar benefits; (f) training, advancement, apprenticeship, transfer, promotion or retrenchment; (g) provision of facilities related to or connected with employment; and (h) provision of any other benefits or other matters related to employment

Section 33 (1) of the *Persons with Disabilities Act* seems to re-enforce the provisions of the *Employment and Labour Relations Act* and the respective subsidiary legislation command employers to ensure non-discriminatory practices at work places. According to these, prohibition of discrimination extends to employment advertisement and selection, training, and performance and reviews.<sup>579</sup> Employers are obliged not to unfairly limit advertisement for employment to areas or publications which may exclude or disproportionately reduce the number of applicants on the basis of the prohibited grounds of discrimination; and that the selection criteria and test, and the respective process, should not be designed in such a way that they leave room for direct or indirect discrimination against candidates.<sup>580</sup> It is the primary responsibility of every employer to promote equal opportunity in employment and to eliminate discrimination in any employment policy or

---

<sup>577</sup> *Ibid.*

<sup>578</sup> *Ibid*

<sup>579</sup> According to Section 7(9) (b) of the Act, "employee" includes an applicant for employment. Also see Reg. 34(1), (2) and (3), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>580</sup> See Reg. 31(1), (2) and (3); 35 (1), (2); 36 (1), (2), *ibid.*

practice.<sup>581</sup> In that respect, an employer shall register, with the Labour Commissioner, plan to promote equal opportunity and to eliminate discrimination in the work place.<sup>582</sup> Participation of employees is required in preparation of such a plan,<sup>583</sup> and that the Plan shall take into account all employees entitled to equal opportunity and equal treatment, subject to an assessment of their abilities in relation to the employer's organizational needs.<sup>584</sup> The plan shall address each of the employment policies or practices relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion transfer, demotion, termination of employment and disciplinary measures.<sup>585</sup> The policy shall contain plans to eliminate discrimination under various terms, *inter alia*:-

With regard to recruitment procedure, advertising and selection criteria, an employer may direct that interview panels as far as possible, comprise men and women, job adverts highlight any affirmative action policies in existence, or the selection criteria to be audited to ensure that they strictly relate to the inherent requirement of a job;<sup>586</sup>

With regard to appointments and appointment process, an employer may direct that preference in selection be given to suitably qualified candidates from previously disadvantaged groups. These groups include, but are not limited to, women and people with physical and/or mental disabilities;<sup>587</sup>

With regard to the working environment and facilities, the employer may audit that these are non-discriminatory that employees with disabilities are not disadvantaged.<sup>588</sup>

In any proceedings of alleged discrimination, the Labour Court or arbitrator, as the case may be, shall take into account any plan registered.<sup>589</sup>

Under the employment legislation, the duty not to discriminate is extended to employees while carrying out employment related functions. The employees are duty bound to prevent any discrimination they come across in the work place. In order to promote a non-

---

<sup>581</sup> Section 7(1), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79; Reg. 30 (1); 32 (1) and (2), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>582</sup> Section 7(2), 7(3)(a) and 7(3)(b), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>583</sup> See Reg. 30 (2) and (3), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>584</sup> Reg. 30 (4), *ibid*.

<sup>585</sup> Section 7 (9)(c), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79. and Reg. 30 (4), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>586</sup> Reg. 30 (4) (a), *ibid*.

<sup>587</sup> Reg. 30 (4) (b), *ibid*.

<sup>588</sup> Reg. 30 (4) (d), *ibid*.

<sup>589</sup> Section 7(8)(c), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.



discriminatory work environment, employees shall comply with the work plan measures to avoid discrimination; notify the employer or the recognized trade union of any suspected discriminatory conduct; and refrain from harassing or victimizing employees.<sup>590</sup> Nevertheless, discrimination is not expressly listed as among such kinds of misconducts that may justify termination.<sup>591</sup>

In addition to anti-discrimination measures, *Persons with Disabilities Act*, and the *Employment and Labour Relations Act*, together with their respective subsidiary legislation, provide for affirmative action measures, backing up Article 13(5) of the Constitution. The *Persons with Disabilities Act*, extends the application of affirmative action measures to every employer, whether public or private, to employ affirmative action in the recruitment process in order to increase the number of persons with disability in the work force.<sup>592</sup> In addition, under Section 34(2)(a) of the Act, the Minister responsible for the implementation of the Act shall ensure, *inter alia*, the promotion of employment for persons with disability by applying affirmative action treatment.<sup>593</sup> The use of the word “shall” in a written law means that that the ministerial function stated in the above provision must be performed.<sup>594</sup> According to the *Employment and Labour Relations Act*, and the *Code of Good Practice Rules*,<sup>595</sup> it is not discrimination to take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace,<sup>596</sup> and The *Persons with Disability (General) Regulations* specifically provides that positive discrimination or affirmative action directed to persons with disability shall not be construed as discrimination (for purposes of implementation of the *Persons with Disability (General) Regulations*).<sup>597</sup>

The *Persons with Disabilities Act* defines “positive discrimination” to mean “policies and practices which favour persons with disability”<sup>598</sup> However, the use of the term “positive discrimination” is discouraged, due to the fact that the purposes of affirmative actions have

---

<sup>590</sup> Reg. 37 (1), (2) (a), (b) und (c), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>591</sup> Reg 13, *ibid*.

<sup>592</sup> Reg 45 (2), the GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>593</sup> Section 34(2)(a), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>594</sup> According to Section 53(2) of the *Interpretation of Laws Act* [Cap 1. R.E. 2002] (United Republic of Tanzania) , where in a written law the word “shall” is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

<sup>595</sup> GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>596</sup> Section 7(6)(a), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79, Reg. 29 (4) (a), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>597</sup> See Reg. 3(4), GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>598</sup> Section 3, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80, note 79.

to be distinguished from “discrimination”, since discrimination has a pejorative connotation and is in several jurisdiction linked to the concept of disadvantage,<sup>599</sup> while on the other hand, affirmative action measures, or forms of preferential treatment, are taken to address past discrimination and do not constitute a form of discrimination in themselves, unless such measures lead to a violation of the right of others not to be discriminated against.<sup>600</sup> Furthermore, the use of the word “favour” in defining affirmative action may lead into a theoretical contradiction that the intended persons do not deserve the measures, but which are allowed under the law. I have already elaborated that in human rights, affirmative action is essential means for ensuring real equality of persons with disability. It is therefore necessary, and not a matter of favour, which would imply discretion.

Anti-discrimination and equality measures disability and employment laws are backed up by penal provisions<sup>601</sup> which attract the punishment of fine (under the employment law)<sup>602</sup> or an option between fine and imprisonment; or both (under the disability law)<sup>603</sup>. The penal provisions are threatened by some ambiguities and limitations in respective provisions. These challenges are shown in chapter 5

Clearly, there have been progress of equality measures with respect to persons with disability, but the major challenge remain to be the actual realisation, since there were worries that even despite the weaknesses of previous measures (repealed disability legislation), the will to implement the same was questionable.<sup>604</sup>

#### **2.5.2.4. Defining Disability**

The concept of disability in Tanzania Mainland has developed with time. It is generally agreed that some services for persons with disability were introduced during colonial period,<sup>605</sup> carrying the characteristics of “institutionalization” or “charity”, and that the

<sup>599</sup>Hendriks, A. C. (2002), *supra*, n. 305, at p. 209.

<sup>600</sup>*Ibid*, at p. 209 citing *Adarand Constructors, Inc. v Pena*, 1995; *Kalanke*, 1995; and *Abrahamson and Anderson*, 2000.

<sup>601</sup> Section 7(7), 8(2), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79; Section 62(b), and 62 (l) (i), (ii), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80; and Reg. 3(2), (3), GN No. 152 of 2012 (Tz MInd), *supra*, n. 544. Regulation 3(3) reproduces the provision of Section 62(l)(ii) of Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>602</sup> Section 102(3), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>603</sup> Section 33(3), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80. The fine under Section 33(3) amounts to two million Shillings.

<sup>604</sup>*Hansard*, 13 April 2010 (*Second Session*) p.37.

<sup>605</sup>Possi, M. K. (1994) 'Special Education in Tanzania International Journal of Special Education: A Critical Analysis of Special Education Services, *International Journal of Special Education*, Vol. 9, No. 1, at p. 42.; Mboya, M. W. and Possi, M. K. (1996) 'The Special Child in Tanzania Primary School, *Papers in Education and Development*, at p. 52; Bagandanshwa, E. T. T. (1999) 'Some Highlights in the Development of

human rights approach to disability is a more recent phenomenon. However it has been argued that this generalization neglects the fact that pre-colonial societies had various approaches to disability, and that the periodization simply marks the beginning of the western type of services in the Tanzanian society. Pre-colonial societies have been reported to entitle persons with disabilities the “basic human rights”, including the participation in community activities and functions.<sup>606</sup> Definitely the scholarly works with this view do not claim to have researched all Tanzanian societies, but an argument in support of this “generalization” is that societies share sentiments and understanding of humanity and the essence of being.<sup>607</sup> Under such circumstances, the better understanding of disability as a concept, and the ways to promote the rights of persons with disabilities in Tanzania, necessitate an understanding of both official policies and some general societal perceptions. However, the methods and objectives of this work do not provide a comprehensive analysis of societal attitudes towards persons with disabilities.

#### **(a) Prevailing Societal Perceptions of Disability**

Among various communities, cultural beliefs and attitudes significantly reflect beliefs about the causes of disability, attitudes toward people with disabilities, and treatment of people with disabilities.<sup>608</sup> These social attitudes are a mixture of positive and negative images and practices,<sup>609</sup> but the literature which presents that persons with disabilities have been “cared for” in some societies does not reflect the actual realities with respect to the living conditions of majority of individuals with disabilities who still face discrimination based on their ability to participate in the daily social and economic activities of the community.<sup>610</sup> Social attitudes may also have been influenced with the level of development in particular communities, as societies with low technology tend to associate

---

Educational Services for Visually Impaired and Blind People in Tanzania, *Huria: Journal of Open University of Tanzania*, Vol. 2, No. 2, at p. 45.

<sup>606</sup> *Ibid.*, at p. 45.

<sup>607</sup> *Ibid.*

<sup>608</sup> McDonald, A. S. (2012), *supra*, n. 401, at p. 394..

<sup>609</sup> Kisanji, J. (1998), *supra*, n. 64; Kisanji, J. (1995), *supra*, n. 64

<sup>610</sup> For more insight of local perceptions of disability in Tanzania, see for example: McDonald, A. S. (2012), *supra*, n. 401, pp. 393–407; Possi, M. K. (1995) 'Some Myths and Facts about Albinism: A Tanzanian Experience, *International Journal of Special Education*, Vol. 10, No. 1, pp. 82 – 89; Possi, M. K. (1996) 'Gender and Education of People with Disabilities in Tanzania, *Utafiti (New Series): Journal of Faculty of Arts and Social Science, University of Dar es Salaam*, Vol. 3, No. 2, pp. 155 – 168; Mboya, M. W. and Possi, M. K. (1996), *supra*, n. 605, pp. 52 – 64.

disability with supernatural powers which are viewed as “beyond control”.<sup>611</sup> In such communities, disability is regarded as a ‘punishment’ to the family for not abiding to the social rules and Regulations.<sup>612</sup> From these societies, most of “meaningless” myths have developed, and are in fact based on fear.<sup>613</sup> The situation of persons with disability under such communities has been reported to be “very unfortunate.”<sup>614</sup> Furthermore, whether perpetrating “stigma” or “care”, a conclusion can be made that according to the common societal perceptions, disability is viewed as an individual issue, and there is no impairment – disability distinction.

## **(b) Development of Official Definitions**

With respect to official approaches to disability, there is scarcity of comprehensive Tanzanian disability rights literature that can be used to effectively analyse the trend in official disability policies. The available scholarly work and previous legislation indicate that for many years, disability was being viewed as an individual problem (impairment),<sup>615</sup> and treated as a charity issue.<sup>616</sup> Nevertheless, recent approaches to disability indicate a shift towards human rights approach to disability.<sup>617</sup>

Some services and laws for persons with disability date back to the colonial period, although these laws were not in fact “rights” instruments, and they did not attempt to define “disability”. Inferences from these laws strongly suggest that disability was viewed as an individual problem, and at times, the terminology was derogatory. For example, the *Workers Compensation Ordinance*,<sup>618</sup> (which is not subject to discussion in this study) viewed “incapacity to work” as a result of injury,<sup>619</sup> and the *Mental Diseases Ordinance*,<sup>620</sup> which used such term as “criminal lunatics” and “persons of unsound mind” to refer to

---

<sup>611</sup>Possi, M. K. (1999) 'Perceived Causes of Visua Disability: Some Data from Preliminary Survey at the University of Dar es Salaam in Tanzania, *Journal of Adult Education*, Vol. 10, at p. 16.

<sup>612</sup>*Ibid.*, at p. 17..

<sup>613</sup>Possi, M. K. (1996) 'Culture and Disability Superstitious behaviour towards Peope with Disabiities in Coastal Tanzania, *African Journal of Special Needs Education*, Vol. 1, No. 1, at p. 29.

<sup>614</sup>Nzagi, I. (2009), *supra*, n. 120, pp. 43, 49.

<sup>615</sup>Possi, M. K. (1996), *supra*, n. 610, at p. 155.

<sup>616</sup>Bagandanshwa, E. T. T. (1999), *supra*, n. 605, at p. 44. Bagandashwa was writing specifically about education and the situation of persons with visual impairments.

<sup>617</sup>Nzagi, I. (2009), *supra*, n. 120, at p. 45.

<sup>618</sup> ONrdinance No. 43 of 1948 (From 2002 referred to as *The Workers' Compensation Act* [Cap. 263 R.E. 2002] (Tanzania Mainland)

<sup>619</sup> Section 3, *ibid.*

<sup>620</sup> Ordinance No. 13 of 1937 (From 2002 referred to as *The Mental Diseases Act* [Cap 98 R.E. 2002] (Tanzania Mainland)

persons with mental illness.<sup>621</sup> These pieces of legislation continued to be in force after independence, and for many years.

The first official definition of disability appeared in the first (former) disability legislation of 1982, which defined a "disabled person" to mean:-

a person who, on account of injury, disease or congenital deformity, is substantially handicapped in obtaining employment, or in undertaking work on his own account, of a kind which apart from that injury, disease or deformity would be suited to his age, experience and qualification

The old definition was considerably similar to the definition used in the *Vocational Rehabilitation and Employment (Disabled Persons) Convention*<sup>622</sup> which defined "disabled person" as individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment".<sup>623</sup>

While the former legislation was still in operation, in 2004, the *National Policy on Disability*<sup>624</sup> brought two definitions of "disability" and "a person with disability," while also bringing the elements of social approaches:-

(a) Disability:

The loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical, mental or social factors.

(b) Person with Disability:

An individual whose prospects of obtaining and retaining an employment are greatly reduced due to known physical, mental or social factors.

These definitions were not binding. However, the approach of the Policy marked a significant shift in approach to disability. In its report of 2008, the LRCT proposed that the Policy's definition should be part of the new disability legislation.<sup>625</sup>

The *Persons with Disabilities Act* defines "disability" and "person with disability" as follows:-

"disability" in relation to an individual means loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical, mental or social factors.

---

<sup>621</sup> See the long title to *ibid*.

<sup>622</sup> ILO Convention No. 159 of 1983, *supra*, n. 243.

<sup>623</sup> Article 1, *ibid*.

<sup>624</sup> Disability Policy (Tanzania MInd), *supra*, n. 65.

<sup>625</sup> LRCT (2008), *supra*, n. 71, at p. 130.

"person with disability" means a person with a physical, intellectual, sensory or mental impairment and whose functional capacity is limited by encountering attitudinal, environmental and institutional barriers<sup>626</sup>

These new definitions provide just a starting-point in understanding the legal approach to disability in Tanzania.

The use of the words "in relation to an individual" suggests that disability is a specific "condition" distinguishes other forms of "disability" as may be used in other circumstances, for example in legal proceedings, which may suggest an "inability to perform a legal duty".<sup>627</sup> The expression "in relation to an individual" should not be construed as tying the "problem" to an individual (the old perception of disability), because the definition is centered on the "loss or limitation of opportunities to take part in normal life on equal basis with others". This is a broader approach compared to the old approach which viewed disability as a condition where a person becomes "substantially handicapped in obtaining employment, or in undertaking work on [individual's] own account, of a kind which apart from [impairing conditions] would be suited to his age, experience and qualification."<sup>628</sup> Furthermore, the addition of "social factors" as among causes of "the loss of opportunity" shifts the emphasis to issues like social attitudes, which were not the centre of attention in the old definition of disability, which was limited to treating disability as a result of specific biological conditions, i.e. injury, old age, disease or deformity.

In order to prove disability one does not have to prove all three disabling factors - "physical, mental or social factors". This is due to the fact that under the *Interpretation of Laws Act*, the reference to "or" shall be construed disjunctively.<sup>629</sup> Each of the three disabling factors can therefore be considered to be "independent". The only contentious issue could be the clarification of what constitutes "physical, mental or social factors" enough to cause loss of opportunities. Nevertheless, the difficulties of interpreting the legal definition of disability which adopts the "social" model does not mean that the legal definition should be restricted to the old (medical) notion of "truly disabled person", as Degener calls it,<sup>630</sup> rather, it is a reminder that in any legal definition of disability, the

---

<sup>626</sup> Section 3, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>627</sup> e.g. legal disability under the *Limitation of Proceedings Act*, [Cap 89 R.E. 2002].

<sup>628</sup> The Original statutory text does not use the phrase "impairing conditions". The phrase "impairing conditions" is used here in place of the words "injury, old age, disease or deformity" appearing in the original text. See Section 2, [Cap 183 R.E. 2002] (Tz MInd, repealed), *supra*, n. 76; Section 2, [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>629</sup> Section 13, [Cap 1. R.E. 2002] (Tz), *supra*, n. 594.

<sup>630</sup> Degener, T. (2006), *supra*, n. 390.

bearers of rights should be ascertained. A more liberal interpretation of the definition is likely to be more inclusive.

In addition to the definition of “disability”, the *Persons with Disabilities Act* also defines “a person with disability” (the CRPD only defines only a person with disability). Perhaps it would have been enough to define a person with disability as a person with the conditions the conditions described above. i.e.:-

a person who has a loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical, mental or social factors.

However, the *Persons with Disabilities Act* defines a person with disability to mean:-

a person with a physical, intellectual, sensory or mental impairment and whose functional capacity is limited by encountering attitudinal, environmental and institutional barriers;

The use of the term “impairment” alone does not necessarily perpetrate the medical model of disability, but is just “a reflection of the reality of disability-based discrimination, which in the eyes of the beholder is always linked to a real or imagined difference, a so-called impairment.”<sup>631</sup> Adopting Degener’s view, there is nothing wrong in applying the term “impairment” in the definition of “disability” - rather, it is the adoption of the notion of “truly disabled person” which perpetuates the medical model of disability, and is itself discriminatory.<sup>632</sup> The *Persons with Disabilities Act* does not seem to adopt the notion of a “truly disabled person”. What conditions should be included in the definition of impairment? This is a difficult question, one of the problems being the blurry distinction between impairment and illness.<sup>633</sup> The two concepts of impairment and illness could be related to each other, but they are neither completely coincidental, nor completely independent from one another.<sup>634</sup> It is possible to have impairment and also to be in excellent health, but more serious impairments often compromise an individual’s health.<sup>635</sup> The overlap between impairment and illness becomes increasingly important as the conditions on either or both increase in severity. It is probably not possible to come up

---

<sup>631</sup>*Ibid.*

<sup>632</sup>*Ibid.*

<sup>633</sup>Olkin, R. (1999) *What Psychotherapists Should Know about Disability*, New York: Guildford Press, at p. 9.

<sup>634</sup>*Ibid.*, pp. 9 -10.

<sup>635</sup>*Ibid.*, at p. 10.

with a definition of impairment that includes only impairment and not illness, and vice versa.<sup>636</sup>

A person's functional capacity is limited by encountering attitudinal, environmental and institutional barriers. These barriers are what appear to be the "social factors" in the definition of "disability" under the Act. Thus, the law suggests that social barriers like discrimination, inaccessibility to work places, inaccessible information or marginalization of persons with disability in decision making or policies tend to expose the limiting effects of impairment. The use of conjunction "and" in the list of barriers - "attitudinal, environmental *and* institutional barriers" (emphasis mine) suggests that different from the definition of disability under the Act, one has to prove all the three disabling factors, and not just any of them. This also is a significant difference from the definition of a person with disability under the CRPD which uses the expression "various barriers" instead of categorizing them into "attitudinal, environmental and institutional barriers".

The disturbing element of the definition of a person with disability under the *Person with Disabilities Act* is the reference to "limitation of functional capacity" – which seems to be a narrower approach compared to the "loss of opportunity" or "full and effective participation in society on an equal basis with others".<sup>637</sup> That notwithstanding, the use of expressions "loss of opportunity" in the definition of "disability", or "functional limitations" in the definition of "a person with disability" under the Act may raise some interesting questions. For example, while some individual conditions (impairment) may not impede on employment, it is important to note that such differences may be at the core of a cultural conception of disability.<sup>638</sup> That stated, can a loss of a finger qualify as a disability upon proof of discrimination hindering one's employment chances? What about a person with disability who does not encounter discrimination in a work place, but whose condition is stigmatized by some Sections of the society?

Question raised with respect to definitions should not imply that the official definition of disability in Tanzania Mainland is stuck to the old. The mere fact that the law has accommodated factors outside the body is itself a significant step.

---

<sup>636</sup>*Ibid.*

<sup>637</sup> Article 2, CRPD, *supra*, n. 24.

<sup>638</sup> Devlieger, P. J. (2010), *supra*, n. 23, at p. 81.



### 2.5.3. Approaches to Equality and Disability in Zanzibar

#### 2.5.3.1. Overview

The 1963' Independence Constitution<sup>639</sup> followed the Westminster model of government, and was therefore similar to the other independence constitutions of former British colonies, and also contained the Bill of Rights.<sup>640</sup> However, the constitution lasted only for about a month, before the 12<sup>th</sup> January 1964 people's revolution which resulted into the abrogation of the 1963 Independence Constitution. From that period, there was no constitution until 1979. The 1979 Constitution had no Bill of Rights. Like Tanzania mainland, Zanzibar had to wait until 1984 when the Bill of Rights was inserted in the current constitution. There were no constitutional developments with respect to disability rights until 2010 constitutional amendments, where disability was included in the list prohibited grounds of discrimination.

In terms of sectoral legislation, the first provisions related to the employment of persons with disability appeared in 1997's *Labour Act*<sup>641</sup> which contained some equality and anti-discrimination provisions.<sup>642</sup> These were also backed up by penal provisions.<sup>643</sup> The Act was replaced by the *Employment Act* in 2005.<sup>644</sup> In 2006, Zanzibar enacted the *Persons with Disabilities (Rights and Privileges) Act*.<sup>645</sup>

In terms of policy, there was a move to prepare a disability policy for Zanzibar in 2004. An initiative of persons with disability proposed draft policy, but which never developed into an official policy.<sup>646</sup> This is what appears to be mistakenly referred to in several reports as 2004 Zanzibar's disability Policy. Apparently, the office of the First President of Zanzibar is now in the process of developing a disability policy. The current draft policy touches matters of equality as well as employment. The policy objective (with respect to employment) is to reduce barriers to employment.<sup>647</sup>

---

<sup>639</sup> *The Constitution of the State of Zanzibar, 1963* Legal Supplement (Part I) to the Official Gazette of the Zanzibar Government, Vol. 72, No. 4320 of 5th December 1963) (repealed)

<sup>640</sup> Parkinson, C. O. (2007) *Bill of Rights and Decolonisation The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories*, Oxford, New York: Oxford University Press, at p. 256; Oloka-Onyango, J. and Nassali, M. (2003), *supra*, n. 503, at p. 10; Haule, R. R. (2006)), *supra*, n. 503, at p. 220.

<sup>641</sup> Act No. 3 of 1997 (Znz, repealed), *supra*, n. 82.

<sup>642</sup> Section 120(1), (2) and (3), *ibid*.

<sup>643</sup> Section 120(5), *ibid*.

<sup>644</sup> Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>645</sup> Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>646</sup> Muhammed, R. A. (15<sup>th</sup> June 2014), Interview (Email).

<sup>647</sup> Abdallah, A. (10<sup>th</sup> June 2014), Interview (Email).

### 2.5.3.2. Development of Equality Measures

#### (a) Equality and Disability in the Absence of the Bill of Rights

While there was no Constitution between 1964 and 1984, the 1964's *Constitutional Government and the Rule of Law Decree*<sup>648</sup> proclaimed the Peoples' Republic of Zanzibar as a Democratic State dedicated to the rule of law,<sup>649</sup> and disability was mentioned in the 1964's *Equality, Reconciliation and Unity of Zanzibar Peoples Decree*,<sup>650</sup> which *inter alia* provided:-

2. A primary objective of the Zanzibar Peoples Revolution is to end all economic, social or legal privileges and disabilities which have in the past divided various citizens and groups of citizens according to their race, sex, religion or origin, and to promote the equality, reconciliation and unity of the people of Zanzibar.
3. Accordingly, every citizen of Zanzibar is declared to be equally entitled to the rights, privileges and protections of citizenship insofar as he or she equally assumes the duties and obligations of citizenship. No such rights, privileges or protections may lawfully be withdrawn from any citizen by instrumentalities of the State or by private action for reasons only primarily or in part, of that Citizen's race, religion, sex or origin.
4. Nothing in this Decree shall preclude the Government's legislating to give special relief or other preference to economically, culturally or socially under-privileged categories of citizens for purposes of bringing them to equality with other comparable categories.

Clearly from the above provisions, Zanzibar had some elements of substantive equality measures (at least stated in the law), although disability was not specifically provided.

Later in 1981, the International Year of Disabled People appeared to have motivated individual initiatives to push for equality of persons with disability,<sup>651</sup> but there is no evidence to suggest that the International Year of Disabled Persons had a significant impact upon Zanzibar's equality measures.

#### (b) Developments after the Bill of Rights

---

<sup>648</sup>*The Constitutional Government and the Rule of Law Decree, 1964* (Decree No. 5 of 1964) (Zanzibar, repealed).

<sup>649</sup> Section 2, *ibid.*

<sup>650</sup>*The Equality, Reconciliation and Unity of Zanzibar Peoples Decree, 1964* (Presidential Decree No. 7 of 1964) (Zanzibar, repealed)

<sup>651</sup> Khalfan, H. K. (2008, November 17). Interview with V. Chaubey, *Innovations for Successful Societies: Oral History Program* (Elections, G2), Princeton University, New Jersey.

As already stated, the Bill of Rights in Zanzibar was introduced in 1984, when the current constitution was adopted. The current constitution expressly prohibits discrimination,<sup>652</sup> and mentions various grounds of discrimination, including disability.<sup>653</sup> Before the amendment of 2010, anti-discrimination and equality provisions in the Constitution did not mention disability as a prohibited ground of discrimination. In 2002, the equality provision was amended to include a proviso to the effect that it is not discrimination to take such specific measures which aim at solving specific social problems.<sup>654</sup> Disability as a prohibited ground of discrimination was included in the constitution through the constitutional amendment of 2010.<sup>655</sup>

Like in Tanzania Mainland, the inclusion of disability as a prohibited ground of discrimination in the *Constitution of Zanzibar*<sup>656</sup> was not supported by the amendment of its Bill of Rights to address specific needs of persons with disability. Some of such matters are included in the Fundamental Objectives and Directive Principles and Policies,<sup>657</sup> a part of the constitution which is not justiciable.<sup>658</sup> According to the relevant provisions of the said directives, Zanzibar adheres to the principles of democracy and social justice, under which security and welfare of the people are the primary objective.<sup>659</sup> However, the directives appear to take a charity approach to disability, since while the government is supposed, for the purposes of promoting *inter alia* social welfare, to ensure all people's opportunities to work, the disadvantaged groups which include persons with disability, the language used therein does places more emphasis on "assistance".<sup>660</sup>

### **2.5.3.3. Equality Measures under the Current Disability and Employment Legislation**

The international and national obligation to which Tanzania has committed herself must have influenced Zanzibar's approach towards disability, considering the nature of political and legal arrangement within the United Republic of Tanzania as already herein highlighted.

---

<sup>652</sup> Article 12(1), (2) and (4), *The Constitution of Zanzibar (as amended)*, *supra*, n. 500

<sup>653</sup> Article 12(5), *ibid.*

<sup>654</sup> Article 12(5), *ibid.*

<sup>655</sup> Section 8, *The Constitutional Amendment Act* (Act No. 9 of 2010) (Zanzibar) .

<sup>656</sup> *The Constitution of Zanzibar (as amended)*, *supra*, n. 500.

<sup>657</sup> Articles 8 – 10, *ibid.*

<sup>658</sup> Article 10 A, *ibid.*

<sup>659</sup> Article 9(1) and (2)(b), *ibid.*

<sup>660</sup> Article 10 (g), *ibid.*

While, on one hand, the enactment of the *Persons with Disabilities (Rights and Privileges) Act*<sup>661</sup> may be viewed as among the efforts taken by Zanzibar to ensure the equality and inclusion of persons with disability (including specific provisions on employment), the *Employment Act*<sup>662</sup> has, been enacted to give effect to the international labour standards, in particular those set by the ILO.<sup>663</sup> The Act, among other things provides for the fundamental rights of employees,<sup>664</sup> and has more elaborate provisions on equality generally and disability in particular, compared to its predecessor.

Both the disability and employment laws prohibit direct or indirect discrimination against any persons on grounds disability in any employment policy or practice.<sup>665</sup> Although the *Persons with Disabilities (Rights and Privileges) Act*<sup>666</sup> does not have a general anti-discrimination provision, prohibition of discrimination can be found in various provisions, such as those related to employment. The Act defines “discrimination” to mean to accord different treatment directly or indirectly to a person solely as a result of his disability. Such acts of discrimination includes the use of words, gestures or caricatures that demean, scandalize or embarrass persons with disability and also include to limit, segregate or classify in a way that adversely affects the opportunities or status of a person with disability.<sup>667</sup> This list of discriminatory acts does not appear to be exhaustive.

Under the *Employment Act*,<sup>668</sup> discrimination is defined to include:-

any distinction, exclusion or preference made on the basis of race, colour, gender, religion, political opinion, national extraction or social and place of origin, marital status, pregnancy, disability, and HIV/AIDS status which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>669</sup>

---

<sup>661</sup> Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>662</sup> Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>663</sup> LHRC and ZLSC (2010), *supra*, n. 70, at p. 250.

<sup>664</sup> *Ibid.*

<sup>665</sup> Section 6 (1) and 7, Act No.9 of 2006 (Znz), *supra*, n. 82; Section 10(1), 10(2)(a), 10(2)(b), Act No. 11 of 2005 (Znz), *supra*, n. 82. Under Section 6(3)(b) of the Act No.9 of 2006 (Znz), *supra*, n. 82, an employment policy or practice’ means any policy or practice relating to and includes: (i) recruitment procedures, advertising and selection criteria and process; (ii) appointment and appointment process; (iii) job classification grading, promotion and demotion; (iv) remuneration, employment benefits and terms of employment; (v) the working environment and facilities; (vi) training and development; (vii) disciplinary measures; (viii) termination of employment; and (ix) job retention and return to work.

<sup>666</sup> Act No.9 of 2006, *ibid.*

<sup>667</sup> Section 3 *ibid.*

<sup>668</sup> Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>669</sup> Section 10(3), *Ibid.*

The rule against discrimination also extends to unions or organisations which are prohibited, under the *Labour Relations Act*,<sup>670</sup> from discrimination either in their constitutions or through their actions against any person on various grounds, which include disability.<sup>671</sup>

To strengthen equality provisions, both the disability and employment laws embrace the principle of affirmative action,<sup>672</sup> and they do also contain penal provisions against discriminating employees with disability, denial of employment or dismissal on the ground of disability, failure to punish reasonable accommodation or failure to provide alternative job upon disability.<sup>673</sup> Relevant provisions in both disability and employment laws with respect to the employment of persons with disability are more elaborated in Chapter 3 of this work.

#### **2.5.3.4. Defining Disability**

Although the *Employment Act* retained the previous medical definition of a person with disability under the 1997 repealed employment legislation,<sup>674</sup> the definition of disability under the *Persons with Disabilities (Rights and Privileges) Act* of Zanzibar inclines towards a human rights approach to disability, and more descriptive than the definition of the same term in Tanzania Mainland. Under the said Act, disability is defined to as:-

a state of restricted participation that results from the interaction between persons of impairments, conditions, health needs or similar situations, and environmental, social, and attitudinal barriers, where the impairments, conditions, health needs or similar situations may be permanent, temporary, intermittent or imputed, and include those that are inter alia, physical, sensory, cognitive, psychosocial, neurological, medical or intellectual or a combination of those.<sup>675</sup>

The above definition contains individual attributes which are similar to what constitute impairment under Tanzania Mainland's disability legislation. Zanzibar's disability legislation does not define the term impairment. In practice however, the circumstances covered under the above definition may not be significantly different from those covered under the definition of disability in Tanzania mainland. Although this definition cannot be

---

<sup>670</sup> Act No. 1 of 2005 (Znz), *supra*, n. 82.

<sup>671</sup> Section 7(4), *ibid*.

<sup>672</sup> Section 6(2), Act No.9 of 2006 (Znz), *supra*, n. 82; Section 10 (4)(a), Act No. 11 of 2005 (Znz), *supra*, n. 82. The disability law limits affirmative action to matters related to employment only.

<sup>673</sup> Section 90, *ibid*; Section 22 (b), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>674</sup> Section 3(1), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>675</sup> Section 3, Act No.9 of 2006 (Znz), *supra*, n. 82.

completely free from some questions, such as those related to the actual length or extent of a condition or health that is needed or required for purposes of defining disability.

*The Persons with Disabilities (Rights and Privileges) Act* also defines “a person with disability”. This definition appears to contain an “ideological confusion”, for mixing impairment and disability. The Act defines “a person with disability” as: -

any person who has a physical or sensory or mental disability wholly or partly, either congenital or not causing functional limitation or an activity restriction of one or more of major life activities of such individual.<sup>676</sup>

This definition substitutes “disability” for “impairment”, and is medical. That is, the emphasis on “restriction of major life activities of [an] individual” and the exclusion of external factors to such an individual may mean that in defining a person with disability, environmental or attitudinal factors are excluded. Practical or easy to implement as might seem, this definition may tend to exclude people who, despite having impairment and suffering or at the risk of suffering discrimination, they cannot be biologically considered as having restriction of one or major life activities. A good example in Tanzania can be persons with albinism.

## **2.6. Comparative analysis: Selected African States**

In the introductory chapter, I have already pointed out that development of disability policies in the west entered Africa (and other developing countries) during colonial period, although during this time the said policies were formulated on the practices grounded on charity approaches.<sup>677</sup> Even after colonialism, the charity approach has influenced disability policies of several developing States, and may have served as a reason for the failure of governments to commit to full responsibility for persons with disability.<sup>678</sup>

While African governments may have inherited the colonial practices with respect to disability, recent developments in disability laws and policies is a reflection of international and regional developments in the area of disability rights. However, it is hard to give a detailed account of the situation regarding the rights of persons with disability in

---

<sup>676</sup>*Ibid.*

<sup>677</sup>Ito, N. (2010) 'Convention on the Rights of Persons with Disabilities and Perspectives of Development Assistance: A Case Study of Thai Disability Policy, *Asia Pacific Disability Rehabilitation Journal*, Vol. 21, No. 1, at p. 47; Ingstad, B. (2001), 'Disability in the Developing World', in Albrecht, G. L, Seelman, K. D. and M. Bury (Eds.), *Handbook of Disability Studies*, at p. 778.

<sup>678</sup>Ingstad, B. (2011), *ibid.*

Africa, owing to varying circumstances within individual African States.<sup>679</sup> Some States have gone through periods of civil conflicts and gross human rights violations under undemocratic regimes: for example, Uganda in the era of Idi Amin, which in some ways may have paralysed the growth of civil society; or apartheid regime in South Africa, which meant that the experience of disability ought to have also been viewed in the context of racial segregation.<sup>680</sup> The general analysis is that the progress in the field of disability rights have been slow,<sup>681</sup> reflecting the general situation in developing nations which have a shorter history and less solid foundation to facilitate the notion of rights.<sup>682</sup> It was in the period of 1980s and 90s when significant activities started to take shape, including the formation of various organizations of persons with disability.<sup>683</sup> During this time, several States developed official policies, laws and action plans to ensure the rights of persons with disability.<sup>684</sup>

Even before the adoption of the CRPD, some African States had disability provisions which seem to be compatible with the Convention in some aspects. African States selected for purposes of this study have in place laws and policies which are directly or indirectly applicable to persons with disability. These are in the form of constitutional and general equality measures,<sup>685</sup> specific disability laws,<sup>686</sup> employment/labour relations,<sup>687</sup> general

---

<sup>679</sup>Cooper, J. (2000), 'Improving the Civil Rights of People with Disabilities through Domestic Law: A Global Overview', in J. Cooper (Ed.), *Law, Rights and Disability*, at p. 81.

<sup>680</sup>Du Plessis, I. G. and Van Eck (2011), 'Protection of Disabled Employees in South Africa: An analysis of the Constitution and Labour Legislation', in Du Plessis, I. G. and T. van Reenen (Eds.), *Aspects of disability law in Africa*, at p. 234. Although the impact of apartheid was a major issue which the first post apartheid government was confronted with, other forms of oppression also became acknowledged, including discrimination against persons with disability. South Africa had also a strong disability movement after the breakdown of apartheid, as many political activists acquired disability through the struggle against the apartheid regime (Flynn, E. (2011), *supra*, n. 295, pp. 103, 104). For a detailed analysis of South African disability movement, See Howell, C., *et al.*, 'A History of Disability Movement in South Africa', in B. Watermeyer, et al. (Eds.), *Disability and Social Change: A South African Agenda*.

<sup>681</sup>Cooper, J. (2000), *supra*, n. 679, at p. 81.

<sup>682</sup>Ito, N. (2010), *supra*, n. 677, pp. 43 – 59.

<sup>683</sup> For example, the first multi-racial organisation of persons with disability in South Africa, the Disabled People South Africa (DPSA) was formed in 1984 ( Howell, C., *et al.*, *supra*, n. 680, at p. 48). In Uganda, the National Union of Disabled Persons (NUDIPU), an umbrella organisation for persons with disability in Uganda, was formed in 1987 ( ILO (2004), *supra*, n. 27, at p. 12).

<sup>684</sup>Ingstad, B. (2001), *supra*, n. 677, at p. 772.

<sup>685</sup> See for example: *The Interim Constitution of South Africa, 1993* (Act No. 200 of 1993) (South Africa, repealed) ; Act No. 4 of 2000 (SA), *supra*, n. 350.

<sup>686</sup> See for example: *The Disability Rights Charter of South Africa, 1992* ; Office on the Status of Disabled Persons (South Africa) (1997) 'White Paper on Integrated National Disability Strategy, Office on the Status of Disabled Persons; Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>687</sup> These include general employment and/or labour relations legislation with specific provisions on disability. There are also employment equity specific legislation, which are aimed at achieving the equality of opportunities of either persons with disability or other groups considered as marginalised. Example are: *The Employment Equity Act, 1998* (Act No. 55 of 1998) (South Africa) ; *Industrial and Labour Relations Act* Cap

economic empowerment laws.<sup>688</sup> The development and the extent of coverage of all these measures, and the nature of their enforcement, vary from one country to another. Nevertheless, these measures have helped to create a new sense of awareness of the needs of persons with disability. National institutions and mechanisms have been established to promote and protect human rights.<sup>689</sup> The ratification of the CRPD by these States is therefore expected to influence further developments in the area of disability rights.

### 2.6.1. Constitutional Disability Rights Provisions

Some Constitutions have specific enforceable provisions for persons with disability, although they may differ in language and coverage. Examples from Uganda, Ghana and Kenya help to illustrate the point:

Article 35 (1) of the *Constitution of the Republic of Uganda*, 1995<sup>690</sup> provides:-

Persons with disability have a right to respect and human dignity, and the State and society shall take appropriate measures to ensure that they realise their full mental and physical potential.

Article 29 of the *Constitution of the Republic of Ghana* (hereinafter Constitution of Ghana)<sup>691</sup> provides generally for the special rights of persons with disability. On matters of employment, Article 29(7) provides:-

(7) Special incentive shall be given to disabled persons engaged in business and also to business organisations that employ disabled persons in significant numbers.

There could be advantages or disadvantages of both (general and elaborative) approaches. The provision of the Ugandan Constitution is such that it gives room for the wider interpretation with respect to the “appropriate measures”. On the other hand, the provision is limited to “mental and physical” potentials. The Ghanaian provision is limited to “incentives.” Although it may have helped to identify a specific measure to promote persons with disability’ access to employment, it has in fact ignored such other relevant aspects as job accommodation. An argument may however be raised that such measures ought to be provided in specific disability legislation which may serve to expand the

---

169 (Zambia) ; *The Employment Act, 2006* (Act No. 6 of 2006) (Uganda) ; *The Employment Act, 2007* (Act No. 11 of 2007) (Kenya) ; Act No. 6 of 2006 (Ug), *supra*, n. 687; and the *Labour Act, 2003* (Act No. 651 of 2003) (Ghana) .

<sup>688</sup> See for example: *The Citizens Economic Empowerment Act, 2006* (Act No. 9 of 2006) (Zambia)

<sup>689</sup> LRCT (2008), *supra*, n. 71, at p. 53.

<sup>690</sup> The Constitution of Uganda, *supra*, n. 350.

<sup>691</sup> The Constitution of Ghana, *supra*, n. 350.



interpretation of the right to “work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind.”<sup>692</sup>

Article 54 of the *Constitution of Kenya*<sup>693</sup> provides generally for persons with disability, but does not touch employment matters. It states:-

54. (1) A person with any disability is entitled—

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

(b) to access educational institutions and facilities for persons with disability that are integrated into society to the extent compatible with the interests of the person;

(c) to reasonable access to all places, public transport and information;

(d) to use Sign language, Braille or other appropriate means of communication; and

(e) to access materials and devices to overcome constraints arising from the person’s disability.

(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disability.

Despite the fact that Article 54 does not specifically mention employment, there are entitlements which are essential for either preparing persons with disability for employment, or accommodating persons with disability at work place. Education impact on skills of persons with disability, and means of communication or accessible environment help to remove barriers. Significantly, according to Article 54 (1) (e), a person with disability is entitled to “access materials and devices to overcome constraints arising from the person’s disability.” This entitlement has a profound importance, since such materials and devices may serve to accommodate a person with disability at a work place.

The *Constitution of Kenya* also sets out the values and principles of public service to include affording adequate and equal opportunities for appointment, training and advancement of... persons with disability at all levels of the public service.<sup>694</sup> Article 54(2) looks more of an “equal representation provision”. However, if these elective or appointed posts can be construed as “employment in public service”, then the Article is in line with

---

<sup>692</sup> Article 24(1), *ibid.*

<sup>693</sup> *The Constitution of Kenya, 2010* .

<sup>694</sup> Article 232 (1) (i) (iii), *ibid.*

the provision of Article 27(1) (g) of the CRPD which requires States Parties to the Convention to employ persons with disability in the public sector.

There have been a number of judicial decisions in Kenya with respect to the rights of persons with disability. Once the court stated that the *Constitution of Kenya* [as a whole] has explicit provisions which provide a foundation for the rights of persons with disability, and provides a window for enforcement and enrichment of the rights and freedoms of persons with disability through the application of international law principles, treaties and conventions Kenya has ratified.<sup>695</sup>

### **2.6.2. General Equality and Anti-Discrimination Measures**

Some constitutions list disability as a prohibited ground of discrimination.<sup>696</sup> Those which do not list disability as a prohibited ground of discrimination tend to list such prohibited grounds, and in such forms which may either give room for broader interpretation to include persons with disability, or exclude persons with disability completely. Examples from Constitutions of Ghana and Zambia may help to elaborate the point:

Article 17 (2) of the *Constitution of Ghana* prohibits discrimination on the grounds of “gender, race, colour, ethnic origin, religion, creed or social or economic status,” and Article 17(3) defines discrimination as:-

to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

Article 23(3) of the *Constitution of Zambia* defines discriminatory treatment as:-

affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

---

<sup>695</sup>*Paul Pkiach Anupa & Another v Attorney General & Another*, High Court of Kenya at Nairobi, Petition 93 of 2011.

<sup>696</sup>See Article 9(3), *The Constitution of the Republic of South Africa, 1996* (Act No. 108 of 1996) (as amended) ; Articles 21(1), 21(2), 35(1) and 53 (2), *The Constitution of Uganda*, *supra*, n. 350; Articles 27(1) and 27(4), *The Constitution of Kenya*, *supra*, n. 693.

Anti-discrimination provisions have often been supported by affirmative action measures, which are specifically provided with the view of implementing policies and programmes aimed at redressing social, economic or educational imbalances.<sup>697</sup> They may make different provisions for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of [the] Constitution.<sup>698</sup> These measures are aimed at redressing any disadvantage suffered by individuals or groups considered marginalized, on the basis of disability or any other reason, which may have been created by history, tradition or custom constituting a long period of past discrimination.<sup>699</sup>

Often, the constitutions provide for the legislative organs to enact further legal provisions on affirmative action,<sup>700</sup> and as such, these measures can also be found in the respective employment or disability-specific legislation, or such other legislation as may be necessary for the promotion of equality.<sup>701</sup> The measures contained in these pieces of legislation are not very different from those contained in Tanzanian disability and employment legislation,<sup>702</sup> although there may be some variations.

In some African States, in addition to general equality and anti-discrimination provisions, there exist penal sanctions for discriminating persons with disability in matters related to employment.<sup>703</sup> Furthermore, in some States, contracts for employment, or other

---

<sup>697</sup> Article 17(4) (a), The Constitution of Ghana, *supra*, n. 350.

<sup>698</sup> Article 17(4) (d), *ibid*.

<sup>699</sup> Article 32(1), The Constitution of Uganda, *supra*, n. 350; Article 27(6), The Constitution of Kenya, *supra*, n. 693. Article 27(7) further provides that any measure taken under article 27(6) shall adequately provide for any benefits to be on the basis of genuine need.

<sup>700</sup> See for example: Article 17(4), The Constitution of Ghana, *supra*, n. 350; Article 32(2), The Constitution of Uganda, *supra*, n. 350; Article 27(8), *The Constitution of Kenya*, *supra*, n. 693; Article 9(2), The Constitution of South Africa, *supra*, n. 696.

<sup>701</sup> Section 5(3)(a), Act No. 11 of 2007 (Kn), *supra*, n. 687; Section 20(2)(d) and 35(3)(h), Act No. 6 of 2012 (Zmb), *supra*, n. 569; Section 6(2), Act No. 55 of 1998 (SA), *supra*, n. 687.

<sup>702</sup> The laws of some African States list employment related matters with respect of which persons with disability are protected from discrimination. These are: job application procedures or advertisement; recruitment for employment; creation, classification or abolition of posts; determination or allocation of wages, salaries, pensions, accommodation, leave or the related benefits; choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; the provision of facilities related to or connected with employment; or any other matter related to employment (See: Section 12 (3), 15(1)(a) to (g), Act No. 14 of 2003 (Kn), *supra*, n. 197; Section 12(1), 14 and 15, *The Persons with Disabilities Act, 2006* (Uganda) ; Section 4 (2); 11 (a), (b); 12(1), (2); *The Persons with Disability Act, 2006* (Act No. 715 of 2006) (Ghana) ; Section 3 35(2), Act No. 6 of 2012 (Zmb), *supra*, n. 569).

<sup>703</sup> For example: In Kenya, it is a criminal to, inter alia, discriminate a person with disability in matters related to employment, and this extends to prospective employers (Section 26(b), (c), Act No. 14 of 2003 (Kn), *supra*, n. 197, and Section 5(6), Act No. 11 of 2007 (Kn), *supra*, n. 687). Similar position exists under Ghana's disability law (Sections 8, 4(1) and (2), and 37 (1) and (2), Act No. 715 of 2006 (Gh), *supra*, n. 702, *supra*, note 685).

agreements, risk being declared void insofar for limiting or denying a person with disability any rights or privileges conferred under the law.<sup>704</sup>

Limited anti-discriminatory provisions can limit the judicial interpretation of human rights with respect to persons with disability. Zambia's anti-discrimination provisions in the current Constitution do not appear very different from the provisions of Article 82(3) of the former *constitution of Kenya*,<sup>705</sup> according to which discriminatory treatment was defined as:-

affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The above provision was subject to interpretation in the case of *Duncan Otieno Waga v Attorney General*,<sup>706</sup> in which the petitioner was a police officer whose services were terminated when he became visually impaired. He then petitioned the High Court to vindicate his fundamental rights and freedoms, the basis of his claim being that he suffered discrimination as a person with physical disability. The major hurdle to the Applicant's case was that despite the fact that the Court was petitioned after the promulgation of the current *Constitution of Kenya*, the facts relied upon by the petitioner took place between 2004 and 2008, and the High Court found the new Constitution not to be retrospective, and therefore could not invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution.<sup>707</sup> Applying the provisions of the former Constitution, the Court stated *inter alia* that:-

45. The definition of discrimination at Section 82(3) was limited to classifications of, "*race, tribe, place of origin or residence or other local connation, political opinions, colour, creed or sex.*" There was no protection for discrimination on account of disability. The only way to include disability as a prohibited form of discrimination is to read disability as being prohibited on account of "*other local connation.*"

---

<sup>704</sup> See for example: Section 18, The Persons with Disabilities Act (Ug), *supra*, n. 702; Section 15(2), Act No. 14 of 2003 (Kn), *supra*, n. 197; and Section 10, Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>705</sup> The *Constitution of the Republic of Kenya*, 1963 (repealed).

<sup>706</sup> *Duncan Otieno Waga v Attorney General*, High Court of Kenya at Nairobi, Petition 94 of 2011.

<sup>707</sup> Citing *Joseph Ihugo Mwaura v Attorney General* Nairobi Petition No. 498 of 2009 (Unreported) and *Du Plessis and Others v De Klerk and Another*(CCT 8/95) [1996] ZACC 10.

46. The argument whether Section 82(3) includes other categories of discrimination was considered in the case of *RM (suing through next friend JK) v Attorney General* (2008) 1 KLR (G & F) 574... The court was invited to go beyond the categories set out in Section 82(3). The court declined this invitation and observed, *"In interpreting our Constitution we consider ourselves bound by its provisions in the matter before us namely s. 82 and its limitations. Perhaps it is important to point out at the outset, that following the great momentum of gender equity in the 80's and 90's, s 82 of the Constitution was amended in 1997 and the prohibited category expanded to include "sex". [Other] status were [sic] [recte was] not added. At the moment we can only conclude that the exclusion was deliberate and we do not consider it the function of the Court to fill the gaps."*

47. The court is obliged to give a broad and purposive interpretation to the Constitution that enhances the protection of fundamental rights and freedoms but such an interpretation must be founded on the words of the Constitution. Any other approach would amount to usurping the constituent power of the people enshrined in the Constitution.

48. To include a prohibition based on disability in the definition of *"other local connection"* would also be inconsistent with the language of Section 82(2). The use of local connation must be read together with race, tribe, place of origin or residence and connotes reference to a place. The forms of disabilities are infinite and various and do not necessarily have a connection with a place or at any rate it has not been shown that the disability subject of this suit relates to a place or origin or locality.

49. I conclude that the former Constitution is not applicable to the facts and circumstances of this case and therefore the petitioner cannot claim breach of his rights on the basis on Section 82 thereof. The enactment of protections of persons with disability in Article 27 of the Constitution is recognition of the fact that the former Constitution was deficient in so many respects including limiting the protections afforded to persons with disability.

It is important to note that the Petitioner successfully petitioned the high court for the second time, this time avoiding the provision of the new constitution.<sup>708</sup> The court stated, *inter alia*, that:-

By now, it must be obvious that this court is making a finding that the retirement of the Claimant on medical grounds was discriminative and a contravention of his fundamental rights and freedoms as enshrined under the Persons with Disabilities Act and the international instruments aforesated. As much as the repealed constitution did not regard disability as an element of discrimination, the foregoing statute provided the desired protection to fill up the lacunae that existed in the repealed constitution.

---

<sup>708</sup> *Duncan Otieno Waga v The Hon. Attorney General*, Industrial Court of Kenya, at Mombasa, Cause No. 89 Of 2013

After holding that the petitioner's claim was not maintainable under the Constitution, the court found that the petitioner had a right not be discriminated against under *The Persons with Disabilities Act*. However, the court further stated:-

51. Article 19(3) provides that the Bill of Rights does not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights...

52. The question that needs to be answered is whether "*other rights and fundamental freedoms not in the Bill of Rights*" but recognized under Article 19(3) (b) can be enforced by a petition filed under Article 22 of the Constitution. Article 22(1) [which give every person the right to institute proceedings in claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened]

53. [Human rights and fundamental freedoms] are specifically defined and as part of the Constitution, they take precedence over any laws, policies and measures of the State and its organs.

54. The importance of these rights and fundamental freedoms is underpinned by the fact that... the High Court is entitled to frame appropriate relief... to give effect to these rights....

55. Other rights and fundamental freedoms recognized by Article 19(3) (b) do not enjoy the same status as those found in the Bill of Rights and cannot be elevated to the same status without an amendment of the Constitution. The nature and extent of these rights and the reliefs in respect breach thereof and the procedure for enforcement must be determined in the context of the respective statutory instruments, treaties or conventions.

56. It is clear that the right conferred by Article 22 is only for the purpose of enforcing fundamental rights and freedoms in the Bill of Rights. The right is not conferred for the purpose of litigating other matters unconnected with the enforcement of the Bill of Rights....

57. [R]ights and fundamental freedoms, whether under protected by the Constitution or other instruments, [do not] exist in pigeon holes, isolated from each other. Indeed Article 19 reinforces the universality and indivisibility of human rights and fundamental freedoms. All rights are interdependent and reinforce each other. Article 22 merely gives a special right to a party to move the High Court to protect a special class of rights.

58. [I]n the circumstances, an application filed under Article 22 of the Constitution cannot form the basis of a claim under *The Persons with Disabilities Act* or *the CRPD*. These rights must be litigated or enforced in another forum save where the enforcement is incidental to the enforcement of the rights contained in the Bill of Rights.

Following the promulgation of the *Constitution of Kenya* in 2010, disability was included as one of the prohibited grounds of discrimination,<sup>709</sup> and this paved the way for individuals and organizations of persons with disability to petition the courts in an effort to enforce the provisions of both the Constitution and the *Persons with Disabilities Act*. It has now been recognized that “the [law] that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination [against the marginalized], especially against women and persons with disability.”<sup>710</sup>

### 2.6.3. Defining Disability

When it comes to the concept of disability, there appears to be a “mixed” picture in Africa. Different States have different definitions of disability, some still adhering to the medical approach, and other shifting to the human rights approach. Elements of social approach to disability can be seen in Zambia’s *Persons with Disabilities Act* of 2012, disability is defined as:-

permanent physical, mental, intellectual or sensory impairment that alone, or in a combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in society on an equal basis with others

This definition has also been adopted by the 2012’s *Zambia Draft Constitution*.

In Uganda, despite the social approach-looking definition of disability in framework disability legislation, the definition still places emphasis on “substantial functional limitation”, and the law also provides for disability coding based on medical attributes, such as amputations, diseases, injuries or dis-orders.<sup>711</sup> The problem also appears in Ugandan’s *Employment Act*,<sup>712</sup> which defines disability as any permanent:-

- (iI) physical disability or impairment;
- (iII) physical illness;

<sup>709</sup> Article 27(4), The Constitution of Kenya, *supra*, n. 693.

<sup>710</sup> *Federation of Women Lawyers Kenya and 5 others v Attorney General and Judicial Service Commission*, High Court of Kenya at Nairobi, Constitutional Petition No. 102 of 2011.

<sup>711</sup> Section 2 of The Persons with Disabilities Act (Ug), *supra*, n. 702 defines disability as “substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation”. Although Paragraph 22 of Uganda’s *Republic of Uganda (2010) Initial Status Report on the UN Convention on the Rights of Persons with Disabilities*, (2010) states that the definition is aligned to the CRPD’s definition, the CRPD’s definition does not require “substantial functional limitation”. Also see the First Schedule to the Persons with Disabilities Act (Ug), *supra*, n. 702.

<sup>712</sup> Act No. 6 of 2006 (Ug), *supra*, n. 687.

- (iIII) psychiatric illness;
- (iIV) intellectual or psychological disability or impairment;
- (iV) loss or abnormality of physiological, psychological or anatomical structural function;
- (iVI) reliance on a guide dog, wheelchair, or any other remedial means; and
- (iVII) presence in the body of organisms capable of causing illness.

Medical Definitions also appears in Ghana's and South Africa,<sup>713</sup> and this approach to disability is had affected the judicial approach in the case of *IMATU v City of Cape Town*.<sup>714</sup> The case has been criticised for being "overly aligned with an individual impairment model."<sup>715</sup>

## 2.7. Conclusive Summary

In this chapter, I have depicted how approaches to equality and disability have been evolving, at international and domestic levels. The 1970s witnessed the beginning of some meaningful activities, within the UN, regarding the rights of persons with disability. Earlier arrangements had some limitations especially because of their non-binding nature, and emphasis on medical/welfare approaches to disability issues. Developments within the UN also influenced regional human rights mechanisms in Africa as well as individual States.

The human rights approach to disability has its origins in the social model of disability, which itself originated in England. Approaches to equality, like the gender and minority approaches, did significantly influence the disability movement in the United States. The British and American approaches to disability are not the only approaches to disability to date, but these appear to have dominated discussions in English literature. Unlike in Europe or Americans, there is no evidence that African disability movement had defined its own (original) approach to disability. Nevertheless, because of international influences, the continental approaches as well as the approaches in individual States are less in favour of individual centred (medical or welfare) approaches to disability. These new approaches to disability require broader understanding of equality, and therefore, the substantial equality approach is more appropriate for the promotion of the equality of persons with disability.

---

<sup>713</sup> Section 175, Act No. 651 of 2003 (Gh), *supra*, n. 687.

<sup>714</sup> *IMATU v City of Cape Town*, [2005] 11 BLLR 1084 (LC).

<sup>715</sup> Ngwena, C. G. (2010) *Disabled People' and the Search for Equality in the Workplace: An Appraisal of Equality Models from a Comparative Perspective*, LL.D. Thesis, University of the Free State, at p. 417..



In Tanzania, parallel systems of political administration have a clear impact on the nature of progress in official approaches to equality and disability. Generally though, despite some progress in official approaches to disability, general societal perceptions still present an obstacle.

From the general comparative analysis of approaches to equality and disability in Tanzania and some African States, it is clear that African States have not been moving at the same pace. The progress in disability matters is a reflection of the general situation of human rights in individual countries which may have influenced the nature of their respective disability movements. While some African states never had disability laws before 2000s, others have repealed the old laws, and replaced them with the new ones, which seem to correspond with recent international and regional developments in the field of disability rights. In terms of judicial developments, Kenya and South Africa seem to be moving fast. Despite some progress, a common reality in Africa is that there are still some challenges in promoting the new understanding and to disability, especially considering the fact that, social attitudes still hamper the understanding of disability and elimination of discrimination. This and other challenges are discussed in detail in Chapter 5.

## CHAPTER 3

### WORK AND DISABILITY

#### 3.1 Introduction

Simply put, work (in the context of this chapter) is a means of earning income. Although conventionally a financial reward is the “main purpose” of work, there is a view that work does not necessarily involve financial remuneration based on the market value of the labour involved.<sup>716</sup> While salaried work plays a significant role in industrialized communities, the situation is different in non-industrialized societies, where salaried work has a relatively minor role.<sup>717</sup> People may choose to work because they value non-financial benefit (social and psychological) benefits of the activities involved - satisfaction, sense of achievement, avoidance of boredom, social status, etc.<sup>718</sup> Persons with disability will be motivated to engage in work to the extent that they perceive work as offering these benefits.<sup>719</sup>

Distinction has been made between the two terms - work and employment, the latter being linked to wages.<sup>720</sup> Employment has therefore been defined with emphasis on income and the relationship (economic exchange) between employer and employee:<sup>721</sup> a work for cash income.<sup>722</sup> Despite the said distinction, literature uses the two terms interchangeably, and Article 27 of the CRPD (right to work) also uses both terms. In this part, “work” also means “employment.

Work as a right should to be examined in the light of relevant human rights instruments of international, regional or domestic nature. The previous chapter has described the development of disability rights in general, with some insights on the work related matters. This chapter examines in depth the development and meaning of the right to work, and its

---

<sup>716</sup>Shepherd, G. (1989) 'The value of work in the 1980s', *Psychiatric Bulletin*, No. 13, pp. 231-233. Also see Tororei, S. K. (2009), *supra*, n. 40, citing Macha (2006).

<sup>717</sup>Källström, K. and Eide, A. (1999), 'Article 23', in G. Alfredsson and A. Eide (Eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, at p. 490.

<sup>718</sup>King, R., *et al.* (2006) 'Enhancing Employment Services for People with Severe Mental Illness: The Challenge of the Australian Service Environment', *Australian and New Zealand Journal of Psychiatry*, Vol. 40, No. 5, at p. 472, <http://anp.sagepub.com/content/40/5/471>, accessed: 17.4.2014; Boardman, J., *et al.* (2003) 'Work and Employment for People with Psychiatric Disabilities', *British Journal of Psychiatry*, Vol. 182, at p. 467; Shepherd, G. (1989), *supra*, n. 716, pp. 231 - 332

<sup>719</sup>Shepherd, G. (1989), *ibid*, at p. 332.

<sup>720</sup>*Ibid*, at p. 231., citing Hartley, J. (1980).

<sup>721</sup>*Ibid*.

<sup>722</sup>Boardman, J., *et al.* (2003), *supra*, n. 718; Tororei, S. K. (2009), *supra*, n. 40 .

significance to persons with disability. A discussion on international standards with respect to the right to work is centered on the right to work provisions in the UDHR, the ICCPR, the ICESCR, the CRPD and the *Banjul Charter*. These instruments have been ratified by Tanzania, and they are considered as sources of domestic law to the extent they are incorporated in domestic instruments. Therefore, there is also a discussion of the relevant provisions of The *Constitution of the United Republic of Tanzania*, and the relevant measures put with the objective of protecting persons with disability's right to work.

### 3.2 Significance of Work to Persons with Disability

Through work, a person has the opportunity of making significant contributions to society; and contributions to one's self-esteem become limited if she or he is unable to secure gainful employment.<sup>723</sup>

Among other things, work creates opportunities for persons with disability to participate in society as active citizens: it functions as a way of incorporating persons with disability fully into mainstream society, and promoting life of independence, as it creates a feeling of usefulness and self-fulfillment; gives satisfaction; builds up personal dignity; brings a rhythm in daily life; and increases their social networks and civic skills, among several other benefits.<sup>724</sup> Simply put, work is among the means of achieving persons with disability's empowerment and self-advocacy.<sup>725</sup> Access to work in the mainstream employment sector is therefore of crucial importance to persons with disability as are the associated rights to just and favorable conditions of work and freedom of association.<sup>726</sup>

Unequal employment opportunities deepens the exclusion of persons with disability, and makes persons with disability dependent on others, and thereby "become a liability to themselves, as they tend to accept and purposefully demand that everything be done for

---

<sup>723</sup>Henderson, G. and Bryan, W. V. (2011), *supra*, n. 26, at p. 72.

<sup>724</sup>Boardman, J, *et al.* (2003), *supra*, n. 718, at p. 467; Lehman, A. F. et al. (2002) 'Improving Employment Outcomes for Persons with Severe Mental Illnesses, *Archive of General Psychiatry*, Vol. 59, No. 2, at p. 165, accessed: 17.4.2014; Schur, L. et al. (2005) 'Corporate Culture and the Employment of Persons with Disabilities, *Behavioral Sciences and the Law*, at p. 4, <http://onlinelibrary.wiley.com/doi/10.1002/bsl.624/pdf>, accessed: 17.4.2014, citing Schur (2002).

<sup>725</sup>Henderson, G. and Bryan, W. V. (2011), *supra*, n. 26, at p. 72; Sharma, R. N. (2006) 'Employment leads to Independent Living and Self-Advocacy: A Comparative Study of Employed and Unemployed Persons with Cognitive Disabilities, *Asia Pacific Disability Rehabilitation Journal*, Vol. 17, No. 1, at p. 57.

<sup>726</sup>Tororei, S. K. (2009), *supra*, n. 40, citing Quinn and Degener (2002).

them, hence encroaching on the time available to other members of the family and the community to do productive work.”<sup>727</sup>

### 3.3 Persons with Disability and the Challenge of Accessing the Labour Market

The ILO estimated that 386 million of the world's working-age population has some kind of disability.<sup>728</sup> Unfortunately, the increasing need to be ‘intellectually able’ and ‘physically fit’ for work, makes persons with disability economically vulnerable.<sup>729</sup> It has been observed that persons with disability are likely to lose their jobs than those without disability,<sup>730</sup> and as stated in Chapter 1 and at a later stage of this work, various reasons, including attitudes, or inaccessible work environment, may mean that persons with disability face more difficulties in obtaining employment.

Reliable data on the employment of persons with disability worldwide is difficult to obtain, but the available data indicates that persons with disability have poorer employment outcomes than persons without disability.<sup>731</sup> Unemployment among the persons with disability is as high as eighty per cent in some countries, as persons with disability continue to be disproportionately unemployed, underemployed and underpaid, resulting in condition of extreme poverty for millions of their families.<sup>732</sup>

Literature reveals that charity approaches to disability worldwide have been prevalent, thereby separating persons with disability from the general labour market by either being pensioned off (mostly in the west) or placed in segregated jobs specially designed for them,<sup>733</sup> with a heavy emphasis on sorting and labeling, whereas individuals who qualify into a disability category are expected to become part of the labour force, while those found to be “disabled” are exempted from work.<sup>734</sup> Since non-discrimination measures found in institutional policies and legislation (worldwide) tend to be vague and less

---

<sup>727</sup>*Ibid.*

<sup>728</sup>UN Enable2006 (2006), *supra*, n. 35, at p. 34.

<sup>729</sup>Goodley, D. (2011), *supra*, n. 34, at p. 2, citing Barnes and Roulstone (2005).

<sup>730</sup>Barnes, C. (2000) *Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation*, London: C. Hurst and Co. Publishers, at p. 121; Morris-Wales, J. (2010) *Literature Review on Job Retention and Career Progression for Persons with disability in Canada and Internationally*, <http://disabilitystudies.ca/wp-content/uploads/2010/08/Job-Retention-and-Career-Progression-Among-People-with-Disabilities-Final-Report.htm>, accessed: 3.10.2012.

<sup>731</sup>Gottlieb, A. *et al.* (2012), *supra*, n. 35.

<sup>732</sup>Priestley, M. (2001), *supra*, n. 54, at p. 8.

<sup>733</sup>Waddington, L. and Diller, M. (2002), 'Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law', in M. L. Breslin and S. Yee (Eds.), *Disability Rights Law and Policy: International and National Perspectives*, at p. 244.

<sup>734</sup>*Ibid.*

comprehensive, the shift towards human rights approach seems to be less obvious,<sup>735</sup> to the prejudice of persons with disability. It should be noted however, several African States have been improving their laws and policies towards more “rights-based” approaches.

Attitudes of certain employers, and some approaches towards the problem of unemployment of persons with disability may negatively affect the employment status of persons with disability. Sims (2002) summarises the problem as follows:

Certain employers still mistakenly assume that a person with a disability is not able to contribute to the workplace. Or they may be willing to hire a person with a disability, but the cost of adapting the workplace may be too great without assistance from the government. Many governments also feel that they must focus first on employment promotion in general because they consider that the cost of rehabilitation and creating better access for persons with disability is too high. Other governments lack the technical resources and specially trained staff to implement effectively employment promotion policies and programmes for persons with disability.<sup>736</sup>

It follows that unregulated labour market tends to exclude employees or potential employees with disabilities, since the decision whether or not to employ is based solely on personal judgments on the part of employers’, interpretation of suitability and acceptability criteria.<sup>737</sup> In a society with a long history of marginalization of persons with disability, such decisions are not likely to benefit persons with disability. As employers strive to generate profits, they make choices and want what they consider to be the best,<sup>738</sup> which may mean to hire workers without the “risk” of incurring job accommodation costs. All this means limitation of employment opportunities of persons with disability.

For persons with disability already in employment, marginalization (either in terms of physical environment or attitudes from employers, immediate supervisors or co-employees) may limit their job performance and opportunities for training and advancement.<sup>739</sup>

The consequences of prolonged oppression may also affect persons with disability’ attitude, which may in turn negatively affect’s employer’s decision to employ persons with disability. Some persons with disability may present themselves to employers with either hostility or acceptance of society’s view that they are incapable of doing everything for

---

<sup>735</sup>Degener, T. and Quinn, G. (2002), *supra*, n. 302, pp. 38 – 40.

<sup>736</sup>Sims, E. (2002), 'Employment Policy', in M. Humblet, et al. (Eds.), *International labour standards: A Global Approach*, 1st (edn), at p. 204.

<sup>737</sup>Tororei, S. K. (2009), *supra*, n. 40, citing Vernon (1998) and Macha (2002).

<sup>738</sup>*Ibid*

<sup>739</sup>Schur, L. et al. (2005), *supra*, n. 724, at p. 10.

themselves. They may appear “aggressive and at times difficult to handle,” or “meek, submissive, and lacking in forcefulness.”<sup>740</sup> Generally, attitudes and employers pre-judgemental perceptions towards persons with disability tend to reinforce each other, and may lead to stereotyping of persons with disability by the employers.<sup>741</sup>

Global experiences of marginalisation of persons with disability are also reflected in Tanzania, where persons with disability experience lack of equal opportunities in employment and as a result, there are high unemployment levels among persons with disability. Even those who secure employment remain in low status jobs and they earn low salaries.<sup>742</sup> It is generally accepted fact that unemployment, poverty and general marginalisation infringe on persons with disability’ rights to access social services such as education, health, food, shelter, transport and technical aids facilities.<sup>743</sup>

In addition to combating marginalisation, removal of barriers to employment aimed at enhancing persons with disability’s employment opportunities is a “risk worth taking” in recognition of “potentials for more productive, more diverse, better prepared and more highly motivated workforce”.<sup>744</sup> Therefore, the benefit is not only for persons with disability, but also employees, and employers.<sup>745</sup>

### **3.4 Work as a right**

#### **3.4.1 Overview**

The right to work is a fundamental right, recognized in several international and regional legal instruments.<sup>746</sup> It means that one should be able to access the labour market, and freely choose employment, which means the rejection of forced labour or the related arrangements; and that the remuneration and working conditions must be satisfactory. In its broader sense, the right to work can be regarded as a prerequisite for protection against

---

<sup>740</sup>Tororei, S. K. (2009), *supra*, n. 40.

<sup>741</sup>*Ibid*

<sup>742</sup>LRCT (2008), *supra*, n. 71, at p. 105.

<sup>743</sup>Quinn, G. (2010), *supra*, n. 45, at p. 35; UN Enable2006 (2006), *supra*, n. 35; Goodley, D. (2011), *supra*, n. 34, p. 2; Deegan, M. (2010), 'Feeling Normal and 'Feeling Disabled', in S. N. Barnartt (Ed.), *Disability as a Fluid State: Research in Social Science and Disability*, at p. 39.

<sup>744</sup>Cook, J. A. (2006) 'Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission, *Psychiatry Services*, Vol. 57, No. 10, at p. 1402, <http://ps.psychiatryonline.org/data/Journals/PSS/3777/06ps1391.pdf>, accessed: 17.4.2014..

<sup>745</sup>Schur, L. et al. (2005), *supra*, n. 724, at p. 18.

<sup>746</sup>Paragraph 1, General Comment No. 18 (The Right to Work), *supra*, n. 355.

discrimination, freedom of association and favourable working environments, and the associated rights of employees.<sup>747</sup>

The Right to work signifies universality, inalienability, interrelationship, interdependency, and indivisibility of rights.<sup>748</sup> Its realisation is dependent not only upon trade union rights, but also such other rights as protection from slavery and forced labour, or the right to just and favourable conditions of work.<sup>749</sup> On the other hand, the rights to freedom of association, and to form and join trade unions,<sup>750</sup> are dependent upon the right to liberty.<sup>751</sup>

Realisation of the right to work contributes to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.<sup>752</sup> This is due to the fact that the true realization of the right to work is essential for the enjoyment of such other rights as protection from exploitation,<sup>753</sup> to live independently and being included in the community,<sup>754</sup> adequate standard of living,<sup>755</sup> and social protection,<sup>756</sup> or generally the whole notion of equality underlying the CRPD.<sup>757</sup>

### 3.4.2 Origins and Developments

Labour rights have attracted comparatively little attention in developing countries, which have for long focused primarily on the assertion and development of civil and political rights.<sup>758</sup>

Although it waited until 1948 to appear in the universally recognized document, the UDHR, the characterization of the right to work as a social right to the individual is closely linked to modern industrialized society,<sup>759</sup> where work in exchange for cash became the principal way of distributing the national income among members of society, and the

---

<sup>747</sup>Källström, K. and Eide, A. (1999), *supra*, n. 717, pp. 489 – 490.

<sup>748</sup>*Ibid.*, at p. 456.

<sup>749</sup>Article 8, ICCPR, *supra*, n. 10.

<sup>750</sup>Article 22, *ibid.*, Article, 8, ICESCR, *supra*, n. 11.

<sup>751</sup>Article 9, ICCPR, *supra*, n. 10.

<sup>752</sup>Paragraph 2, General Comment No. 18 (The Right to Work), *supra*, n. 355.

<sup>753</sup>Article 16, CRPD, *supra*, n. 24.

<sup>754</sup>Article 19, *ibid.*

<sup>755</sup>Article 11, ICESCR, *supra*, n. 11; MacNaughton and Frey (2011), *supra*, note 451, p. 456.

<sup>756</sup>Article 28(2), CRPD, *supra*, n. 24.

<sup>757</sup>Article 1, *ibid.*

<sup>758</sup>Böhning, W. R. (2005) *Labour Rights in Crisis: Measuring the Achievement of Human Rights in the World of Work*, Hampshire, New York: Palgrave Macmillan, at p. 1.

<sup>759</sup>Källström, K. and Eide, A. (1999), *supra*, n. 717, at p. 490.

political significance of the right to work has therefore grown considerably.<sup>760</sup> The phrase "the right to work", according to Robertson, came up just before 1848, and it was the then "best-liked slogan of the period" authored by Louis Blanc.<sup>761</sup>

The modern international labour law instruments date back to the short period before the UDHR, after the adoption of *slavery and forced labour conventions*<sup>762</sup> by the League of Nations and the ILO respectively. However, the two conventions were very limited compared to the current international law standards on the right to work.

In modern human rights instruments, the right to work was for the first time internationally recognized under Article 23 of the UDHR. Generally, the content of this provision, together with relevant provisions of other international instruments correspond to the principles contained in Article 2 of the *Declaration on Fundamental Principles and Rights at Work*<sup>763</sup> which address matters which are now covered by several ILO Conventions. These are: freedom of association,<sup>764</sup> elimination of forced labour,<sup>765</sup> abolition of child labour<sup>766</sup> and elimination of discrimination in the work place.<sup>767</sup> Thus, the following ILO convention are designated as "fundamental conventions": *Freedom of Association and*

---

<sup>760</sup>*Ibid.*

<sup>761</sup>Robertson, P. S. (1952) *Revolutions of 1848A Social History*,, Princeton: Princeton University Press, at p. 19.

<sup>762</sup>*Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, 60 L.N.T.S. 253, 25 September 1926 ; *Convention Concerning Forced or Compulsory Labour*, ILO Convention No. 29 of 1930 .

<sup>763</sup>*Declaration on Fundamental Principles and Rights at Work*, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010). .

<sup>764</sup> Articles 20(1) and 23(4), UDHR, *supra*, n. 8; Article 22 (1), ICCPR, *supra*, n. 10; Article 8 (1) (a) – (d), ICESCR, *supra*, n. 11; Articles 2 – 5, *Convention concerning Freedom of Association and Protection of the Right to Organise*, ILO Convention No. 87 ; Articles 1(1), (2) (a) and (b), 2(1) and (2), *Right to Organise and Collective Bargaining Convention*, ILO Convention No. 98 of 1949 ; Article 10(1) and (2), Banjul Charter, *supra*, n. 14

<sup>765</sup> Article 2, *Slavery Convention*, *supra*, n. 762; Article 1, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI), 30 April 1956 ; Article 4, UDHR, *supra*, n. 8; Article 8(1) and (3)(a), ICCPR, *supra*, n. 10; Article 1, ILO Convention No. 29 of 1930, *supra*, n. 762; Article 1, *Abolition of Forced Labour Convention*, ILO Convention No. 105 of 1957 ; Article 5, Banjul Charter, *supra*, n. 14.

<sup>766</sup> Article 24(1), ICCPR, *supra*, n. 10; Article 32, CRC; Article 1, *Minimum Age Convention*, ILO Convention No. 138 of 1973 ; *Worst Forms of Child Labour Convention*, ILO Convention No. 182 of 1999 ; Article 15(1) and (2) (a) – (d), ACRWC, *supra*, n. 285; Article 15(g), Maputo Protocol, *supra*, n. 286.

<sup>767</sup> Articles 2 and 23(1) – (4), UDHR, *supra*, n. 8; Articles 2(1) and 3, ICCPR, *supra*, n. 10; Articles 2(2) and 3, ICESCR, *supra*, n. 11; ILO Convention No. 111 of 1958, *supra*, n. 242; Article 5(e)(i), 5(e)(ii), *Convention on the Elimination of All Forms of Racial Discrimination*, General Assembly Resolution 2106 (XX), 1965 (CERD); Articles 1, 2, 3, 4, 5, 6, and 11(1)(a) – (f), (2)(a) – (d), and (3), *Convention on the Elimination of All Forms of Discrimination against Women*, General Assembly Resolution 34/180, 1979 (CEDAW). Articles 2, and 15, Banjul Charter, *supra*, n. 14 (the right to work is accorded to "every individual"); Articles 2(1)(a)-(e), (2), and 13 (a), (b), (c), (d), (e), (f), (h), (k) Maputo Protocol, *supra*, n. 286; Articles 2 (1) – (3), 13(1), (2), (3) and (4)(a) – (h), AYC, *supra*, n. 287.



*Protection of the Right to Organise Convention*;<sup>768</sup>*Right to Organise and Collective Bargaining Convention*;<sup>769</sup>*Forced Labour Convention*;<sup>770</sup>*Abolition of Forced Labour Convention*;<sup>771</sup>*Minimum Age Convention*;<sup>772</sup>*Worst Forms of Child Labour Convention*;<sup>773</sup>*Equal Remuneration Convention*;<sup>774</sup> and *Discrimination (Employment and Occupation) Convention*<sup>775</sup>(and its respective recommendation, *Discrimination (Employment and Occupation) Recommendation*<sup>776</sup>). The fundamental labour principles enshrined in these conventions are regarded as universal rights, and they are therefore applicable regardless of a country's level of economic, political or other development – thereby defeating the “progressive realization excuse” generally associated with economic, social and cultural rights.<sup>777</sup> It should be noted however, that designing certain rights as “fundamental” would suggest that not all human rights enjoy equal status.<sup>778</sup> However, as already stated, human rights are universal, inalienable, interrelated, interdependent, and indivisible, which means that the right to work should not be viewed in isolation.

Despite the significance of ILO Conventions,<sup>779</sup> they are not too focused on human rights approaches. Their scope is limited, and so is the status of their ratification.<sup>780</sup> Furthermore, the “fundamental” ILO Conventions do not expressly provide for disability issues, save for the *Discrimination (Employment and Occupation) Convention*, whose Article 1(1)(b) gives room for Member States, after consultation with representative employers' and workers' organisations, and with other appropriate bodies, to extend the definition of disability to “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

The right to work is now included in international and regional human rights instruments, such as the ICESCR, the *Banjul Charter*. These instruments cover all human beings

---

<sup>768</sup>*ILO Convention No. 87 of 1948, supra, n. 764.*

<sup>769</sup>*ILO Convention No. 98 of 1949, supra, n. 764*

<sup>770</sup>*ILO Convention No. 29 of 1930, supra, n. 762.*

<sup>771</sup>*ILO Convention No. 105 of 1957, supra, n. 765.*

<sup>772</sup>*ILO Convention No. 138 of 1973, supra, n. 766.*

<sup>773</sup>*ILO Convention No. 182 of 1999, supra, n. 766.*

<sup>774</sup>*Equal Remuneration Convention, ILO Convention No. 100 of 1951 .*

<sup>775</sup>*ILO Convention No. 111 of 1958, supra, n. 242.*

<sup>776</sup>*Discrimination (Employment and Occupation) Recommendation, ILO Recommendation No. 111 of 1958 .*

<sup>777</sup>Böhning, W. R. (2005), *supra*, n. 758, at p. 2.

<sup>778</sup>*Ibid*, p. 3

<sup>779</sup>ILO has expertise in labour rights-related matters, and the Committee on Economic, Social and Cultural Rights rely on the expertise and practice of the ILO mechanisms on the Application of Conventions and Recommendations. ( MacNaughton, G. and Frey, D. F. (2011), *supra*, n. 464, at p. 451, citing: Riedel (2007))

<sup>780</sup>MacNaughton, G. and Frey, D. F. (2011), *Ibid*, at p. 446.

regardless of the nature of their occupations, and compared to ILO Conventions, they have been ratified by more States.<sup>781</sup> The right to work has further been elaborated in Article 27 of the CRPD. The elaboration of the right to work in the CRPD is intended to ensure that persons with disability enjoy on equal status with others the right to work as enshrined in existing international conventions.

### **3.4.3 Right to Work under Selected International Law Instruments and Recommendations**

In this Section, I elaborate on the specific provisions of the right to work under ILO Conventions, UDHR, ICESCR, the Banjul Charter and the CRPD.

#### **3.4.3.1. ILO Conventions and Recommendations**

As the UN agency responsible for drawing up and overseeing international labour standards, ILO brings together representatives of governments, employers and workers to jointly shape policies and programmes; and in the case of policies and programmes related to disability, representatives of and for persons with disability are also consulted.<sup>782</sup>

The history of ILO dates back to 1919, after the First World War (WWI). But at this period, the focus was on the employment generally, and not on the specific groups, such as persons with disabilities.<sup>783</sup>

Over the years ILO has developed international labour standards through Conventions and Recommendations on various matters. The Conventions are legally binding instruments under international law, and they elaborate “minimum” international labour standards imposed upon Member States.<sup>784</sup> Recommendations provide guidance in matters of policy,

---

<sup>781</sup>*Ibid.*, at p. 447.

<sup>782</sup>ILO (2008) 'Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and Recommendation (No. 168), at p. iii.

<sup>783</sup> According to Breining-Kaufmann (2007), After WW I there was a need for international regulation of labour conditions for three major reasons. First, increasing the level of labour standards was considered a humanitarian issue. Second, there was a broad consensus that industrial peace and international peace were closely related, and there was considerable fear of social disorder. Third, the parties at the table in Versailles were convinced that if social protection was not increased, world peace would be severely threatened by countries that undermined labour standards and promoted social dumping. Establishing international labour standards thus became the primary objective for the founders of the ILO. ( Breining-Kaufmann, C. (2007) *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law*, Oxford and Portland: Hart Publishing, at p. 49; citing, O'Higgins (2002)).

<sup>784</sup>Bronstein, A. (2009) *International and Comparative Labour Law: Current challenges*: Palgrave Macmillan and International Labour Office, Geneva, at p. 91.

legislation and practice and are used when a “subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.”<sup>785</sup>

The term “human rights” does not appear in ILO conventions,<sup>786</sup> and not all of them cover human rights situations. The distinction is important, because in non-human rights areas, States enjoy the flexibility to change positions in various issues, which cannot be the case with human rights standards.<sup>787</sup> Despite not being human rights instruments, the ILO has been one of the few specialised UN agencies which have adopted a specific profile on human rights within the sphere of its activity, primarily labour and employment.<sup>788</sup> Furthermore, the broad anti-discrimination clause of Article 2 of the UDHR can be found in several ILO instruments, and the ILO was the first to proclaim the indivisible character of human rights encompassing both civil and political rights and economic, social and cultural rights,<sup>789</sup> a significant aspect of disability rights. The activities and objectives make the ILO one of the most important UN agencies for matters related to persons with disability’ access to employment, although it is not a disability rights- institution.<sup>790</sup>

In addition to the “fundamental conventions”, other conventions and recommendations adopted by ILO include: *Vocational Rehabilitation and Employment (Disabled Persons) Convention*;<sup>791</sup> *Vocational Rehabilitation (Disabled) Recommendation of 1955*,<sup>792</sup> and the *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation of 1983*.<sup>793</sup>

Under the *Discrimination (Employment and Occupation) Convention*, a ratifying country undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in

---

<sup>785</sup>Breining-Kaufmann, C. (2007), *supra*, n. 783, at p. 50.

<sup>786</sup>Cooper, J. (2000), 'Improving the Civil Rights of People with Disabilities Through International Law', in J. Cooper (Ed.), *Law, Rights and Disability*, at p. 73; Degener, T. (1995), *supra*, n. 117, at p. 20.

<sup>787</sup>Riedel, E. (2007), 'Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights', in G. P. Politakis (Ed.), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, at p. 5.

<sup>788</sup>Cooper, J. (2000), *supra*, n. 786, at p. 73; Degener, T. (1995), *supra*, n. 117, at p. 20.

<sup>789</sup>Degener, T. (1995), *ibid*.

<sup>790</sup>*Ibid*.

<sup>791</sup>ILO Convention No. 159 of 1983, *supra*, n. 243.

<sup>792</sup>*Vocational Rehabilitation (Disabled) Recommendation*, ILO Recommendation No. 99 of 1955 .

<sup>793</sup>*Vocational Rehabilitation and Employment (Disabled Persons) Recommendation*, ILO Recommendation No. 168 of 1983 .

respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.<sup>794</sup> The Convention defines discrimination to include:-

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.<sup>795</sup>

Disability is not expressly included as grounds for prohibited discrimination in this Convention. However, Article 1(1) (b) gives room for broadening the scope of anti-discrimination provision, which may include disability.<sup>796</sup> While the period in which this Convention was adopted may have affected influenced the drafters with respect to suspected grounds of discrimination, its respective Recommendation (*Discrimination (Employment and Occupation) Recommendation*) appeared to have recognized that more approaches than formal equality were necessary to promote equality. Elaborating on Article 2 of the Convention on the national policy to promote equality of opportunity in employment and eliminating of discrimination in respect thereof, the Recommendation provides:-

[T]he application of the policy should not adversely affect 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 recognised to require special protection or assistance.

The Recommendation is however a non-binding instrument, and, and it was issued at the time where no definition of disability existed in any of ILO Conventions. It was until 1983 that ILO adopted a definition of disability in its binding instrument, when the *Vocational Rehabilitation and Employment (Disabled Persons) Convention* was adopted.

the declaration of 1981 as the *International Year of Disabled Persons* and the subsequent *World Programme of Action Concerning Disabled Persons*; together with the desire to improve the *Vocational Rehabilitation (Disabled) Recommendation of 1955*,<sup>797</sup> were among the which led to the adoption of the *Vocational Rehabilitation and Employment*

---

<sup>794</sup>Cooper, J. (2000), *supra*, n. 786, at p. 73.

<sup>795</sup> See Article 1(1) (a) and (b), ILO Convention No. 111 of 1958, *supra*, n. 242.

<sup>796</sup>Böhning, W. R. (2005), *supra*, n. 758, at p. 7.

<sup>797</sup>ILO Recommendation No. 99 of 1955, *supra*, n. 792

(*Disabled Persons*) Convention.<sup>798</sup> According to the Convention, the purpose of vocational rehabilitation is to enable persons with disability to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society.<sup>799</sup>

The *Vocational Rehabilitation and Employment (Disabled Persons) Convention* was of particular importance during the UN Decade of Disabled Persons, since a number of projects were set up at this time under the auspices of the ILO, aimed at the “deinstitutionalisation, mainstreaming and normalisation of persons with disability within the labour market.”<sup>800</sup> Since the adoption of the convention, an increasing number of States have prohibited discrimination of persons with disability in employment, either through general equality law, or specific disability legislation.<sup>801</sup> However, the definition of disability under this Convention leans towards the individual approach to disability. For purposes of the Convention, a person with disability (original expression “a disabled person”) is defined as:-

an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.<sup>802</sup>

This definition is not very different from the earlier definition found in the *Vocational Rehabilitation (Disabled) Recommendation of 1955*, according to which a person with disability was defined as:-

an individual whose prospects of securing and retaining suitable employment are substantially reduced as a result of physical or mental impairment.<sup>803</sup>

The above definitions were neither improved by the 1983's *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation*.<sup>804</sup> However, this Recommendation provided for persons with disability' equality of opportunity and treatment in respect of access to, retention of and advancement in employment which, wherever possible, corresponds to their own choice and takes account of their individual suitability for such

---

<sup>798</sup> The preamble to the ILO Convention No. 159 of 1983, *supra*, n. 243.

<sup>799</sup> Article 1(2), *ibid*.

<sup>800</sup> Cooper, J. (2000), *supra*, n. 786, at p. 74., citing Degener (1995), Momm and Konig, (1989), and Stace (1987).

<sup>801</sup> Bronstein, A. (2009), *supra*, n. 784, at p. 171.

<sup>802</sup> Article 1(1), ILO Convention No. 159 of 1983, *supra*, n. 243.

<sup>803</sup> ILO Recommendation No. 99 of 1955, *supra*, n. 792.

<sup>804</sup> ILO Recommendation No. 168 of 1983, *supra*, n. 793.

employment.<sup>805</sup> The Recommendation also introduced “positive measures” (in addition to those contained in 1955 Recommendation) aimed at effective equality of opportunity and treatment between workers with disabilities and other workers.<sup>806</sup>

Despite worldwide acceptance, not all ILO Conventions have been ratified by all of the ILO Members.<sup>807</sup> In addition, the enforcement mechanism of these conventions is similar to the enforcement mechanisms under Core UN Human Rights Treaties, i.e. submission of reports.<sup>808</sup> Another real weakness is the fact that the breach of obligations arising out of the ratification of ILO Conventions can result in moral sanctions only, which are not effective in all cases. ILO standards are therefore not free from shortcomings.<sup>809</sup>

### **3.4.3.2. UDHR**

The UDHR was the first universally recognizable instrument which provided for the parameters of the right to work, under Article 23 and 24 of the UDHR. The Articles provide as follows:-

#### **Article 23**

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) 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.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

#### **Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

The provisions of the UDHR do not mention persons with disability, save for Article 25 (1) of the UDHR. It has already been shown in the previous Chapter that old (individual) approaches to equality had not promoted equality of opportunities to persons with

---

<sup>805</sup> Paragraphs 7 and 8, *Ibid.*

<sup>806</sup> Paragraphs 9 to 14, *Ibid.*

<sup>807</sup> Bronstein, A. (2009), *supra*, n. 784, at p. 91.

<sup>808</sup> Breining-Kaufmann, C. (2007), *supra*, n. 783, at p. 53.

<sup>809</sup> Bronstein, A. (2009), *supra*, n. 784, at p. 92.

disability. Therefore, despite the fact that everyone is protected against unemployment under the UDHR, the said declaration, much as it is praised for its value in international human rights, can be criticised for “ignoring” the differences. Even Article 25 (1) of the UDHR which provides for the right to adequate standard of living cannot be said to be good enough to protect persons with disability. The Article mentions persons with disability only under the limited circumstances - “the right to security in the event of ... disability”.

#### **3.4.3.3. ICESCR**

Articles 6, 7 and 8 of the ICESCR re-enforce and expand the right to work previously provided under the UDHR. Under Article 6, States agree to recognize the “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”,<sup>810</sup> and that the steps taken to achieve this right shall be geared to achieve, inter alia, “full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”<sup>811</sup> Articles 7 and 8 expand the provisions of Article 23(2), 23 (3) and 24 of the UDHR on matters related to conditions of work, remuneration, equality of opportunities, and length of working period. Article 8 is covers union rights.

Generally, the right to work under the ICESCR covers all forms of work, whether independent work or dependent wage-paid work, but should not be understood as an absolute and unconditional right to obtain employment.<sup>812</sup> In addition, work should not only be available, but also accessible, and acceptable. Acceptability and quality imply “decent work”, the concept which has a broad range of rights. It means:-

... the work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in Article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.<sup>813</sup>

Rodgers (2002) further elaborates the concept as follows:-

---

<sup>810</sup> Article 6(1), ICESCR, *supra*, n. 11.

<sup>811</sup> Article 6(2), *Ibid.*

<sup>812</sup> Paragraph 6, General Comment No. 5 (Persons with Disabilities), *supra*, n. 214.

<sup>813</sup> Paragraph 7, General Comment No. 18 (The Right to Work), *supra*, n. 355.

[Decent work] brings together employment, rights, security and representation in a package which makes sense as a whole. Promoting employment without considering the quality and content of those jobs is no recipe for progress. Promoting rights at work without worrying about whether or not there is work for those who want it is equally fruitless. Representation and social dialogue are needed to ensure that peoples' voices are expressed and heard.

The goal of decent work is best expressed through the eyes of people. It is about [one's] job and future prospects; about [one's] working conditions; about balancing work and family life.... It is about gender equality, equal recognition, and enabling women [or persons with disability] to make choices and take control of their lives. It is about having a voice in [one's] workplace and community. For many, it is the primary route out of poverty... it is about realizing personal aspirations in their daily existence and about solidarity with others.... [D]ecent work is about securing human dignity.<sup>814</sup>

Therefore, the expression decent work is broader than a wage employment, since it reflects a broader notion of participation in the economy and the community.<sup>815</sup> It is about work itself, human dignity generally, and specific labour-related rights. Thus, according to Rogers (2002), the “four dimensions” of decent work are: work itself; rights at work; security; and representation and dialogue.<sup>816</sup> The third dimension, if viewed beyond traditional ways of trade union operations, is of significant importance for persons with disability, since it plays a crucial role to facilitate ways in which people's voices can be heard – and therefore an extension of the notion of “nothing about us without us” in the work place.

Decent work is therefore not realized where the only real opportunity open to persons with disability is to work in segregated facilities under substandard conditions, since such arrangement may amount either to discrimination or forced labour.<sup>817</sup>

#### **3.4.3.4. Banjul Charter**

The *Banjul Charter* contains less elaborate provisions with respect to the right to work compared to the provisions of UDHR and ICESCR. Article 15 of the Charter provides:-

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

---

<sup>814</sup>Rodgers, G, Casanova, F, Ramírez Guerrero, J, Galhardi, Regina M. A. A, Vargas, F. and Gamerding, G. (eds.) (2002) *Training, Productivity and Decent work*, at p. 14.

<sup>815</sup>*Ibid.*

<sup>816</sup>*Ibid.*, atp. 15.

<sup>817</sup> Paragraph 21, General Comment No. 5 (Persons with Disabilities), *supra*, n. 214; Paragraph 17, General Comment No. 18 (The Right to Work), *supra*, n. 355.



Like the ICESCR, the approach of the *Banjul Charter* furthers juridical approach to equality with respect to all rights mentioned in the charter, including the right to work.

#### **3.4.3.5. CRPD**

Article 27 of the CRPD does not in essence create a new right. It is aimed at enabling persons with disability to realise the right to work on equal basis with other persons – although some stipulations under that Article may appear as “new”. Article 27 of the CRPD provides:-

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
  - (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
  - (b) Protect the rights of persons with disabilities, on an equal basis with others, 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 harassment, and the redress of grievances;
  - (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
  - (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
  - (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
  - (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
  - (g) Employ persons with disabilities in the public sector;
  - (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
  - (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

- (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
- (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

As it stands, Article 27 contains the most detailed stipulations with respect to persons with disability's right to work in modern human rights instruments. Prior to the CRPD, there was uncertainty about how the right to work for persons with disability should be implemented.<sup>818</sup> According to Article 27 above, States have positive and negative obligations to ensure persons with disability's right to work.<sup>819</sup>

The right to work under Article 27 "includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities." These stipulations place emphasis on inclusive nature of work environment, and to achieve this, the obligation to protect persons with disability from harassment, or ensure the provision of reasonable accommodation, are among the important interventions of the CRPD, and so are issues like vocational guidance, job placement, promotion of self-employment, or the obligation to employ persons with disability in the public sector. Matters like equal remunerations, safe and healthy working conditions or trade union rights also exist in the ICESCR. Nevertheless, their inclusion in the CRPD should be perceived as placing emphasis on equality of persons with disability with respect to such matters. In this sense, Article 27 moves away from the traditional approaches to equality which ignored specific requirements of persons with disability, and the reality of marginalization.

Article 27 does not mention such arrangements like segregated work settings or sheltered employment, but Article 27 should be read together with both the purpose and general principles of the CRPD. The unique aspect of the CRPD is that there is a requirement to interpret it 'in context', which requires that one reads a specific provision in the CRPD in light of the overall convention.<sup>820</sup> The purpose of the CRPD is *inter alia*, to "ensure the full

---

<sup>818</sup>Harper, P. (2012), *supra*, n. 235, at p. 7.

<sup>819</sup>*Ibid.*

<sup>820</sup>Allain, J. "Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities: Legal Report No. 2 issued on behalf of Disability Action's Centre on Human Rights for People with Disabilities, Queen's University: Belfast, 2009, at p. 6.

and equal enjoyment of all human rights ... by all persons with disabilit[y]”,<sup>821</sup> and the general principles of the CRPD include, *inter alia*, equality of opportunity, full and effective participation and inclusion in society, as well as respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.<sup>822</sup>The

In other words, the purpose and general principles of the CRPD stated in Article 1 and 3 signify that the provisions of the CRPD, including Article 27, should be construed in the best interests of persons with disability.

### **3.5 General Domestic Approaches for the Protection of Persons with Disability’s Right to Work**

The common language used in international human rights instrumentsemphasises on the use of “appropriate means,” and often with emphasis on the legislative and administrative steps.<sup>823</sup>The CRPD does not contain different measures of ensuring effective realization of rights, save for some innovations related to the requirement of specific institutional mechanism (chapter 4). The CRPD also recognizes the possibility of some States having in place more effective means of realising the rights of persons with disability (than those stated in the convention).<sup>824</sup>

Generally, the holistic human rights approach to disability (and in particular with respect to the right to work) requires that measures aimed at ensuring persons with disability’ equal opportunities in accessing employment accommodate all possible measures aimed at removing barriers, including those aimed at ameliorating the history of discrimination, and those which prepare persons with disability to enter into the labour market.<sup>825</sup>

There are substantial differences in the means by which different States have sought to achieve integration, despite what seems to be a move away from the institutional approach to a more work-promoting and integrationist approach.<sup>826</sup> In general, worldwide measures aimed at ensuring persons with disability’ access to employment may either specifically prohibit denial of employment opportunities to persons with disability,<sup>827</sup> or impose a duty

---

<sup>821</sup> Article 1, CRPD, *supra*, n. 24.

<sup>822</sup> Article 3(c), (d) and (e), *ibid*.

<sup>823</sup> See Article 2 (1), ICESCR, *supra*, n. 11, Article 1, Banjul Charter, *supra*, n. 14; Articles 4 (1) (a), 4(1)(b), 4(1) (c), 4(1)(d), 4(1)(e), 5(2), CRPD, *supra*, n. 24.

<sup>824</sup> Article 4(4), CRPD, *ibid*.

<sup>825</sup> Tororei, S. K. (2009), *supra*, n. 40.

<sup>826</sup> Bagenstos, S. R. (2003), *supra*, n. 21, pp. 652 - 653

<sup>827</sup> Section 12(1), Act No. 14 of 2003 (Kn), *supra*, n. 197.

upon employers to ensure that the physical features of the premises occupied by an employee do not place an employee with a disability at a disadvantage.<sup>828</sup> Strategies for realization of persons with disability's right to work depend on general disability policies. Some authors have categorized disability policies into three, namely: those where disability policy is associated with specific government departments (dealing with quotas, reserved employment etc.); general anti-discrimination legislation, and the third, which includes States where there is no legislation at all. They have argued in developing countries, disability policies usually falls into the first or the third category.<sup>829</sup> This is by no means the only way to categorise disability employment approaches. However, all the countries picked for this study have laws which provide for persons with disability, although South Africa does not have framework legislation on persons with disability.

There have been debates among scholars with respect to the appropriateness of measures employed to facilitate persons with disability's access to the labour market, especially between general anti-discrimination measures versus employment quotas or reserved jobs. For example, a number of American commentators, dissatisfied with the anti-discrimination approach, have looked to the European quota systems as a model for achieving integration of people with disabilities in their respective countries. They have argued, for example, that such requirements as "reasonable accommodation" are unfair for distributing burdens unevenly among morally similar employers.<sup>830</sup> They have argued that "[q]uota systems may seem to address these criticisms by distributing the burdens of disability accommodations equally across employers and assuring that an increasing number of people with disabilities will be employed."<sup>831</sup> On the other hand, these scholars have been "criticised" for "hav[ing] paid little attention to the actual effects those [European] systems have had when implemented."<sup>832</sup> It is not the purpose of this work to settle that debate.

Considering developments in disability legislation and policy in Tanzania and several African States, it can be argued, or rather supported that there is another approach of enhancing persons with disability's access to the labour market - the combination of old

---

<sup>828</sup> Section 16, The Persons with Disabilities Act (Ug), *supra*, n. 702.

<sup>829</sup> Turmusani, M. (2001), *supra*, n. 45, at p. 200. Also see Hasegawa, T. (2007) 'Equality of Opportunity or Employment Quotas?: A Comparison of Japanese and American Employment Policies for the Disabled, *Social Science Japan Journal*, Vol. 10, No. 1, at p. 41.

<sup>830</sup> Bagenstos, S. R. (2003), *supra*, n. 21, at p. 563, citing Waddington, L and Diller, M (2002).

<sup>831</sup> *Ibid*, at p. 563.

<sup>832</sup> *Ibid*, at p. 564.

and new approaches, which also include the imposition penal sanctions for contravening equality or employment legal provisions applicable to persons with disability.

### **3.6 Persons with Disability's Right to Work in Tanzania**

#### **3.6.1 Tanzania Mainland**

##### **3.6.1.1. Developments**

The “field” of labour relations in Tanzania is older than that of disability, let alone the fact that in Tanzania, disability has not grown into the academic discipline, or a field of legal practice so to state. In chapter 2, I have shown that the significant legal and policy development in the area of disability rights could be traced back since 1982, and the more meaningful developments came after the adoption of the National Policy on Disability in 2004, and recently, after the enactment of the *Persons with Disabilities Act* in 2010. On the other hand, the history of labour relations in Tanzania has been shaped by the country's political and economic history.<sup>833</sup> Rutinwa (2012) has provided a detailed account of the history of Tanzania Mainland's labour law,<sup>834</sup> which dates back to the era of German East Africa (*Deutsch-Ostafrika*), which comprised of what are now Tanganyika (Tanzania mainland after 1964 union with Zanzibar), Rwanda and Burundi. The German rule ended after the defeat in the WW I, and the British took over the administration of Tanganyika until 1961, when Tanganyika gained her independence. “The German and British Colonial States, as well as the post-independence States, introduced labour legislation aimed at fostering the economic policies pursued by these States during [their respective times]”<sup>835</sup>

The settler economy was the main economic policy during the German rule, and strategies had to be developed for the purposes of securing wage labour for the settlers. This was achieved through the introduction of taxation in the form of cash through the *House and Poll Tax Ordinance of 1912*, and as a result people were forced to work in order to secure Taxation.<sup>836</sup> In addition, through the *Labour Recruiting Ordinance* and the *Legal Status of*

---

<sup>833</sup>Rutinwa, B. (2012), 'Historical Overview of Labour Legislation in Tanzania', in B. Rutinwa, et al. (Eds.), *The new Employment and Labour Relations law in Tanzania: An analysis of labour legislation in Tanzania*, at p. 1.

<sup>834</sup>*Ibid*, pp. 1 – 36.

<sup>835</sup>*Ibid*.

<sup>836</sup>*Ibid*.

*Native Labourers Ordinance*, the Colonial State participated directly in the recruitment of workers, and was allowed to use penal sanctions and armed intervention.<sup>837</sup>

At the end of the WWI, the British took over administration of Tanganyika as a mandate territory from 1920, but retained the German economic policies until towards the end of WW II. A series of legislation had been developed, including the *Employment Ordinance*<sup>838</sup> (renamed as *Employment Act*<sup>839</sup>), and the *Workmen's Compensation Ordinance*.<sup>840</sup>

The *Workmen's Compensation Ordinance* was a form of a “disability compensation” law, limiting the employer’s liability to compensate a victim to accidents arising out of and in the course of the employment. The law is still in force, as the new *Workers' Compensation Act No. 20 of 2008* has not been made operational. The existing *Workmen's Compensation Ordinance* requires that a disability must be caused by an employment injury or by an identifiable occupational disease, the condition which has been narrowly construed by the courts of law in Tanzania.<sup>841</sup>

After independence in 1961, Tanzania Mainland (then Tanganyika) inherited the *Employment Ordinance*. There were therefore no significant improvements in the area of labour rights, also considering the fact that the Independent Constitution excluded the Bill of Rights. In 1964, the *Security of Employment Act* was enacted, but again, it did not provide for matters related to persons with disability at the work place. The *Employment Ordinance*,<sup>842</sup> as amended from time to time, consolidated the laws relating to labour, and regulated conditions of employment of employers and employees. The Act had special provisions with respect to women, young persons and children, but there was no mention of employees with disabilities, save for the provision which gave the discretion to the Minister responsible for labour matter, after considering the advice of the Labour Advisory Board, to make Regulations for, *inter alia*, prohibiting or regulating the employment of persons suffering from any infectious disease or any other prescribed physical

---

<sup>837</sup>*Ibid*, at p. 2.

<sup>838</sup>*Employment Ordinance, 1956* (Ordinance No. 35 of 1956) (Tanganyika, repealed) .

<sup>839</sup>*The Employment Act* [Cap. 366 R.E. 2002] (Tanzania Mainland, Repealed) .

<sup>840</sup>[Cap. 263 R.E. 2002] (Tz MInd), *supra*, n. 618.

<sup>841</sup> Two Tanzanian cases of *Hans Nagorsen v. BP Tanzania Limited* [1987] TLR 175 and *Fakurudin Ebrahim v The Bank of Tanzania* [1978] LRT (Parts III & IV), n. 45 are referred to in Footnote No. 32 in Ackson, T. (2008), *supra*, n. 304, at p. 84.

<sup>842</sup>Ordinance No. 35 of 1956 (Tng), *supra*, n. 838.

disability.<sup>843</sup> No such Regulations were made. Nevertheless, this shows that the approach of the time was to group disability in the same category as illness.

As already stated in Chapter 2, there was nothing much in terms of development of disability rights until the enactment of the first disability legislation in 1982. One of the two pieces, the *Disabled Persons (Employment) Act*, was intended to enable persons with disability to secure employment or work on their own account and for purposes connected with those matters. Measures adopted to enhance opportunities of persons with disability to secure employment included: vocational training and industrial rehabilitation,<sup>844</sup> employment quotas,<sup>845</sup> and designation of classes of employment specifically for persons with disability.<sup>846</sup> There were a number of mechanisms employed, which included, *inter alia*, penal provisions in cases of contravention with quota provisions.<sup>847</sup> However, there was nothing in this piece of legislation which could infer that persons with disability were “right holders”, since the measures designed to enhance employment opportunities of persons with disability could be taken only at the discretion of the Minister, and could only amount as a forms of obligations on the part of the employers. Persons with disability had no any legal rights under this legislation. This perhaps reflected the existing situation of human rights at the time. However, even after the adoption of the Bill of Rights in 1984, which included the right to work, no amendments were made either in this legislation, or the existing employment legislation.

After the developments of the 1980s, there were no fast and significant improvements in terms of legislation and policy on matters related to the employment of persons with disability. Even the introduction of the Bill of Rights in 1984 did not help to remedy the situation (Chapter 2). From 1990s, there were a number of policy developments in the fields of employment and disability. In 1994, the Parliament passed the *Vocational Education and Training Act*,<sup>848</sup> establishes the *Vocational Education and Training Authority*,<sup>849</sup> whose one of its objectives is to promote access to vocational education and

---

<sup>843</sup> Section 169 (1)(e), *ibid*.

<sup>844</sup> Sections 11 and 12, [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>845</sup> Section 15, *ibid*.

<sup>846</sup> Section 19(1), *ibid*

<sup>847</sup> Section 17 (1) and (2), *ibid*.

<sup>848</sup> Cap 82 R.E. 2002 (Tz MInd), *supra*, n. 77.

<sup>849</sup> Section 3(1), *ibid*. The Vocational Training Authority was not the first vocational training institution, and neither was its establishing law the first vocational training legislation. In 1974 the Vocational Training Act (Act No. 28 of 1974) was enacted to replace the Apprenticeship Ordinance (Cap. 81), followed by the establishment of the National Vocational Training Division in 1975 within the Ministry of Labour and

training for disadvantaged groups.<sup>850</sup> Although the Act does not define what constitutes a disadvantage group, it is acceptable that persons with disability in Tanzania fall into that category. In 1997, the government adopted the *National Employment Policy*. This was the first time ever such policy was adopted. The policy stated that special groups, which included persons with disability, had been facing specific problems in seeking wage employment or employing themselves. The government thus committed itself to start special programs of promoting employment for special groups. According to the policy, such programs would put emphasis on “self” employment activities.<sup>851</sup> The policy outlined a number of strategies aimed at ensuring that persons with disability enters the National employment mainstream, and if need be, get the priority in employment.<sup>852</sup> In 1999, the Parliament passed the *National Employment Promotion Services Act*,<sup>853</sup> which established the *National Employment Promotion Services*,<sup>854</sup> and one of its functions was to provide or make arrangement for the registration employment, counseling, vocational rehabilitation and placement of persons with disability.<sup>855</sup> Read together with the *Disabled Persons (Employment) Act*, this was an attempt to improve employment opportunities of persons with disability. However, not much is available on the success of the National Employment Promotion Services in facilitating persons with disability’s access to employment opportunities. In 2003, the *Occupational Safety and Health Act*<sup>856</sup> was enacted. Basically, the Act is aimed at securing the safety, health and welfare of person at work, and thereby protecting them against risks to safety or health in connection with the activities at work places, this piece of legislation is also applicable to persons with disability, and it is significant for them because it protects them against further disabilities which may result from unsafe or unhealthy working conditions.

The policy and legislative developments between 1990s and 2003 did not bring significant changes to persons with disability. The *National Policy on Disability, 2004*, recognized, among other things, the difficulties faced by persons with disability in accessing

---

Manpower Development. The National Vocational Training Division existed for 20 years until its replacement by the Vocational Educationa Authority. More detailed information about vocational training in Tanzania can be found at VETA web page: <http://www.veta.go.tz/index.php/en/history>, accessed 31.1.2014

<sup>850</sup> Section 4(1) (g), *ibid*.

<sup>851</sup> *National Employment Policy, 1997* ((Tanzania)).

<sup>852</sup> *Ibid*.

<sup>853</sup> Cap 243 R.E. 2002 (Tz MInd), *supra*, n. 78.

<sup>854</sup> Section 3(1), *ibid*.

<sup>855</sup> Section 4(2), *ibid*.

<sup>856</sup> *The Occupational Health and Safety Act, 2003* (Act No. 5 of 2003) (Tanzania Mainland)



employment, and that employment often resulted into poverty.<sup>857</sup> The policy highlighted the fact that the former disability legislation did not provide a solution to, *inter alia*, employment problems of persons with disability due to changes in the economic climate and globalization.<sup>858</sup> Under this policy, the government committed itself to reviewing the then existing disability legislation.<sup>859</sup> In addition, the *Employment and Labour Relations Act*,<sup>860</sup> which repealed the previous labour legislation, stated among its principle objects: “to give effect to the provisions of The *Constitution of the United Republic of Tanzania*, in so far as they apply to employment and labour relations and conditions of work”,<sup>861</sup> and generally to give effect to the core Conventions of the ILO as well as other ratified Conventions.<sup>862</sup> I have shown in Chapter 2 that the *Employment and Labour Relations Act*, mentions disability as one of the prohibited grounds of discrimination, and also contains some measures to protect persons with disability at the work place. Under Section 99(1) of the Act, the Minister for labour made the *Code of Good Practice Rules*<sup>863</sup> for purposes of carrying into effect the provisions of the *Employment and Labour Relations Act*. The new labour law, i.e. the *Employment and Labour Relations Act*, read together with the *Code of Good Practice) Rules*, represent a policy shift from the manner the law regulated the employment contract under the repealed laws. The law seeks to generally give effect to the provisions of the Constitution in so far as they apply to employment and labour relations and conditions of work and to give effect to the core conventions of the ILO as well as other ratified conventions. This policy shift now limits contractual powers of employers by mandating observance of fair labour practices.<sup>864</sup>

Further developments with respect to the employment rights of persons with disability were in 2008 and 2010. Citing the “on-going macro-economic reforms, Eastern African Regional Integration developments, and the impact of globalization on the labour market,” the first Employment Policy was reviewed, and replaced by the second *Employment Policy*

---

<sup>857</sup> Disability Policy (Tanzania MInd), *supra*, n. 65

<sup>858</sup> *Ibid*, p. 6

<sup>859</sup> *Ibid*.

<sup>860</sup> Act No. 6 of 2004 (Tz MInd), *supra*, n. 79

<sup>861</sup> Section 3 (f), *ibid*

<sup>862</sup> Section 3 (g), *ibid*

<sup>863</sup> GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>864</sup> *Martin Oyier. v Geita Gold Mine Ltd*, High Court of Tanzania (Labour Division) at Mwanza, Revision No. 226 of 2008; *Macmillan Aidan Ltd. v Blandina Lucas Mohamed*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 273 of 2008; and Section 3(f) and 3(g), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79

of 2008.<sup>865</sup> Among the objectives of the new policy were “to promote equal access to employment opportunities and resources endowments for marginalized and vulnerable groups, including women, youth and people with disabilities.”<sup>866</sup> In 2010, Tanzania enacted the *Persons with Disabilities Act, 2010*, which contains some specific provisions with respect to the employment of persons with disability. These measures, together with those stated in the employment and labour relations legislation, are discussed in detail at a later stage in this chapter.

### **3.6.1.2. Policy Position and General Objectives of Disability and Employment Laws**

Under the *National Policy on Disability, 2004*, work is seen as a means to achieve development, and also crucial for an individual’s dignity.<sup>867</sup> It defines work as “[a]ny legal activity that enables a person with disability live independently.”<sup>868</sup> In line with this approach, the policy aims at providing conducive environment for people with disabilities to engage in productive work for their development and the utilization of available resources for improved service delivery.<sup>869</sup> Other aspects in the policy which together forms the holistic approach include such matters as awareness rising to curb negative attitudes,<sup>870</sup> technical aids,<sup>871</sup> skills training,<sup>872</sup> accessibility,<sup>873</sup> integration,<sup>874</sup> recognition of the role of organisations of persons with disability,<sup>875</sup> international cooperation,<sup>876</sup> and significantly, human rights.<sup>877</sup> With respect to human rights, the policy recognizes that:-

People with disabilities like other citizens have the right to respect, acceptance, employment and care. The society in general is insensitive to the needs of disabled persons and have in most part shown negative attitude towards them.

The policy objectives with respect to the employment and human rights of persons with disability seems to have been significantly achieved on paper, with the enactment of new employment and disability legislation, since one of the policy objectives was to review

---

<sup>865</sup> *National Employment Policy, 2008* ((Tanzania Mainland)).

<sup>866</sup> *Ibid*, pp. vii, 11.

<sup>867</sup> Disability Policy (Tanzania Mlnd), *supra*, n. 65

<sup>868</sup> *Ibid*, at the definition Page.

<sup>869</sup> *Ibid*, at p. 10.

<sup>870</sup> *Ibid*, at p. 12.

<sup>871</sup> *Ibid*, at p. 15.

<sup>872</sup> *Ibid*, at p. 16.

<sup>873</sup> *Ibid*, at p. 17.

<sup>874</sup> *Ibid*, at p. 19.

<sup>875</sup> *Ibid*, at p. 23.

<sup>876</sup> *Ibid*, at p. 25.

<sup>877</sup> *Ibid*, at p. 20.

legislation insensitive to the needs of persons with disability, and in particular, the old disability legislation.

Different from the *National Policy on Disability, 2004* which preceded the current disability legislation, the *Employment Policy, 2008* came after enactment of the new Employment Legislation, and it does not call for the new employment legislation. The policy commits the government, in collaboration with other stakeholders, to educate and establish capacity building programmes for vulnerable and marginalized groups including persons with disability, with the view of ensuring that the pattern of economic growth is made more employment intensive and pro-poor.<sup>878</sup> Specifically, with the view of improving access to employment opportunities and productive resources for persons with disability, the policy provide for: affirmative measures to enhance employability; provisions of special facilities and equipment to enhance the capacity of persons with disability to enter the labour market, or to be self-employed; the establishment of user of friendly infrastructures for persons with disability to enhance employability; sensitization of employers on their compliance of employing a minimum set number of persons with disability as set out in the law regarding persons with disability (employment quotas).<sup>879</sup> In addition, the policy commits the government generally to safeguard the basic rights and interests of workers, with regard to international labour standards, including, *inter alia*, the principle of non-discrimination and equality of treatment and opportunities.<sup>880</sup> To this extent, the policy is in line with the *Employment and Labour Relations Act* and The *Persons with Disabilities Act*, together with their respective subsidiary legislation, whose relevant provisions are discussed in this chapter.

The general aim of the *Persons with Disabilities Act* is to make provisions for, *inter alia*, employment or work protection and promotion of basic rights for the persons with disability.<sup>881</sup> To this end, the *Persons with Disabilities Act* enshrines the “basic principles and obligations for realization of the rights of the persons with disability”, which are similar to the general principles of the CRPD. These basic principles are: respect for human dignity, individual's freedom to make own choices and independency of persons with disability;<sup>882</sup> non-discrimination;<sup>883</sup> full and effective participation and inclusion of

---

<sup>878</sup>Employment Policy (2nd) (Tanzania MInd), *supra*, n. 865.

<sup>879</sup>*Ibid.*, at p. 28.

<sup>880</sup>*Ibid.*, at p. 33.

<sup>881</sup> See the long title to Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>882</sup> Section 5 (1) (a), *ibid*

persons with disability in all aspects in the society;<sup>884</sup> equality of opportunity;<sup>885</sup> accessibility;<sup>886</sup> equality between men and women with disabilities and recognition of their rights and needs;<sup>887</sup> and provision of basic standard of living and social protection.<sup>888</sup> The significance of these basic principles is the fact that all other provisions under the Act, including work related provision ought to be construed in accordance with these principles. This could also mean that the employment related provisions should not be construed in isolation: they should be rather broadly construed to achieve the general aim of promotion of basic rights for the persons with disability. In other words, these basic principles reinforce the notion of interrelation and indivisibility of rights. That is, the respect of human dignity and independent living is possible where people with disabilities are able to fully participate in all aspects of life. This requires the elimination of all forms of discrimination, and ensuing equalization of opportunities in such aspects as work. In the end, the right to better standard of living is attained.

Since the *Persons with Disabilities Act* does not primarily govern employment and labour relations, it is important to consider some principle objectives of the *Employment and Labour Relations Act*, which include:-

- (a) ...
- (b) to provide the legal framework for effective and fair employment relations and minimum standards regarding conditions of work;
- (c) ...
- (d) ...
- (e) ....
- (f) to give effect to the provisions of the Constitution of the United Republic of Tanzania of 1977, in so far as they apply to employment and labour relations and conditions of work; and
- (g) generally to give effect to the core Conventions of the International Labour Organisation as well as other ratified conventions.<sup>889</sup>

Generally, fair employment relations imply equality, which is enshrined under the *Constitution of the United Republic of Tanzania* (although leaning towards formal equality). In line with these objectives, the Labour Court had held that the new

---

<sup>883</sup> Section 5 (1) (b), *ibid.*

<sup>884</sup> Section 5 (1) (c), *ibid.*

<sup>885</sup> Section 5 (1) (d), *ibid.*

<sup>886</sup> Section 5 (1) (e), *ibid.*

<sup>887</sup> Section 5 (1) (f), *ibid.*

<sup>888</sup> Section 5 (1) (g), *ibid.*

<sup>889</sup> Section 3, Act No. 6 of 2004 (Tz MInd), *supra*, n. 79

employment law marks a policy shift which limits employer's power of dismissal, where employers were contesting their dismissal after obtaining disability at the work place.<sup>890</sup>

### **2.6.1.3. Protection of the Right to Work**

When it comes to the domestic application of international law standards, Tanzania embraces dualism, which means a distinction between domestic and international law. The practice is supported by positivism, which stresses the overwhelming importance of the state and tends to emphasize on the existence of wide differences between domestic and international law, the latter being founded upon the consent of States.<sup>891</sup> According to this view, if international law is applicable to individuals, then it does so only mediately and through the state.<sup>892</sup>

Among the major shortcomings of this arrangement is that some States, Tanzania not being an exception, do not efficiently and timely incorporate treaties in their domestic law; and consequently, a country may have accepted to be bound by a number of treaties but because of the absence of incorporating legislation, it may not be possible to enforce the same in domestic courts.<sup>893</sup> It may therefore not be uncommon that some rights protected in domestic laws are not as broad as those contained in international instruments.

I have shown in Chapter 2 that some international human rights standards have a force of law in Tanzania through the Bill of Rights, which was incorporated in the Constitution in 1984. Despite the fact that some other pieces of legislation may contain provisions which are in effect a reflection of international human rights stipulations, these pieces of legislation are second in the hierarchy of laws in Tanzania.

The *Constitution of the United Republic of Tanzania* contain the right to work provisions, which are found in Articles 22 and 23 of the Constitution, which are reproduced as follows:-

22-(1) Every person has the right to work

(2) Every citizen is entitled to equal opportunity and right to equal terms to hold any office or discharge any function under the state authority

---

<sup>890</sup>*Martin Oyier. v Geita Gold Mine Ltd, supra*, n. 864; *Vodacom Tanzania. v Zawadi Bahenge and 6 others*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 12 of 2012

<sup>891</sup>Shaw, M. N. (2008) *International Law*, 6th (edn), New York: Cambridge University Press, at p. 131.

<sup>892</sup>Starke, J. G. (1936) 'Monism and Dualism in theory of International Law, *British Year Book of International Law*, Vol. 17, at p. 71..

<sup>893</sup>Mapunda, B. T. (2003), *supra*, n. 531, at p. 156..

23-(1) Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work.

(2) Every person who works is entitled to just remuneration.

In addition to the above provisions, Article 25(1), which provides for duty to participate in work, work alone creates material wealth in society, and is the source of well-being of the people and the measure of human dignity. Notwithstanding the duty to participate to work, the Article 25(2) of the *Constitution of the United Republic of Tanzania* expressly prohibits forced labour

These provisions constitute very basic stipulation of the right to work, compared to such broad provisions as those contained in ICESCR, which contains, for example, the right to form and join trade union and the right to strike, the absence of which was said to have made the enforcement of the right to a fair remuneration very unsecured, and that the government and employers were given the space to control, manipulate, and otherwise despise trade unions with only minimal chances of successful judicial review.<sup>894</sup>

Equality provisions in the *Constitution of the United Republic of Tanzania* mean that persons with disability are entitled to the rights specified under Articles 22 and 23, and the only “justification” for categorization of posts or remunerations seems to be the degree of work and relevant qualifications. However, the Bill of Right in Constitution seems to be leaning towards less substantive approach to equality (in particular with respect to persons with disability), which makes it difficult for persons with disability to enjoy the right to work or any other rights stated in the Constitution. A positive approach is therefore required in order to guarantee the desired protection of the rights, and in this case, an account must be taken of the international instruments which have been ratified by Tanzania. The Court of Appeal of Tanzania, in *Director of Public Prosecution v Daudi Pete*,<sup>895</sup> had stated, *inter alia*, that in interpreting the Bill of Rights in the *Constitution of the United Republic of Tanzania*, an account must be taken of the *Banjul Charter*. Although the case above was concerned with interpretation of what is primarily a civil right, the principal stated therein could be transferred to other rights present in the Constitution, which are also present in the *Banjul Charter* – and in this case, the right to work. The positive approach to the interpretation of the Bill of Rights was also affirmed in

---

<sup>894</sup>Wambali, M. K. B. (2009), *supra*, n. 13, pp. 72 – 73.

<sup>895</sup>*Director of Public Prosecution v Daudi Pete* [1983] TLR pp. 22.

the case of *Julius Ishengoma Francis Ndyanabo v The Attorney General*,<sup>896</sup> where the Court stated, *inter alia*, that:-

... Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it...

... the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail...<sup>897</sup>

Again, in *Legal and Human Rights Centre and Others v Attorney General*,<sup>898</sup> the High Court of Tanzania followed a similar approach, while generally referring to the provisions of the UDHR. It follows therefor that since Tanzania had ratified the ICESCR and the CRPD, the interpretation of the Bill of Rights with respect to persons with disability in relation to any of the rights should take into account the stipulations of these international instruments.

The enactment of the new labour and disability laws in 2004 and 2010 may be perceived to have made improvements with regards to the protection of the right to work and the rights of persons with disability generally. Nevertheless, the inclusion of such improvements in the constitution would give them some constitutional effect and legitimacy.<sup>899</sup>

#### **3.6.1.4. Selected Measures for Achieving Equality of Persons with Disability at Work Places**

##### **(a) Quota Provisions and the Obligation to Employ Persons with Disability**

The *Persons with Disabilities Act* imposes a general obligation for an employer, public or private, to employ persons with disability, depending on availability of posts. The Act provides:-

---

<sup>896</sup> *Julius Ishengoma Francis Ndyanabo v The Attorney General Civil*, Court of Appeal of Tanzania at Dar es Salaam, Appeal No. 61 of 2001.

<sup>897</sup> *Ibid*, pp. 15 – 16.

<sup>898</sup> *Legal and Human Rights Centre and Others v Attorney General*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Case No 77 of 2005.

<sup>899</sup> Wambali, M. K. B. (2009), *supra*, n. 13, at p. 73.

Every employer, public or private, shall, where there is a vacant post fit for a person with disability and the person applies for the vacancy, give the employment to the persons with disability who meet the minimum qualification for such an employment.<sup>900</sup>

By extending its application to private employers, the law “cures” the limitations of the repealed disability legislation, which did not apply to private employers.<sup>901</sup> However, two things worth further considerations: (1) the “post fit for a person with disability”, and (2) the requirement for application.

The condition of a “post fit for a person with disability” may be negatively interpreted to legitimize “job segregation”, that only certain jobs are fit for persons with disability. While it is acceptable that that certain degrees of impairment (impairment being a significant factor in disability) may limit some persons with disability with respect to certain jobs, the provision should have been designed in such a way that the emphasis was more on the possibility of job accommodation than the availability of a “post fit for a person with disability”. In other words, the emphasis on the requirement that there should be a “post fit for a person with disability” contradicts the effort to accommodate persons with disability at the work place.

The reason for the above provision’s second requirement, “the application for a job by a person with disability” sounds obvious that employee and employer relationships are contractual, and as such, employers are not expected to employ just every person, even those who are not interested with a particular job. However, for various reasons, such as “disability-unfriendly” media of communication of job advertisement, persons with disability may not be able to apply for some jobs. The problem could be solved if there was a clear and well establish procedure of assisting persons with disability to access information with respect to job advertisements. However, as it is depicted in chapters 4 and 5 of this work, the relevant government institutions established for the purpose have not been of sufficient help for persons with disability.

Notwithstanding the shortcomings of the requirement to give jobs for persons with disability, the said requirement is backed up by employment quotas. Generally under quota schemes, employers employing a specified minimum number of persons are obliged to ensure that a certain percentage (a quota) of their workforce is made up of persons with

---

<sup>900</sup> See Section 31 (1), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80.

<sup>901</sup> LRCT (2008), *supra*, n. 71, at p. 30.



disability.<sup>902</sup> Worldwide, approaches to Quota schemes can be generally divided into three basic groups: (1) binding quotas backed up with effective sanctions/enforcement; (2) binding quotas not backed up with effective sanctions/enforcement; and (3) non-binding quotas based on a recommendation.<sup>903</sup> Under the third form, compliance with the quota obligation is voluntary and there is no sanction in the event that employers fail to meet the recommended quota.<sup>904</sup>

While for the first time in Tanzania the quota schemes were introduced in 1980s. Such schemes have its origins in Europe in the aftermath of the WWI, and initially war veterans who acquired disability as a result of military action were the only beneficiaries. These schemes typically exempted small employers.<sup>905</sup> The end of WW II saw the extension of these quota systems, both in terms of the number of countries which chose to adopt them, and in terms of the kind of persons with disability protected, with the new quotas covering civilians with disability as well as ex-soldiers.<sup>906</sup>

The origins of employment quotas (after WWI) suggest that they are based on the idea that society owed a duty to those who acquired disability while serving their country.<sup>907</sup> Transforming this to serve the current times where even private employers are obliged to abide by the quotas, one may argue that the quotas are a representation of the idea that the society owes a duty towards persons with disability. While this proposition look like a charity approach to disability (the duty to help), and this would strengthen the views of those who have challenged disability employment quotas for sending the wrong message - an implied stigmatization - that “that most workers with a disabilit[y] are less valuable economically and less productive, and that, if such workers are to be integrated into the open labor market, employers need to be obliged to hire them.”<sup>908</sup> By obliging employers to

---

<sup>902</sup>ILO (2007) 'Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines, ILO, at p. 35.

<sup>903</sup>*Ibid*, pp.35 – 40.

<sup>904</sup>*Ibid*, at p. 40.

<sup>905</sup>*Ibid*.

<sup>906</sup>Waddington, L. (1996) 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws, *Comparative Labour Law Journal*, Vol. 18, at p. 62; Goss, D, *et al.* (2000) 'Disability and Employment: A Comparative Critique of UK Legislation, *International Journal of Human Resource Management*, Vol. 11, No. 4, at p. 808.

<sup>907</sup>*Ibid*, at p. 64.

<sup>908</sup>Bagenstos, S. R. (2003), *supra*, n. 21, at p. 655. Also see Goss, D, *et al.* (2000), *supra*, n. 906, at p. 829.

employ certain persons, the quotas have also been criticised for being costful and risking to sacrifice standards.<sup>909</sup>

Those supporting the quota schemes have argued that such schemes promote equality.<sup>910</sup> I support the view that quotas are one category of affirmative action measures, the other category being that of using of policies of “preferential treatment” in which people who belong to a group with a longer history of marginalisation are supposed to receive more favourable considerations in various sectors, including employment.<sup>911</sup>

Employment quotas were introduced for the first time in Tanzania through Section 15 of the repealed *Disabled Persons (Employment) Act*, but they were not very much of help to persons with disability, especially after the liberalization policies, the reason being that most of the employers were in the private sector which was not covered by the then existing law, while the public sector which was the sole employer, according to that law, did not provide conducive environment of employment to persons with disability.<sup>912</sup> In addition, it was argued that the required employment quota under the first disability legislation was not only small, but also difficult to implement, as most persons with disability and employers were not registered under the Disabled Persons Register and the Employers Register respectively as required by the first disability legislation.

Following the repeal of the *Disabled Persons (Employment) Act*, by the *Persons with Disabilities Act*, the employment quotas were “re-enacted” in the later legislation, save for the amendment of the quota ratios. Section 31(2) of the *Persons with Disabilities Act* provides:-

The Minister shall, in consultation with the Minister responsible for labour, make Regulations requiring every employer with the work force of twenty and above to employ persons with disability based on a quota system and to ensure that three percent of it constitutes persons with disability.

---

<sup>909</sup>Welch, F. (1976) 'Employment Quotas for Minorities, *Journal of Political Economy*, Vol. 84, No. 4, at p. S106.

<sup>910</sup>*Ibid*

<sup>911</sup>Nishith, P. 'Improving the Labour Market Outcomes of Minorities: The Role of Employment Quota,, IZA Discussion Papers, No. 4386', at p. 1.

<sup>912</sup>LRCT (2008), *supra*, n. 71, at p. 30.

Compared to the former disability legislation, the current legislation seems to be offering more opportunities, in the ratio of 3% of jobs for workforce of twenty employees as compared to the former 2% of jobs in the workforce of fifty employees.<sup>913</sup>

Under the current disability legislation, there is no requirement of registration of persons with disability for matters related to employment quotas. The quota provisions therefore apply to all persons who qualify as persons with disability under the law, and it is prohibited to discriminate persons employed under disability quotas when such persons require specific facilities to satisfactorily perform their duties.<sup>914</sup>

Exceptions to the employment quotas under the *Persons with Disabilities Act* are similar to those contained in the former legislation.<sup>915</sup> The employer will not be bound by the employment quota upon proof of the following:-

- (a) after reasonable efforts he has failed to find a person with disability or a qualified person with disability for that post;
- (b) due to the nature of the employment, he could not get a person with disability with the skills or experience required;
- (c) due to the nature of work or the circumstance of the working place it may not be possible to employ a person with disability; and
- (d) taking into consideration of the conditions of the person with disability, he is not or would not be able to perform the work adequately as required.<sup>916</sup>

When the law is properly implemented, one should expect to find one or person with disabilities in all workplaces with twenty or more persons with disability, save where there are exceptions provided by the law. However, the quota approach in Tanzania, both in the old and current legislation appears to be that of “binding quotas not backed up with effective sanctions/enforcement”. Under these circumstances, although employers are obliged, through legislation, to comply with specific employment quotas of persons with disability, the quotas are less effective either because the sanctions to enforce the quotas do not exist, or because the sanctions are not enforced.<sup>917</sup> The former legislation had a specific

---

<sup>913</sup> See Section 13(1), [Cap 183 R.E. 2002] (Tz MInd, repealed), *supra*, n. 76. The number could have been lesser, subject to specifications from time to time either generally or in respect of any particular occupation trade industry or undertaking by an order made by the Minister. Also see Section 15(1), [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75, and Regulation 10, *The Disabled Persons (Care and Maintenance) Regulations, 1985* (G.N. No. 465 of 1985) (Tanzania Mainland repealed) .

<sup>914</sup> Regulation 40 (3), GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>915</sup> Section 15(2)(a) – (d), [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>916</sup> Section 31 (3), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80:

<sup>917</sup> ILO (2007), *supra*, n. 902, pp. 38 – 39.

provision that made it an offence to contravene quota provisions,<sup>918</sup> but research has not traced any prosecution made under that provision. It was reported that the legal requirement of the Director of Public Prosecution (DPP)'s consent, under the former disability legislation, to prosecute employers who refuse to offer employment to persons with disability or to discontinue him from employment<sup>919</sup> made it difficult to commence prosecutions, and the law was silent on the alternative remedy in case the DPP consent was not obtained. Lack of effective sanctions makes it difficult to achieve the desired objective.

Experience from elsewhere outside Africa has shown that it is insufficient to simply legislate to impose an obligation on employers to employ persons with disability without effective sanctions for breach of the quotas. Such quota systems do little more than rely on the goodwill of employers, and do not greatly increase the chances of the covered disabled people in the open labour market.<sup>920</sup> Lack of effective sanctions in the old quota scheme in Tanzania did not provide a solution to employment problems of persons with disability.<sup>921</sup> In the current legislation, it is an offence to deny employment to a person with disability without a good cause,<sup>922</sup> but there is no specific offence for contravening quota provisions.

#### **(b) Placement Services**

Neither the *Employment and Labour Relations Act*, nor the *Persons with Disabilities Act* provides for job placement services. This notwithstanding, there have been established institutions mandated by their respective laws (before the ratification of the CRPD, and the enactment of *Persons with Disabilities Act*) to provide job placement services. More about these institutions is explained in Chapter 4.

#### **(c) Job Retention and Reasonable Accommodation**

For purposes of this work, the expression “job retention” is generally used to mean the continuation of employment after disability. This is important considering that persons with disability are likely to lose their jobs than those without disability, as already pointed out. In order to protect persons with disability retaining their jobs, the *Employment and*

---

<sup>918</sup> Section 17, [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>919</sup> Section 17(2), *ibid.*

<sup>920</sup> Waddington, L. (1996), *supra*, n. 906, at p. 67.

<sup>921</sup> Disability Policy (Tanzania MInd), *supra*, n. 65

<sup>922</sup> Section 62 (k), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

*Labour Relations Act* prohibits termination of employment for reasons related to disability, and therefore termination on the ground of disability is unfair,<sup>923</sup>

Viewed in somewhat “broader perspectives”, job retention has been treated elsewhere as a form of “disability management”, that is, a way of limiting or controlling the negative costs of disability in terms of either statutory payment, or loss of knowledge, experience (or several other personal values advantageous to the business), when one’s contract of employment is terminated as a result of disability.<sup>924</sup> Therefore, the “job retention” aspect of disability management is aimed at making secure the employment opportunities of persons with disability.

The first disability legislation in Tanzania had provisions which required registered employers not to discontinue persons with disability, but only under certain circumstances.

Section 16 of the *Disabled Persons (Employment) Act* provided:-

A person to whom this Section applies, who for the time being has in his employment a person registered as a disabled person shall not, unless he has reasonable cause for doing so, discontinue the employment of that person, as if immediately after the discontinuance the number of persons so registered in the employment of the person to whom this Section applies would be less than his quota as fixed by the Minister under Regulations made under Section 15:

Provided that this subsection shall not have effect if immediately after the discontinuance the employer would no longer be a person to whom this Section applies.

This provision was weak in the sense that it did not have any standard measures to control the decision of employers to discontinue persons with disability from employment: the only standard was “reasonable cause”, and especially if after the discontinuation of a person with disability’s employment, the quota was not breached, or the employer would cease to be bound by quota provisions. These provisions were applicable only to registered employers with certain number of employees.

In addition to the limitations of the former job retention provisions, there were also some weaknesses with its enforcement. Despite a number of complaints from persons with disability who were discontinued from employment, lack of effective enforcement of the

---

<sup>923</sup> Section 40 (1) (a), (b) and (c), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>924</sup> Bruyère, S. M. and Flynn, B. G. (2001) “The Role of Disability Management Programs in ADA Compliance, Cornell University, <http://digitalcommons.ilr.cornell.edu/edicollect/31/>, accessed: 6.8.2013

then disability legislation meant that the Social Welfare Department would only “persuade” the employers to reengage the complainants to their employment.<sup>925</sup>

The current disability legislation requires employers to make efforts to safeguard the employment of persons with disability, and to this effect, employers are under the duty to provide reasonable job accommodation. To start with, Section 32 of The Persons with Disabilities Act provides:-

For purposes of maintenance and safeguarding employment of persons with disability, every employer shall endeavour to maintain employment of the persons with disability on his working place.

This provision is backed up by Section 34(1) (b) of the *Persons with Disabilities Act*, and Regulation 43(2) of the *Persons with Disability (General) Regulations*, according to which it shall be the duty of every employer to provide job accommodation and provision of working tools to meet the needs of persons with disability, and enable them to perform their work effectively. The *Persons with Disabilities Act* defines job accommodation to mean:-

appropriate measures to design and adapt work places and work premises in such a way they become accessible to persons with disability<sup>926</sup>

The above is elaborated under the *Persons with Disability (General) Regulations* to mean:-

- (a) Making existing facilities used by employers readily accessible and used by employees with disabilities;
- (b) Job restructuring, modifying work schedules or reassignment to a vacant position;
- (a) Acquiring or modifying equipment or assistive devices, adjusting or modifying tests, training materials or policies; and
- (b) Providing sign language interpreters or readers to employees who have hearing impairment, visual impairment or low vision.<sup>927</sup>

The obligation to ensure job retention and reasonable accommodation is extended also to the Minister responsible for matters of persons with disability.<sup>928</sup>

Determining the required changes for purposes of accommodating an employee with disability may involve a range of considerations, and these may range depending on the

---

<sup>925</sup>LRCT (2008), *supra*, n. 71, at p. 31.

<sup>926</sup> Section 3, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>927</sup> Reg. 43 (1) (a) to (d), GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>928</sup> Section 34 (2) (b) and (c), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

nature of impairment, job, the work environment, or the costs of such changes. The preference of the term “reasonable accommodation”, “reasonable changes” or “reasonable adjustment” aims at balancing between the objective maintaining an employee with disability on one hand, and the practical aspects on the other hand. The *Persons with Disabilities Act* defines reasonable changes to mean:-

necessary, appropriate and adjustments offered in a manner that does not impose a disproportionate burden, where needed in a particular case, to ensure persons with disability enjoy or exercise on an equal basis with others all human rights and fundamental freedoms.

While both the employment and disability laws provide for job accommodation, an employer cannot forever continue to employ a person, where it is not possible to keep particular person in employment through job accommodation. In *Martin Oyier v Geita Gold Mine Ltd*<sup>929</sup> it was stated that:-

The law does not mandate an employer to continue with an employee who cannot perform his duties. But require employer to make reasonable efforts to accommodate employee’s disability caused by ill health before taking decision to terminate, i.e., the employer is expected to carry on an appraisal/investigation and the employee is entitled to be consulted in the investigation, advised of alternatives and represented in consultations<sup>930</sup>

The decision in *Martin Oyier v Geita Gold Mine Ltd*<sup>931</sup> involved the interpretation of the employment and labour relations law, which provides for an elaborate procedure for termination of employment under various circumstances, including reasons related to impairment.

Under the *Employment and Labour Relations Act*, the reason related to employer’s capacity is a “fair reason” to terminate.<sup>932</sup> However, fairness of reason to terminate is just one of the elements of the “substantive fairness” which together with “procedural fairness” are required before one is terminated from employment. In substantive fairness, the requirement is that the reason for termination shall not only be one of the reasons considered fair, but it shall be sufficiently serious to justify termination in a particular case.<sup>933</sup> Procedural fairness requires employers to follow a fair procedure before

---

<sup>929</sup> *Martin Oyier. v Geita Gold Mine Ltd, supra*, n. 864.

<sup>930</sup> This observation was also made in the case of *Vodacom Tanzania. v Zawadi Bahenge and 6 others, supra*, n. 890.

<sup>931</sup> *Martin Oyier. v Geita Gold Mine Ltd, supra*, n. 864.

<sup>932</sup> Section 37(3)(b)(i), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>933</sup> Reg. 9 (1), (a) to (d), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

terminating an employee's employment, which may depend to some extent in the reason given for such termination.

The *Employment and Labour Relations Act* sets out an elaborate procedure in respect of termination based incapacity or incapability.<sup>934</sup> The law is more concerned with "ill health" or "injury".<sup>935</sup> Since the employment legislation does not distinguish between disability and impairment, disability is inferred from the use of the terms "ill health" or "injury".

Under the *Employment and Labour Relations (Code of Good Practice) Rules*, an employer who considers terminating the employment of an employee on grounds of ill health or injury shall take into account five factors to determine the fairness of the reasons in the circumstances. These are: the cause of incapacity; the degree of the incapacity; the temporary or permanent nature of incapacity; the ability to accommodate the incapacity; and the existence of any compensation or pension.<sup>936</sup>

The duty to accommodate employees with disabilities is imposed upon employers, when an employee is injured at work or is incapacitated by a work-related illness.<sup>937</sup> The duty to accommodate extends also in circumstances where employees are not permanently incapacitated, but the nature of incapacity is such that there is a likelihood of an employee to be absent for a time that is reasonably long.<sup>938</sup>

The employer shall be guided by an opinion of a registered medical practitioner, in determining the cause and degree of an incapacity and whether it is of a temporary or permanent nature.<sup>939</sup> When the employee is permanently incapacitated, the employer shall ascertain the possibility of securing alternative employment for the employee or adopting the duties or work circumstances of the employee to accommodate the employee's disability.<sup>940</sup> The general test is whether in a particular case the employer can reasonably be expected to accommodate the employee's disability having regard to the cost, practicality and convenience of such steps; and the cause of the employee's incapacity.

---

<sup>934</sup> Reg. 9 (1) and (2), *ibid.*

<sup>935</sup> See Reg. 15 (1) and (2), *ibid.* It should be noted that while the law outlines ill health, injury and poor work performance as distinct reasons for termination, the three may be interrelated. i.e: while injury may result into impairment and disability, poor work performance may be a consequence of disability – where because of the nature of impairment caused by injury, the employer can no longer work in his normal capacity in the same working environment without some adjustments.

<sup>936</sup> Reg. 19 (1) (a) to (e), *ibid.*

<sup>937</sup> Reg. 19 (2), *ibid.*

<sup>938</sup> Reg. 19 (4), (5), (6) and (7) *ibid.*

<sup>939</sup> Reg. 19 (3), *ibid.*

<sup>940</sup> Reg. 19 (9) and (10), *Ibid.*



Nevertheless, there is a more onerous duty on an employer where the incapacity is linked to the work-related injury or illness.<sup>941</sup>

While the costs of accommodation are to be considered pending the decision to accommodate the employee, the law is not clear on what exactly are the means to determine whether the costs of accommodation are reasonable. This may complicate the situation, bearing in mind Stain (2004)'s observations that not all types of accommodations may involve "hard" costs (physical alteration of work environment). Other means of accommodating a person may involve "soft" costs – those related with alteration with work practices: e.g. not requiring a person with a particular type of disability to perform certain functions.<sup>942</sup> While it may be easy to quantify "hard" costs, it is not always easy to quantify the "soft" costs, although they may appear less expensive than hard costs.<sup>943</sup>

When the employee cannot reasonably be adopted to accommodate the disability, the employer shall consider the availability of any available alternative work that will depend on the circumstances, and may include such factors as: whether the incapacity was due to a work –related illness or injury; the employee's experience and qualification; and the employee's ability to adopt to a changed working environment.<sup>944</sup> Where there is a vacancy which the employee could fill with training, such vacancy should be offered to the employee,<sup>945</sup> and it is not upon the employee to look for an alternative employment. In the case of *Vodacom Tanzania v Zawadi Bahenge and 6 others*,<sup>946</sup> the respondents were employed by the applicant on diverse dates as Customer Services Operators were terminated from employment due to severe hearing loss. They encountered the medical problems in the course of their employment. The cause of such problems had been alleged to be use of poor headsets, which were below standard thus hazardous to the respondents' health. Since they were permanently incapacitated, and could only hear by using hearing aids, they were exempted from receiving telephone calls. They were also given three months' time in order to seek alternative employment within the company. The respondents were later served with letters informing them that failure to secure an

---

<sup>941</sup> See Reg. 19 (11), *Ibid.*

<sup>942</sup> Stein, M. A. (2004) 'The Law and Economics of Disability Accommodations', *Duke Law Journal*, Vol. 53, at p. 88.

<sup>943</sup> *Ibid.*

<sup>944</sup> Reg. 19 (13) (a) to (c), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>945</sup> Reg. 19 (14), *ibid.*

<sup>946</sup> *Vodacom Tanzania v Zawadi Bahenge and 6 others*, *supra*, n. 890.

alternative position within the three months period would result to termination of employment and were highly encouraged to apply to various internal positions advertised; and they were told that they would be required to undergo normal recruitment procedures. After the expiry of the three months, only one employee had secured an alternative job and the rest had their employment terminated. The High Court found, *inter alia*, that in terms of Rule 19(12) of *The Employment and Labour Relations (Code of Good Practice) Rules*, the duty of providing an alternative employment is basically vested upon the applicant and not the respondent. In “ordering” the respondent to look for alternative employment, the applicants were shifting the burden to the respondents, which was wrong. It was found to be for the applicant to train the respondents on the basic skills needed for the alternative jobs as provided for in Rule 19(14) of the same.<sup>947</sup>

Before a decision is reached to terminate, the fair procedure stipulated under Reg. 21 of *The Employment and Labour Relations (Code of Good Practice) Rules*. It is provided that:-

- 21 – (1) The employer shall investigate an employee’s incapacity due to ill-health or injury.
- (2) The employee shall be consulted on the process of the investigation, and shall be advised of all alternatives considered.
- (3) The employer shall consider the alternatives advanced by the employee and, if not accepted, give reasons.
- (4) The employee is entitled to be represented by a trade union representative or fellow employee in the circumstance.
- (5) Prior to decision to terminate the employment of an employee for ill health or injury, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance.
- (6) The employer shall outline reasons for action to be taken and allow the employer and/or the representative to make representations, before finalising a decision.
- (7) The employer shall consider any representations made, and if these are not accepted, explain why
- (8) The outcome of the meeting shall be communicated to the employee in writing with brief reasons.

The labour Court had the occasion to elaborate the above procedure in the case of *Martin Oyier v Geita Gold Mine Ltd.*<sup>948</sup> The applicant was employed by the respondent as a watchman from 14/2/2000. He developed backache and could not perform his ordinary

---

<sup>947</sup> See *ibid*, at p.4.

<sup>948</sup> *Martin Oyier. v Geita Gold Mine Ltd, supra*, n. 864.

duties. According to the medical report of 18/7/2007, it was recommended that he be given light duty for 6 months and return to hospital for re-evaluation thereafter. However, he was terminated before expiry of that period, following findings by the workplace medical committee and opinion of the employer's doctor that he could not perform heavy duty, "like chasing thieves". The applicant was paid the required benefits after termination. The court found that the gist of Section 37 of the *Employment and Labour Relations Act*, read together with rules 19 and 22 of the *Code of Good Practice* is that the law does not mandate an employer to continue to employ an employee who cannot perform his duties. However, the employer is required to make reasonable efforts to accommodate the employee's disability caused by ill health before taking a decision to terminate. The court found the termination to be unfair because there was no evidence on the duration or permanency of the respondent's ill health; and that the applicant was terminated before the expiry of the reappraisal period of 6 months recommended by the registered practitioner. In addition, despite the registered medical practitioner's recommendation of the light duty for the applicant, no evidence was led to show that a possibility of such light duties was investigated. No evidence was led by the employer, who had the onus of proof to show if possibilities of adjusted duties or alternative work was investigated. In the opinion of the court, such an appraisal ought to have been done particularly considering that the applicant had worked for a long period for the respondent; and that the latter was a large company whose security duties were not necessarily limited to chasing thieves, the duty which required a strong back.<sup>949</sup> On the issue of procedural fairness for the termination, the court found that there was no evidence led to prove that the employee was consulted and advised on all possible alternatives; that the employee was represented by a trade union representative or a friend; and that presentation made by the employee or representative were considered.<sup>950</sup>

Although the Disability Legislation and the Labour Court have been elaborate on the procedure to be followed only when disability results from work related injury, there is a lacuna in the Employment Law on the question as to what is to be done to persons who acquired disability before employment, who perform poorly because of barriers at the work place. The *Code of Good Practice Rules* provide for a general procedure (that is not specifically tied to persons with disability). Reg. 17 Provides:-

---

<sup>949</sup>*Ibid*, pp. 6 – 7.

<sup>950</sup>*Ibid*, at p. 7.

(1) Any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider:

- (a) Whether or not the employee failed to meet a performance standard;
  - (b) Whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standards;
  - (c) Whether the performance standards are reasonable;
  - (d) The reasons why the employee failed to meet the standard; and
  - (e) Whether the employee was afforded a fair opportunity to meet the performance standard.
- (2) Although the employer has the managerial prerogative to set out performance standards, the standards shall not be unreasonable.
- (3) Proof of Poor work performance is a question of fact to be determined on a balance of probabilities.

The procedure for termination of employment on the ground of poor work performance is almost similar to the procedure for termination on the ground of incapacity. The difference in the case of poor work performance is that there is no mention of job accommodation requirement. The employer is required only to give appropriate guidance, instruction or training to an employee before terminating the employment.<sup>951</sup> Therefore, the Employment Law is not adequate in protecting employment rights of employees who are already with disability by the time of their employment.

#### **(d) Vocational/Skill Training and Industrial Rehabilitation**

Vocational training itself does not create jobs, but it prepares the labour force that meets the labour market's needs.<sup>952</sup> By enabling people to contribute to sustainable social, economic, environment and industrial development, technical and vocational skills help to alleviate poverty through the acquisition of skills which may enable persons with disability to be employed or to be self-employed.<sup>953</sup> Training is also important in order to establish long job tenure or job-based career progression, and thereby achieving upward job mobility.<sup>954</sup>

According to the *Persons with Disabilities Act*, it shall be the duty of every employer to enable employed persons with disability to have effective access to general technical and

---

<sup>951</sup> See Reg.18 (2), GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>952</sup> Ansah, S. K. and Ernest, K. (2013) 'Technical and Vocational Education and Training in Ghana: A Tool for Skill Acquisition and Industrial Development', *Journal of Education and Practice*, Vol. 4, No. 16, at p. 179..

<sup>953</sup> *Ibid*; LRCT (2008), *supra*, n. 71, at p. 104.

<sup>954</sup> Morris-Wales, J.2010 (2010), *supra*, n. 730.

vocational guidance and continuing training for their carrier and advancement.<sup>955</sup> The opportunities must be provided equally to all employees without discrimination based on types of impairments.<sup>956</sup>

Vocational training shall be directed to enable a person with disability to be competent to undertake employment or work on his own, depending on his age, experience and qualification.<sup>957</sup> While under the former legislation, the Minister had “discretion” to provide or make arrangements for the provision of vocational training courses<sup>958</sup> and industrial rehabilitation courses,<sup>959</sup> the current legislation “imposes an obligation” to the Minister, in consultation with the Council and other Ministers, to formulate programmes in order to secure integral and inclusive social development of persons with disability. These include vocational training and rehabilitation programs.<sup>960</sup> In addition, the Minister responsible for labour is also required to prepare a sectoral plan which shall contain information relating to: programme of the measure proposed to be taken for, and in relation to the provision of appropriate vocational training and employment support services to facilitate the integration of persons with disability into employment.<sup>961</sup>

Apart from the provisions of the disability legislation, the *Vocational Education and Training Act*<sup>962</sup> establishes the Vocational Education and Training Authority (VETA), and among the objective and function of the authority is to promote access to vocational education and training for disadvantaged groups. Under the repealed *Disabled Persons (Employment) Regulations*,<sup>963</sup> at least two percent (2%) of the vacancies in vocational training centres for were to be reserved for persons with disability.<sup>964</sup>

While the law is clear on the provision of vocational training, the said training has been hampered by several problems. For example, vocational training has been hampered by shortage of qualified work force and equipment, and absence of career guidance and

---

<sup>955</sup> Section 34(1)(f), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>956</sup> Reg. 44 (1), GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>957</sup> Reg. 22 (2), *ibid.*

<sup>958</sup> Section 11 (1), [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75

<sup>959</sup> Section 12(1), *ibid.*

<sup>960</sup> Section 19 (1), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80. According to Reg. 22 (1), of the, vocational training shall be offered is to be offered to persons under the age of eighteen years. Limiting the age of vocational training to persons with disability may create difficulties with respect to persons with disability above the age of 18, who are in need of such training for industrial rehabilitation prposes.

<sup>961</sup> Section 46(1)(b), *ibid.*

<sup>962</sup> Section 4 (1) (g), Cap 82 R.E. 2002 (Tz MInd), *supra*, n. 77.

<sup>963</sup> *The Disabled Persons (Employment) Regulations, 1985* (G.N. No. 464 of 1985) (Tanzania Mainland, repealed) .

<sup>964</sup> Regulation 8(2) *Ibid.*

counseling for people with disabilities.<sup>965</sup> Another problem has been to ensure that existing institutions have accessible environment to persons with disability, and to secure enough teachers in those institutions who are trained to accommodate persons with disability.<sup>966</sup> For private vocational training institutions, among the major challenges has been the lack funding, which can be blamed on heavy reliance on donors.<sup>967</sup> It is also important to note that the “common” skills taught to persons with disability have been such as weaving, sewing, tailoring, carpentry, and basketry.<sup>968</sup> Unless necessitated by severity of impairment, vocational education and skills training needs to reflect the realities of the labour market, because such skills alone may not bring the desired result of ensuring equal employment opportunities for persons with disability within different sectors and levels of employment.

Vocational education or skill training is different from industrial rehabilitation, although it may be a part of it. The difference is that vocational education may not necessarily be the “consequence of a person’s impairment. On the other hand, industrial rehabilitation may be defined to mean a totality of efforts, often through specialized services, aimed at enabling people with impairments, to return to work or to a new job.<sup>969</sup> However, this approach risks criticism for furthering the medical approach to disability. The social approach to disability requires rehabilitation professionals to expand the focus of their interventions from “restoring to normalcy” or “treatment”, to also modifying environments.<sup>970</sup> Thus, the focus on changing cultural attitudes towards persons with disability might have a greater impact on their lives than teaching them exercise regimens.<sup>971</sup> In this way, it is argued that rehabilitation should not be taken to mean only about and curing, or the body and mind, but about lives of persons with disability generally.<sup>972</sup>

The CRPD uses the terms “rehabilitation” and “habilitation” categorically.<sup>973</sup> While the former is focused on regaining lost skills or functioning”, the latter refers to services for

---

<sup>965</sup>Possi, M. K. (1994), *supra*, n. 605, at p. 50.

<sup>966</sup>LRCT (2008), *supra*, n. 71, at p. 28.

<sup>967</sup>*Ibid*, pp. 104 – 105.

<sup>968</sup>Possi, M. K. (1994), *supra*, n. 605, at p. 50..

<sup>969</sup>Keith, R. A. and Aronow, H. U. (2005), 'Comprehensive Rehabilitation: Themes, Models, and Issues', in H. H. Zaretsky, et al. (Eds.), *Medical Aspects Disability: A Handbook for the Rehabilitation Professional*, 3rd (edn), at p. 3.

<sup>970</sup>Hammell, K. W. (2006) *Perspectives on Disability & Rehabilitation: Contesting Assumptions; Challenging Practice*, Philadelphia: Elsevier Limited, at p. 69.

<sup>971</sup>*Ibid*, p. 87, citing Leavitt, R. L (1999).

<sup>972</sup>*Ibid*, p. 107.

<sup>973</sup>Article 26 of the CRPD, *supra*, n. 24.

those who may not have ever developed the skills, often those who are already born with disabilities.<sup>974</sup> The *Persons with Disabilities Act* uses only “rehabilitation”.

Under the *Persons with Disabilities Act*, rehabilitation is defined to mean “combined efforts in the domain of health, education, vocational training, psychology, public awareness and work including community based rehabilitation intended to raise the functional level of a person with disability so as to enable him, take part in the normal life of the community.”<sup>975</sup> While the *Persons with Disabilities Act* has only the general definition of the term “rehabilitation”, the specific goal of industrial rehabilitation services is to assist individuals with disabilities to successfully obtain and maintain competitive employment in a field of interest, in order to support increased autonomy and full participation in society.<sup>976</sup>

Despite the “social approach” definition of rehabilitation, the operational provisions on rehabilitation under the *Persons with Disabilities Act* place more emphasis on medical measures. The law requires that industrial rehabilitation courses to consist of facilities where persons with disability, under adequate medical supervision and circumstances conducive to the restoration of fitness, obtain physical training exercise and occupation conducive to the evaluation of functional level, and such other incidental facilities as may be necessary for 'enabling persons attending such rehabilitation to obtain full benefit of the courses.’<sup>977</sup>

Age is another crucial factor for vocational training or rehabilitation programs. The CRPD requires the habilitation and rehabilitation programmes begin at the earliest possible stage.<sup>978</sup> Under the previous disability legislation, the minimum age for the industrial

---

<sup>974</sup>Hasselkus, A. (2012) *Habilitation*, <http://blog.asha.org/2012/01/04/habilitation-what-it-is-and-why-it-matters-to-you/>, accessed: 4.10.2010.

<sup>975</sup> Section 3, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>976</sup>Wagner, C. C., *et al.* (2006), 'Evidence-Based Employment Practices in Vocational Rehabilitation', in K. J. Hagglund and A. W. Heinemann (Eds.), *Handbook of Applied Disability and Rehabilitation Research*, at p. 179, citing Bolton *et al.* (2000). Under Section 30(1), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80, the industrial rehabilitation courses should be offered for persons with disability in order to render them fit for employment or work on their own or for making use of vocational training courses.

<sup>977</sup> Section 30 (2), *ibid.* According to Reg. 24 (c) of GN No. 152 of 2012 (Tz MInd), *supra*, n. 544, the industrial rehabilitation courses are aimed at making persons with disability to, inter alia, make use of vocational training courses which shall include: “(i) information communication [sic]; (ii) tailoring; (iii) fine arts; (iv) plumbing; (v) electronic; (vi) carpentry; (vii) catering; (viii) house keeping; (ix) weaving; (x) tie and dye; and (xi) shoe making.” The listed should not be construed to mean that these are the only courses appropriate for persons with disability.

<sup>978</sup> Article 26(1)(a), CRPD, *supra*, n. 24.

rehabilitation courses was fifteen years.<sup>979</sup> The current minimum age, according to the *Persons with Disabilities Act*, is sixteen years.<sup>980</sup> However, the *Persons with Disability (General) Regulations*<sup>981</sup> do not appear to be in line with the framework disability legislation on the question of the appropriate age for industrial rehabilitation courses.<sup>982</sup> While the differences between the subsidiary and parent legislation may not pose a big problem for the implementation of the law,<sup>983</sup> the situation still calls for harmonization of laws for the appropriate age for industrial rehabilitation courses, since for purposes of the *Employment and Labour Relations Act*, as well as the *Law of the Child Act*, the minimum age for employment is, where the employment is not in hazardous sectors, fourteen years.<sup>984</sup>

#### **(e) Provision of Assistive Devices**

Persons with disability require technical aids to improve their practical ability. In Tanzania, such technical aids as brailers, typewriters, callipers and hearing aids have to be imported, and they are therefore expensive. The economic condition of majority of persons with disability in Tanzania, and the need to ensure equality of opportunities are good reasons to support the idea that these devices should be made affordable to persons with disability. There already exist tax exemptions on such devices as motor vehicles specially made for persons with disability, wheel chairs, brailers, hearing aids, callipers and typewriters. While tax exemptions may work for imported devices, it would also be appropriate to encourage local manufacturers or vocational training centres to produce the types of devices subject to their technological and financial capabilities. Homemade assistive devices are also more likely to be compatible with local infrastructures than the imported devices.<sup>985</sup>

#### **(f) Safe and Healthy Working Conditions**

<sup>979</sup> Section 12(1), [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>980</sup> Section 30 (1), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>981</sup> GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>982</sup> According to Reg. 24, *ibid*, industrial rehabilitation course are meant for persons with disability under the age of 25 years.

<sup>983</sup> It is a general rule that a subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency. Section 36 (1), [Cap 1. R.E. 2002] (Tz), *supra*, n. 594.

<sup>984</sup> Section 4, Act No. 6 of 2004 (Tz MInd), *supra*, n. 79; Sections 12 and 77(1), (2) and (3), *The Law of the Child Act, 2009* (Act No. 21 of 2009) (Tanzania Mainland) .

<sup>985</sup> LRCT (2008), *supra*, n. 71, at p. 111 - 113.



Inadequate provision of safety measures at work places leads to high rates of accidents and injuries which are a burden to the working population, hence the importance of developing strategies to control their occurrence. Generally, matters concerning the safety of persons at work places in Tanzania Mainland are governed by the *Occupational Health and Safety Act*.<sup>986</sup> However, this law does not specifically provide for persons with disability, save for matters of sanitary conveniences for employees with disability.<sup>987</sup> Under the *Persons with Disabilities Act*, employers have the duty to take all necessary measures to improve work environment to prevent injuries and impairment;<sup>988</sup> and also to ensure safe and healthy working conditions for all employees with disability.<sup>989</sup>

#### **(g) Incentives**

Incentives can be employed in addition to “coercive provisions” of the law. Employers’ attitude towards persons with disability may be improved through such measures as tax exemption for employing persons with disability, motivation to employees with disability or similar measures.<sup>990</sup>

Theoretically, incentives and coercive measures may have some similarities, but the practical significances are different. Similarities may develop from the view that employers cannot willingly employ persons with disability, unless there are some external influences (rewards or sanctions). Viewed in this way, disability is perceived as a “burden”. However, incentives should not only be viewed as a way of motivating employers, but also as a way of recognizing the fact that different needs of persons with disability may need some extra costs, and when these costs are rewarded, there is in fact “rewards” for employing persons with disability.

Despite the significance of incentives, it has been found elsewhere outside Africa that it is difficult to assess the usefulness of persuasion measures in influencing attitudes or

---

<sup>986</sup> Act No. 5 of 2003 (Tz Mlnd), *supra*, n. 856.

<sup>987</sup> Section 55 (4), *ibid*.

<sup>988</sup> Section 34(1) (a), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80.

<sup>989</sup> Section 34(1) (c), *Ibid*.

<sup>990</sup> Such measures may include: awards to employers’ efforts to improve employment opportunities for persons with disability; the use of symbols by public or private enterprises advertisements or other company literature indicating commitment to equal opportunity and treatment for workers with disabilities; codes of good practice for employers; or disability equality awareness training for employers and their employees. O’Reilly, A. (2007), *supra*, n. 29, at p. 107.

behaviour.<sup>991</sup> Nevertheless, considering the challenges of implementing some of the measures already discussed, it is important that some incentives are put in place.

Unlike some other African States, Tanzania does not have specific incentives to employers, such as those in the form of tax deductions, which are aimed at encouraging employers to employ persons with disability. The only tax exemptions apply to importers of appliances and other equipment for use of persons with disability, if the government is so advised by the Council.<sup>992</sup>

#### **(h) Organisational Rights**

For matters related to employment rights, the term organizational rights is defined under The *Employment and Labour Relations Act* to mean either of the following:-

- (i) the right to trade union representation in the workplace including the right to a committee or a field branch;
- (ii) the right to facilities for trade union representatives in the workplace;
- (iii) the right to disclosure of information;
- (iv) the right to deduction of trade union dues and levies;
- (v) the right of access to the employer premises for the purposes of recruitment of members, meeting with members and representing members<sup>993</sup>

Trade unions can play a significant role in shaping working lives of persons with disability in campaigning for, organizing and promoting their rights. Although different trade unions may have different aims, and therefore different responsibilities to its members, they have with respect to persons with disability, a moral obligation to promote barrier-free work environment persons with disability, and also to promote all other rights of employees with disabilities.

Despite the significance of trade unions for employee with disability, issues related access to trade union escaped the attention of policies and legislation in Tanzania. The former legislation on matters related to the employment of persons with disability did not address persons with disability' access to trade unions, save for the inclusion of members of trade unions in the National Advisory Council and the advisory committees (district and regional committees).<sup>994</sup> Likewise, the former trade union law, *Trade Unions Act*,<sup>995</sup> which came

---

<sup>991</sup> *Ibid*, at p. 108.

<sup>992</sup> Section 12(2), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>993</sup> Section 4(1)(a), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>994</sup> See the first, second and third schedules to [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>995</sup> *The Trade Unions Act* [Cap 244 R.E. 2002] (repealed).

about 16 years after the first disability legislation, did not contain any provision that addressed persons with disability participation in trade union activities. It was until 2004 that a provision was inserted in employment legislation, barring discrimination of persons with disability in trade unions. Section 8(1) of the *Employment and Labour Relations Act* states:-

No trade union or employers' association shall discriminate, directly or indirectly, against any of the grounds prescribed in subsection (4) of Section 7

Subsection (4) of Section 7 of the *Employment and Labour Relations Act* lists disability as one of the prohibited grounds of discrimination.<sup>996</sup> Later in 2010, The Persons with Disabilities Act imposed a duty upon employers to permit employees with disability to exercise their labour and trade union rights in accordance with any relevant laws.<sup>997</sup>

### **3.6.2 Tanzania Zanzibar**

#### **3.6.2.1. Developments**

Like Tanzania Mainland, laws related to labour were enacted during the colonial period.<sup>998</sup> These were inherited after the 1964 revolution through the *Existing Laws Decree*,<sup>999</sup> but were later repealed by the labour and employment laws of 1997 and 2005 respectively.<sup>1000</sup>

The 1997's *Labour Act*<sup>1001</sup> was the first legislation to address matters of persons with disability in the work place. The Act provided for the persons with disability's right to be employed at any type of work depending on their standard of education, skill and ability, and to be employed on the same terms and enjoy the same rights and privileges as other employees without disability.<sup>1002</sup> The *Labour Act* also prohibited employers from denying employment to a person on grounds of disability,<sup>1003</sup> or terminate employment on the ground of disability.<sup>1004</sup> Contravention of disability provisions under the Act amounted to

---

<sup>996</sup> Section 7(4)(l), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>997</sup> Section 34(1)(e), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>998</sup> *The Labour Decree, 1946* (Decree No. 11 of 1946) (Zanzibar, repealed) ; *The Minimum Wages Decree, 1935* Decree No. of 1935) (Zanzibar, repealed) ; *The Employment of Children, Young Person and Adolescents Decree, 1952* (Decree No 8 of 1952) (Zanzibar, repealed) ; *The Employment of Women (Restriction) Decree, 1952* (Decree No. 9 of 1952) (Zanzibar, repealed) and *The Forced or Compulsory Labour Decree, 1932* (Decree No. 8 of 1932) (Zanzibar, repealed) .

<sup>999</sup> *The Existing Laws Decree, 1964* (Decree No.1 of 1964) (Zanzibar, repealed)

<sup>1000</sup> Act No. 3 of 1997 (Znz, repealed), *supra*, n. 82; Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1001</sup> Act No. 3 of 1997 (Znz, repealed), *supra*, n. 82.

<sup>1002</sup> Section 120(1), *ibid.*

<sup>1003</sup> Section 120(2), *ibid.*

<sup>1004</sup> Section 120(3), *ibid.*

an offence.<sup>1005</sup> The major weakness of this act was its medical oriented definition of a person with disability, who was defined as “a person [with] a physical or mental impairment that substantially limits one or more of [that person’s] major life activities”.<sup>1006</sup> The Act was replaced by the *Employment Act* in 2005.<sup>1007</sup> In 2006, Zanzibar enacted the *Persons with Disabilities (Rights and Privileges) Act*,<sup>1008</sup> which has more substantive provisions

### **3.6.2.2. Policy Position and General Objectives of Disability and Employment Laws**

The general aim of Zanzibar’s *Persons with Disabilities (Rights and Privileges) Act*<sup>1009</sup> is to achieve the equality of persons with disability. Different from its sister legislation from Tanzania Mainland, Zanzibar’s disability legislation does not contain the “basic principles” similar to those of the CRPD, and this may be explained by the fact that the Act was enacted before Tanzania’s ratification of the CRPD. On the other hand, the employment legislation contains the principles of interpretation and administrations, according to which the Act has been enacted to give effect to the application (in Zanzibar) of the provisions of International Labour Conventions ratified by the United Republic of Tanzania, and for the purposes thereof, the interpretation and application of *Employment Act* shall not derogate from the provisions of any such International Labour Convention.<sup>1010</sup> Although the recommendations of the International Labour Organisations lack a binding force, the *Employment Act* gives a room, in case of ambiguity, for its provisions (and any rules made under it) to be interpreted in such a way as more closely confirms with provisions of not only the ILO Conventions, but also ILO Recommendations.<sup>1011</sup>

### **3.6.2.3. Protection of the Right to Work**

In Zanzibar, the right to work is provided for under Article 21, in particular sub articles (3) and (4), which states:-

---

<sup>1005</sup> Section 120(5), *ibid*.

<sup>1006</sup> Section 2, *ibid*.

<sup>1007</sup> Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1008</sup> Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1009</sup> *Ibid*.

<sup>1010</sup> Section 3(2)(b), *ibid*.

<sup>1011</sup> Section 3(2)(c), *ibid*

(3) Every Zanzibari has the right to work and is entitled to equal opportunity and right on equal terms to hold any office or discharge any function under the state authority of Zanzibar.

(4) Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work and all persons working according to their ability shall be remunerated according to the measure and nature of the work done.

Furthermore, according to Article 22, which provides for duty to participate in work, work alone creates material wealth in society, and is the source of well-being of the people and the measure of human dignity.<sup>1012</sup> However, notwithstanding the duty to participate to work, the Constitution of Zanzibar expressly prohibits forced labour.<sup>1013</sup>

Like in Tanzania Mainland, the Constitution of Zanzibar contains very basic stipulation of the right to work. These Articles apply to every Zanzibari, and non-discrimination clauses mean that persons with disability have the right to work - the only “justification” for categorization of remunerations seems to be the degree of work and relevant qualifications. Despite non-discrimination provisions in the constitution, the above provision alone cannot escape criticisms against less substantive equality measures, which would have sufficiently address disability issues. It is perhaps because of this weakness, that Zanzibar has enacted the disability and employment legislation which has more elaborate provisions with respect to the employment of persons with disability.

#### **3.6.2.4. Selected Measures for Achieving Equality of Persons with Disability at Work Places**

##### **(a) The Obligation to Employ Persons with Disability**

Neither the *Persons with Disabilities (Rights and Privileges) Act*,<sup>1014</sup> nor the *Employment Act*<sup>1015</sup> provides for employment quotas. The *Employment Act* prohibits discrimination of persons with disability,<sup>1016</sup> and so does the *Persons with Disabilities (Rights and Privileges) Act*.<sup>1017</sup> The *Employment Act* prescribes as offences such acts which amounts to denial of employment to a person with disability.<sup>1018</sup> The provisions of the *Employment Act* on employees with disability should also be read together with the provisions of Section

---

<sup>1012</sup> Article 22(1), The Constitution of Zanzibar (as amended), *supra*, n. 500

<sup>1013</sup> Article 22(2), *ibid*.

<sup>1014</sup> Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1015</sup> Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1016</sup> Sections 88(2) and (3), and 90, *ibid*.

<sup>1017</sup> Section 8(1)(a), (b), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1018</sup> Section 90, Act No. 11 of 2005 (Znz), *supra*, n. 82; Section 22(b), Act No.9 of 2006 (Znz), *supra*, n. 82.

118 (3) according to which any termination on the ground of disability is treated as unfair termination of employment.<sup>1019</sup>

In order to safeguard the employment of persons with disability, the current employment legislation, unlike its predecessor, makes provisions for job accommodation. Section 88(3) and (3) provides:-

- (1) An employer shall provide reasonable office accommodation and flexible working schedule to an employee with disability.
- (2) An employer shall provide an alternative job for a disabled employee if the employee is no longer fit or capable to carry out the former job without loss of remuneration.

Despite the provision for reasonable accommodation, the employment legislation does not in fact define the term. The legal definition of reasonable accommodation is provided by the *Persons with Disabilities (Rights and Privileges) Act*, according to which reasonable accommodation means measures to make existing facilities, programmes and services readily accessible to and usable by a person with disability.<sup>1020</sup> However, the two pieces of legislation are being administered by different institutions (Chapter 4).

Under the *Persons with Disabilities (Rights and Privileges) Act*, employers are exempted from the duty to employ persons with disability and to provide reasonable office accommodation upon a proof that:-

- (a) after reasonable effort the employer has failed to find a person with disability; or
- (b) due to the nature of work an employer could not get a person with the skills or experience required; or
- (c) due to the nature of work or the circumstance of the working place it may not be possible to employ a person with disability; or
- (d) the individual with a disability is unable to perform the essential job functions.<sup>1021</sup>

The *Persons with Disabilities (Rights and Privileges) Act*, clearly provides for the requirement of giving reasons and the provision of reasonable accommodation before a person with disability is excluded from employment.<sup>1022</sup> Under the *Employment Act*, such a requirement can be inferred from clear provisions of Section 88.

---

<sup>1019</sup> Section 118(3)(c), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1020</sup> Section 3, Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1021</sup> Section 8(2), *ibid*.

<sup>1022</sup> Section 6(2)(b), *ibid*.

While acknowledging some practical realities behind the above exceptions, it should be noted that unchecked, the exceptions may undermine the whole idea of providing for the duty to employ persons with disability and to provide for office accommodation.

**(b) Placement Services**

The *Persons with Disabilities (Rights and Privileges) Act* does not provide for job placement of persons with disability. Nevertheless, the Act ‘anticipates’ job placement arrangements for persons with disability, since according to Section 36(4) of the said Act, the use of entries and particulars entered in the disability register shall be restricted to, *inter alia*, job placement. However, there are in fact no special mechanisms on the ground for facilitating persons with disability’s access to the labour market.<sup>1023</sup>

**(c) Job Retention and Job Accommodation**

Zanzibar’s disability law defines reasonable accommodation to mean “measures to make existing facilities, programmes and services readily accessible to and usable by a person with disability.” While the disability law does not expressly impose an obligation upon employers to provide reasonable accommodation for employees with disability, such an obligation is imposed by the employment legislation, which apart from making denial or termination of employment on the ground of disability illegal,<sup>1024</sup> it further obliges employers to provide reasonable office accommodation and flexible working schedule to employees with disability;<sup>1025</sup> and to provide alternative jobs for employees with disability where they are no longer fit or capable to carry out their former job without loss of remuneration.<sup>1026</sup>

**(d) Vocational/Skill Training and Industrial Rehabilitation**

Zanzibar’s disability legislation does not have a sophisticated set of provisions on vocational training. Nevertheless, for purposes of eliminating discrimination at the work place, both employment and disability legislation define employment to include access to

---

<sup>1023</sup> Muhammed, R. A. (15<sup>th</sup> June 2014), Interview (Email); Abdallah, A. (10<sup>th</sup> June 2014), Interview (Email).

<sup>1024</sup> Section 88(3), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1025</sup> Section 88(4), *Ibid.*

<sup>1026</sup> Section 88(5), *Ibid.*

vocational training;<sup>1027</sup> and an employment policy or practice' means any policy or practice relating to training and development.<sup>1028</sup>

Disability is also addressed in Zanzibar's vocational education law.<sup>1029</sup> Under this legislation, owners of vocational training centres are obliged to keep environments or special plans to enable peoples with disability attending training in the centres to fully participate in vocational trainings without barriers.<sup>1030</sup> Furthermore, an application to establish a vocational training centre shall be refused if there is no proof of adherence to the principle of equality, regardless of various matters, including disability.<sup>1031</sup>

#### **(e) Provision of Assistive Devices**

Under the *Persons with Disabilities (Rights and Privileges) Act*, employment related provisions do not mention the provision of assistive devices to employees with disability. However, the disability legislation contains general provisions with respect to the provision of assistive devices to persons with disability. According to the Act, persons with disability shall be entitled to, *inter alia*, assistive devices and other equipment to promote their mobility.<sup>1032</sup> It is also among the functions of the Disability Council is to provide, to the maximum extent possible, assistive devices.<sup>1033</sup> Furthermore, the Disability Council shall advise the government on the provisions of assistive devices and appliances and other equipment to persons with disability.<sup>1034</sup>

#### **(f) Safe and Healthy Working Conditions**

Under Zanzibar's occupation safety and health law, every building used as a workplace shall be in the form which allows easily accessibility of the persons with disability,<sup>1035</sup> and that Zanzibar's disability legislation which prohibits direct and indirect discrimination in

---

<sup>1027</sup> Section 6(3)(a), Act No.9 of 2006 (Znz), *supra*, n. 82; Section 10(7)(a), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1028</sup> Section 6(3)(b)(vi), Act No.9 of 2006 (Znz), *supra*, n. 82; Section 10(7)(d)(vii), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1029</sup> Section 2(ii), *The Vocational Training Act, 2006* (Act No. 8 of 2006) (Zanzibar) .

<sup>1030</sup> Section 14(f), *Ibid*.

<sup>1031</sup> Section 14(d), *Ibid*.

<sup>1032</sup> Section 12(1), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1033</sup> Section 29(1)(x), *ibid*.

<sup>1034</sup> Section 29(2)(ii), *ibid*.

<sup>1035</sup> Section 27(2)(d) and 29(4), *The Occupational Safety and Health Act, 2003* (Act No. 14 of 2003) (Zanzibar)



employment policy or practice, defines “employment policy” to mean policy or practice relating to and includes, *inter alia*, the working environment and facilities.<sup>1036</sup>

Although matters of safe and healthy working condition to employers with disability are not directly stated as a right in employment and disability laws these can implied in job accommodation requirements, especially in cases where in the absence of job accommodation, safety and health are at risk. In such cases where safe and healthy working conditions are not necessarily related to disability, then these are already dealt with in the respective occupation safety and health law.

#### **(g) Incentives**

Different from Tanzania Mainland’s disability legislation, Zanzibar’s disability law entitles employers to apply for a deduction from Taxable income equivalent to 10% of the total salary of an employee, apprentice or learner with disability. This provision may encourage employers to employ persons with disability in permanent and bigger posts.<sup>1037</sup> Another important incentive is with respect to reasonable accommodation expenses. Employers are entitled to apply for additional deductions from net taxable income equivalent to 10% of direct costs of improvements, modification or special services made or provided to ensure reasonable working environment to employees with disability.<sup>1038</sup> Furthermore, the disability legislation exempts from postal and customs charges aid and assistive devices for persons with disabilities sent outside Zanzibar by mail for repair, among other things.<sup>1039</sup> However, exemption with respect to assistive devices is not automatic, since the law requires, *inter alia*, that the exempted items are recommended for exemption by the Disability Council, and that the person with disability or organization is registered with the Council.<sup>1040</sup> Technically, this would mean that a person with disability not registered by the council may not benefit from exemptions with respect to assistive devices, the situation which may have discriminatory effect among persons with disability, contrary to the general objectives of the law and international instruments.

#### **(h) Organisational Rights**

---

<sup>1036</sup> Section 6(3)(b)(v), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1037</sup> Section 8 (3), *ibid*.

<sup>1038</sup> Section 8 (4), *Ibid*.

<sup>1039</sup> Section 18(b), *Ibid*.

<sup>1040</sup> Proviso to Section 18), *Ibid*.

Zanzibar's *Labour Relations Act*,<sup>1041</sup> expressly prohibits workers unions or organisations from discriminating, in their constitutions, or through societies against any persons on various grounds, including disability.<sup>1042</sup>

### **3.7 Comparative Experience**

#### **3.7.1 Protection of the Right to Work**

All constitutions selected for purposes of this work contain the right to work provisions, although the style and nature of protection offered vary among these constitutions.<sup>1043</sup> The constitutional protection of the right to work means that the employment legislation or employment provisions contained in disability legislation should not be construed contrary to the constitutional standards. It is also worth noting that while there can be some country to country differences with respect to the development of legislation or policy in the area of employment, the general trend appears to be moving towards inclusiveness.

#### **3.7.2 Selected Measures for Achieving Equality of Persons with Disability at Work Places**

##### **3.7.2.1. Quota Provisions and the Obligation to Employ Persons with disability**

There are different approaches to quota schemes, but trend from selected countries seems to be between quota recommendation(s) or binding quotas with lack of effective sanctions; and some States do not have the quotas at all. In Kenya, the law only provides that “the Council shall endeavour to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disability.”<sup>1044</sup> There are no provisions binding employers to implement the said “reservations.” In Uganda, the law provides that “[t]he minister responsible for labor shall, in consultation with the employers’ organizations, determine the quota of persons with disability work force for employers, and shall by statutory Instrument publish the agreed

---

<sup>1041</sup> Act No. 1 of 2005 (Znz), *supra*, n. 82.

<sup>1042</sup> Section 7 (4), *Ibid*.

<sup>1043</sup> See Articles 21 and 24, The Constitution of Ghana, *supra*, n. 350; Article 40, The Constitution of Uganda, *supra*, n. 350; Article 41, The Constitution of Kenya, *supra*, n. 693; and Article 23, The Constitution of South Africa, *supra*, n. 696. Zambia’s “right to work” provisions are contained in the directive principles of state policy (Article 112(j)), which cannot be enforced by a court of law. There is however a provision in the Bill of Rights, with respect to the right to join trade unions (Article 21(1), The Constitution of Zambia, *supra*, n. 522).

<sup>1044</sup> Section 13, Act No. 14 of 2003 (Kn), *supra*, n. 197.

quota.”<sup>1045</sup> No such instrument has been made operational so far. Ghana and South Africa do not have quota provisions.<sup>1046</sup> In South Africa, Section 15(3) of the *Employment Equity Act* requires that affirmative measures include “preferential treatments and numerical goals, but exclude quotas.” There have been contradicting views as to whether the provision does not impose “quota” obligation.<sup>1047</sup>

### 3.7.2.2. Placement Services

Different States have in place legal provisions on placement services. There are variations with respect to the wording of these provisions, whereas some provisions appear to be imposing more direct obligations compared to others.

In Kenya, the National Council for Persons with disability is responsible for establishing and maintaining a record of persons with disability who are in possession of various levels of skills and training and shall update such records regularly for the purposes of job placement.<sup>1048</sup> In Zambia, the law empowers the minister responsible for persons with disability, in consultation with the minister for labour and vocational training, to issue Regulations and take measures to ensure, *inter alia*, that persons with disability have effective access to placement services.<sup>1049</sup> Ghana’s disability legislation imposes the duty to the responsible minister, through public employment centres, to assist to secure jobs for persons with disability.<sup>1050</sup> In South Africa, the *Skills Development Act*<sup>1051</sup> imposes the duty to establish labour centres,<sup>1052</sup> whose functions include assisting prescribed categories of persons to enter special education and training programmes; find employment; start income-generating projects; and participate in special employment programmes.<sup>1053</sup> The *Skills Development Act* does not directly mention persons with disability. Nevertheless, according to the *Employment Equity Act*,<sup>1054</sup> the provision on affirmative measures require such measures to include measures to “retain and develop people from *designed groups*

<sup>1045</sup> Section 13(3), The Persons with Disabilities Act (Ug), *supra*, n. 702.

<sup>1046</sup> See Sections 9 to 14 of the Act No. 715 of 2006 (Gh), *supra*, n. 702; and Section 15(3) of Act No. 55 of 1998 (SA), *supra*, n. 687

<sup>1047</sup> Giles, G. (2012) *Employment Equity, Targets and Quotas*, <http://www.gilesfiles.co.za/labour-law-amendments-2/employment-equity-amendments-and-targets-or-quotas-carol-paton-in-business-day/>, accessed: 5.8.2013.

<sup>1048</sup> Section 17, Act No. 14 of 2003 (Kn), *supra*, n. 197.

<sup>1049</sup> Section 35 (3), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>1050</sup> Section 9, Act No. 715 of 2006 (Gh), *supra*, n. 702, *supra*, note 685.

<sup>1051</sup> *The Skills Development Act, 1998* (Act No 97 of 1998) (South Africa) .

<sup>1052</sup> Section 23(1)(a), *Ibid*.

<sup>1053</sup> Section 23(2)(d)(i) – (iv), *Ibid*.

<sup>1054</sup> . Act No. 55 of 1998 (SA), *supra*, n. 687

and to implement appropriate training measures, including measures in term of *an Act of Parliament providing for skills development*.<sup>1055</sup> People from designed groups include persons with disability.

### 3.7.2.3. Job Accommodation

Job accommodation provisions exist in various African State's pieces of legislation, save for variations in languages or coverage. Generally, employers are required to provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be needed to accommodate persons with disability.<sup>1056</sup>

Job accommodation provisions have been at the centre of judicial discussion in some African States. In South Africa, the case of *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*,<sup>1057</sup> is perhaps the earliest African case which elaborated the "principles" of reasonable accommodation with respect to Persons with disability. The case concerned an employee who worked for the Standard Bank (South Africa), and who was dismissed two years after sustained injuries in a motor accident, and thereby ending 17 years of her career. The court decided in favour of the employee.

The significance of this judgment is that the court linked reasonable accommodation (in employment) to equality and dignity. Relevant parts of the judgment are reproduced as follows:-

[T]he essence of true equality is the accommodation of difference... Integration and inclusion in mainstream society aim not only to achieve equality but also to restore the dignity of people with disabilities... (*Paragraph 64*)

Dignity, for employees with disabilities, is about being independent socially, and most of all, economically, about managing their normal day to day activities with minimum hardship for themselves and others and about contributing to and participating in society... (*Paragraph 65*)

When employers accommodate employees effectively, they restore dignity to employees... (*Paragraph 66*)

---

<sup>1055</sup> Section 15(2)(d)(ii), *Ibid*.

<sup>1056</sup> Section 15(5), Act No. 14 of 2003 (Kn), *supra*, n. 197; Section 13(4) (b), The Persons with Disabilities Act (Ug), *supra*, n. 702; Section 50, Act No. 651 of 2003 (Gh), *supra*, n. 687; Section 37(3)(a) and (b), and 38(2), Act No. 6 of 2012 (Zmb), *supra*, n. 569; Section 25 (2)(c), Act No. 55 of 1998 (SA), *supra*, n. 687.

<sup>1057</sup> *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*, *supra*, n. 58.

Accommodating disability as difference operates to prevent adverse effect discrimination flowing from employment rules, procedures or standards... (Paragraph 77)

The question of costs of accommodation was also discussed in this case, and the court state, inter alia, that:-

An employer who unreasonably refuses to make any accommodation that falls short of unjustified hardship, or refuses to give reasons for not making an accommodation is irrational... (Paragraph 80)

[R]easonable accommodation is more onerous than a general obligation to implement affirmative action... [It] is also more onerous than accommodating religious and cultural beliefs... [it] prevents absenteeism and unemployment. In a dispute about a nonculpable dismissal for excessive absenteeism caused by disability, the question is whether an employee's absenteeism is caused by the disability or whether an employer has fulfilled its duty to accommodate to the point of hardship... (Paragraph 84)

Finding an accommodation and proving it to be reasonable is an onus resting on the employer. So is the onus of proving that a reasonable accommodation is unjustifiable... (Paragraph 92)

[A]n accommodation that is an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time... (Paragraph 97)

Unjustifiable hardship means '[m]ore than mere negligible Effort'. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. Some hardship is envisaged. A minor interference or inconvenience does not come close to meeting the threshold but a substantial interference with the rights of others does... No hard and fast rule can be set as to what constitutes undue hardship. Each case has to be determined on its own facts. (Paragraph 98)

The facts of the case are almost similar to the facts in Tanzanian cases of *Martin Oyier. v Geita Gold Mine Ltd*;<sup>1058</sup> and *Vodacom Tanzania. v Zawadi Bahenge and 6 others*.<sup>1059</sup>

Although the Tanzanian cases and the *Standard Bank's Case* were decided in favour of dismissed employees, the decision in *Standard Case* stands out as a pace maker in the development of human rights jurisprudence with respect to the employment of persons with disability.

In Kenya, the High Court of Kenya has stood firm on job-accommodation requirements, even with respect to institutions which have been traditionally perceived as "for able bodied persons," – namely the police force.

---

<sup>1058</sup> *Martin Oyier. v Geita Gold Mine Ltd, supra*, n. 864

<sup>1059</sup> *Vodacom Tanzania. v Zawadi Bahenge and 6 others, supra*, n. 890

In the case of *Paul Pkiach Anupa & Another v Attorney General & Another*,<sup>1060</sup> the first petitioner was employed as a Police Constable in 2001 and assigned official duties at the Anti-Stock Theft Unit. In 2003, while on official duty, he was involved in an accident. He sustained spinal cord injury resulting in paralysis of his lower limbs. Medical doctors had recommended “light duties” in the form of office or seated position duties like receptionist, radio room operator, clerical duties and or telephone. However, the Commissioner of Police did not accept this recommendation. He was therefore retired from service on medical grounds. It was the petitioner’s case that despite the fact that Commissioner was fully aware of the fact that the petitioner’s disability was limited to his lower limbs only, the Commissioner made no efforts to provide him with reasonable accommodation or to employ him in the categories of work that the members of the medical board had recommended the petitioner was capable of performing. The petitioner further contended that the Police Service possessed the economic power, facilities and logistics for accommodating the petitioner’s condition and that by assigning the petitioner alternative duties, the Police Service would not have suffered any undue hardship or prejudice. The Petitioner claimed that he was discriminated against contrary to the provisions of the *Constitution of Kenya*.<sup>1061</sup> He also pleaded violation of the provisions of the *Persons with Disabilities Act*<sup>1062</sup> and the *Employment Act*.<sup>1063</sup> The respondent had contended, *inter alia*, that police officers play a very crucial role in maintaining national security and that the responsibility bestowed on them demanded that the Police Force hire and retain persons who could effectively discharge this function. The Respondent further submitted that the 1<sup>st</sup> petitioner was not retired for being ‘disabled’ as alluded to in the petition but for being ‘medically unfit for service’. The Court was of the view that, as the decision was made during the currency of the Constitution, the Commissioner was required to direct his mind not only to the provisions of the Constitution but also to its values and principles. He was also required to consider the rights of persons with disability secured by The Persons with Disabilities Act which was in force. The Court (D.S. Majanja, J.) further stated:-

57... the petitioner’s rights guaranteed under Articles 27, 28 and 54 of the Constitution were violated by the Commissioner of Police retiring the petitioner on medical grounds under Regulation 30(c) of Chapter 20 of the Forces Standing Order without taking into account the possibility of

---

<sup>1060</sup> *Paul Pkiach Anupa & Another v Attorney General & Another*, *supra*, n. 695

<sup>1061</sup> . The Constitution of Kenya, *supra*, n. 693

<sup>1062</sup> Act No. 14 of 2003 (Kn), *supra*, n. 197

<sup>1063</sup> Act No. 11 of 2007 (Kn), *supra*, n. 687.

reasonable accommodation. As a consequence of this failure to reasonably accommodate the petitioner, the Commissioner of Police violated Section 15(6) of The Persons with Disabilities Act by retiring the petitioner before the prescribed retirement age.

58 ... it is necessary for the Police Service Commission to review its Police Standing Orders to ensure that they are consistent with the provisions of the Constitution in order to provide enhanced protection to officers who suffer disability in the course of duty. This is what the Constitution demands

Kenya's Police service procedures were questioned again in the case of Duncan Otieno Waga v The Hon. Attorney General,<sup>1064</sup> where the Court stated:-

This court is of the considered view that, the fact that police service is not employment as known to strict law, puts the respondent to a higher obligation to protect and go an extra mile in ensuring that the welfare of those who suffer disability during their service and even after service is held supreme.

Job-accommodation also entails fair procedure before any decision is reached to retire an employee on grounds of disability. In *Fredrick Gitau Kimani v Attorney General & 2 Others*,<sup>1065</sup> the High Court of Kenya, while citing a South African judgment in *Premier, Mpumalanga & Anor vs. Executive Committee, Association of State-Aided Schools*,<sup>1066</sup> reiterated that discrimination is subtle but can manifest itself in many forms and the State is obligated to eradicate it by *inter-alia* adhering to procedural fairness. The facts in this case were almost similar to *Paul Pkiach Anupa's* case. The Petitioner was relieved of his duties on medical grounds. At the time he was a Prosecutor, and while attending treatment for an illness, he was diagnosed with diabetes and later while hospitalized, his left leg had to be amputated and he was forced upon being discharged, to have an artificial limb fitted. The petitioner was retired a few weeks before attaining the age of 55 (Initially, the Kenyan disability law fix the retirement age for persons with disability at 60, five years longer than the retirement age of persons without disability. On 29<sup>th</sup> May, 2012, the Kenyan Government had belatedly issued a circular to the public service enhancing the minimum mandatory retirement age for persons with disabilities to 65 years old).<sup>1067</sup> The court ruled the termination as unfair.

---

<sup>1064</sup> *Duncan Otieno Waga v The Hon. Attorney General*, *supra*, n. 708.

<sup>1065</sup> *Fredrick Gitau Kimani v Attorney General & 2 Others*, High Court Kenya at Nairobi, Petition 157 of 2011.

<sup>1066</sup> *Mpumalanga & Anor vs. Executive Committee, Association of State-Aided Schools*, Eastern Transvaal [1998] ZACC 20. 17.

<sup>1067</sup> The courts in Kenya have on several occasions upheld the statutory requirement with respect to the retirement age of persons with disability, and have stressed that the provision applies to all employers and such employees in public service, private sector and all other categories of employment. See: *Joram Jotham Waluseshe v Mumias Sugar Co. LTD*, High Court of Kenya at Bungoma, Civil Suit 83 of 2005; *Beatrice*

#### 3.7.2.4. Vocational/Skill Training and Industrial Rehabilitation

Matters related to vocational training or Industrial rehabilitation are addressed in disability laws of various African States, and these States have also in place vocational training laws establishing relevant institutions in an attempt to improve the technical and vocational education,<sup>1068</sup> with the aim of improving the quality of technical and vocational education training in relevant countries.<sup>1069</sup>

The Kenyan disability legislation does not impose a direct duty to provide vocational education, but empowers the national disability council to “formulate and develop measures and policies designed to, *inter alia*, encourage and secure the establishment of vocational rehabilitation centres and other institutions and other services for the welfare, rehabilitation and employment of persons with disability[y].”<sup>1070</sup> Almost the similar approach is found in Zambia’s disability legislation, under which the Minister responsible for persons with disability (after consultation with the Minister responsible for labour and vocational education) to issue Regulations and take measures for enabling persons with disability to, *inter alia*, have effective access to technical and vocational training.<sup>1071</sup> Uganda’s disability legislation imposes a direct duty upon the government to take vocational rehabilitation measures to develop the skills and potentials of persons with disability with the aim of enabling them to compete favorably in the labour market.<sup>1072</sup> Ghana’s main disability legislation’s provision on vocational training seems to focus more on special education,<sup>1073</sup> which appears contrary to the view that inclusive vocational training offers a broader range of options (than special education), and thereby encompassing the diverse interests and talents of persons with disability.<sup>1074</sup>

Vocational education laws also address disability in various forms, such as the requirement of the technical and vocational training programmes to be designed to facilitate the special

---

*Achieng Osir v Board of Trustees Teleposta Pension Scheme*, *supra*, n. 575; *Mary Wangui Gakunju v City Council of Nairobi*, Industrial Court of Kenya at Nairobi, Cause No. 27 of 2012; and *Silas Rukungu Karanja v Teachers Service Commission*, *supra*, n. 575. In *Mary Wangui Gakunju*’s case, the court “considered” the retirement age provisions along the lines of affirmative action measures.

<sup>1068</sup> Section 1, *The Technical and Vocational Education and Training Act, 2006* (Act 718 of 2006) (Ghana) ; Section 6(1), *The Technical and Vocational Education and Training Act, 2013* (Act No. 29 of 2013) (Kenya)

<sup>1069</sup> Ansah, S. K. and TErnest, K. (2013), *supra*, n. 952, at p. 178.

<sup>1070</sup> Section 7(1)(b)(vii), Act No. 14 of 2003 (Kn), *supra*, n. 197.

<sup>1071</sup> Section 35(3)(d), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>1072</sup> Section 11, *The Persons with Disabilities Act (Ug)*, *supra*, n. 702.

<sup>1073</sup> Section 21, Act No. 715 of 2006 (Gh), *supra*, n. 702.

<sup>1074</sup> Stein, M. A. and Stein, J. S. P. (2007), *supra*, n. 155, at p. 1228..



needs of persons with disability;<sup>1075</sup> inclusion of persons with disability in governing organs of special education training;<sup>1076</sup> having a specified unit tasked with the training of persons with disability;<sup>1077</sup> having as principle of vocational training, “to increase equitable access to disadvantaged groups, such as women and people with disability[y]”;<sup>1078</sup> or vesting to a vocational training institution policy functions which are geared to ‘improve the productivity and competitiveness of the skilled workforce and raise the income generating capacities of people, and in particular low income groups,<sup>1079</sup> such as persons with disability (among others).

### 3.7.2.5. Provision of Assistive Devices

Disability laws imposes obligation upon certain entities (mostly government entities) to provide or to ensure the provision of assistive devices to persons with disability.

According to Uganda’s disability legislation, the government shall provide supportive social services to persons with disability through the acquisition of, *inter alia*, assistance devices, and assistance personal services.<sup>1080</sup> In Kenya, among the functions of the national disability focal point entity, National Council for Persons with Disabilities, is to provide, to the maximum extent possible assistive devices, appliances and other equipment to persons with disability,<sup>1081</sup> and the sources of and payments may be allocated (from the National Development Fund for Persons with Disabilities) to provide or contribute to the cost of assistive devices and services.<sup>1082</sup> In Ghana, it is the Ministry of Health which is responsible for, *inter alia*, the provision of appropriate assistive devices for persons with ‘total’ disability.<sup>1083</sup> In Zambia, the Zambia’s disability agency (the national focal point) has, *inter alia*, the informative function with respect to the availability and use of, new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disability.<sup>1084</sup> Under South

<sup>1075</sup> Section 32(2)(iv), *Technical and Vocational Education and Training Act* (Kenya), *supra*, note 1042.

<sup>1076</sup> For example, Sections 8(6), 48(2)(b), Act No. 29 of 2013 (Kn), *supra*, n. 1068; Section 16(1)(c), *The Business, Technical, Vocational Education Act, 2008* (Act No. 12 of 2008) (Uganda) .

<sup>1077</sup> Section 11(g), Act 718 of 2006 (Gh), *supra*, n. 1068.

<sup>1078</sup> Section 4(h), Act No. 12 of 2008 (Ug), *supra*, n. 1076.

<sup>1079</sup> *Ibid.* Also section 2 of Act 718 of 2006 (Gh), *supra*, n. 1068 does not specifically mention low income groups or persons with disability. This can be implied from the provision for the establishment of specific division for persons with disabilities under the Act.

<sup>1080</sup> Section 28(a), *The Persons with Disabilities Act* (Ug), *supra*, n. 702.

<sup>1081</sup> Section 7(1)(d)(i), Act No. 14 of 2003 (Kn), *supra*, n. 197

<sup>1082</sup> Section, 33(2)(b) , *ibid.*

<sup>1083</sup> Section 31, Act No. 715 of 2006 (Gh), *supra*, n. 702.

<sup>1084</sup> Section 17(3), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

Africa's, *Promotion of Equality and Prevention of Unfair Discrimination Act*, no person may unfairly discriminate against any person on the ground of disability, including by denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society.<sup>1085</sup> The definition of the term person under that act cover individuals and institutions, which creates a possibility that the responsibility for the provision of such devices extend also to private entities, which may also include employers.

Although matters related to the provisions of assistive devices are often contained in disability related laws or policies, the Kenyan constitution provides for persons with disability's entitlement to, *inter alia*, access materials and devices to overcome constraints arising from the person's disability.<sup>1086</sup> Zambia's draft constitution contains a similar provision.<sup>1087</sup>

Three issues may arise with respect to assistive devices. First, on what actually should be included in "assistive devices" or "the materials and devices used to overcome constraints arising from the person's disability"; second, on who is responsible for the actual provision or bearing the cost of the provision of assistive devices; and third, if these devices are to be provided by employers or the government, there can be an issue of limiting the category of persons qualifying considering the availability of resources.

With respect to the first issue, examples from Kenya and Zambia may shed light on the term. The Kenya's disability legislation defines assistive device to mean:

implements, tools and specialised services (including the services of qualified interpreters for the deaf and qualified teachers for the blind) provided to persons with disabilities to assist them in education, employment or other activities.<sup>1088</sup>

The above definition is similar to Zambia's definition, except that Zambia's definition includes "the services of personal assistants for persons with disability[y]".<sup>1089</sup> Disability laws Uganda, South Africa, and Ghana do not define the "assistive devices", although they contain provisions covering the same. From the definitions of the term in Zambia and Kenya, it is clear that the term assistive device extend to such devices which be used by persons with disabilities to overcome constraints (caused by impairment) in employment.

---

<sup>1085</sup> Section 9(a), Act No. 4 of 2000 (SA), *supra*, n. 350.

<sup>1086</sup> Article, 54(1)(e), The Constitution of Kenya, *supra*, n. 693.

<sup>1087</sup> Article 45(1)(g), Draft Constitution of Tanzania.

<sup>1088</sup> Section 2, Act No. 14 of 2003 (Kn), *supra*, n. 197.

<sup>1089</sup> Section 2, Act No. 6 of 2012 (Zmb), *supra*, n. 569;

With respect to the second question, it is mostly the government institutions which have been charged with the provision of, or facilitation of the availability of assistive devices.

**Safe and Healthy Working Conditions**

There are different approaches and languages with respect to ‘the right to safe and healthy working conditions’ in constitutions as well as legislation. Under the *Constitution Ghana*, it is clearly provided that “every person has the right to work under satisfactory, safe and healthy conditions...”,<sup>1090</sup> and the same can be inferred under the *Constitution of Kenya* through the right to “reasonable working conditions”.<sup>1091</sup> The *Constitution of Uganda* empowers the parliament to enact the law to provide for the right of persons to work under satisfactory, safe and healthy conditions.<sup>1092</sup> Not every disability law directly mentions “safe and healthy working conditions” as a right, although the same can be inferred through the general application of safety and healthy occupational laws or policies, or anti-discrimination provisions with respect to working conditions. Under Uganda’s disability legislation, “healthy and safe labour condition” is being treated as a disability prevention measure.<sup>1093</sup>

### **3.7.2.6. Incentives**

#### **(a) Incentives to Employers**

Disability or employment law may entitle private employers who employ persons with disability to apply for some tax deductions. These may be either for the purpose of encouraging employers to employ persons with disability, or for remunerating employers in relation to costs of the improvements, or special services, where those employers modifies their physical facilities or avail special services in order to provide reasonable accommodation for employees with disabilities.<sup>1094</sup>

---

<sup>1090</sup> Article 24(1), The Constitution of Ghana, *supra*, n. 350.

<sup>1091</sup> Article 41(2)(b), The Constitution of Kenya, *supra*, n. 693.

<sup>1092</sup> Article 40(1)(a), The Constitution of Uganda, *supra*, n. 350

<sup>1093</sup> Section 9(c), The Persons with Disabilities Act (Ug), *supra*, n. 702.

<sup>1094</sup> Under Kenya’s disability law, a private employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities is entitled to apply for additional deductions from his net taxable income equivalent to fifty percent of the direct costs of the improvements, modifications or special services (Section 16(2), Act No. 14 of 2003 (Kn), *supra*, n. 197). Tax deductions are also provided for by the law in Uganda. (Section 13 (4)(c), The Persons with Disabilities Act (Ug), *supra*, n. 702. Before its amendment, section 17 of Uganda’s Persons with Disabilities Act offered private employers a tax deduction of fifteen percent of all payable tax whose ten or more of their employees were persons with disability either as regular employees, apprentice or learner on full time basis (upon proof to the Uganda Revenue Authority). Currently, the reduction stands at two percent. Also see

## **(b) Incentives to Persons with Disability**

In some African states, employees with disabilities are entitled to exemption from tax on all income accruing from the employment. Similar exemptions may also be used as a means of enhancing self-employment of persons with disability.<sup>1095</sup> There are also “general” incentives in the form of tax exemptions with respect to materials, Articles and equipment (including motor vehicles) that are modified or designed for the use of persons with disability.<sup>1096</sup>

## **(c) Organisational Rights**

Some disability or employment laws expressly prohibit discrimination of persons with disability in exercising trade union rights.<sup>1097</sup> Where there are no specific provisions that mention persons with disability in matters related to organizational rights, persons with disability can still enjoy protection from general anti-discrimination provisions.<sup>1098</sup>

## **3.8 Conclusive Summary**

This chapter has defined work in its general and human rights perspectives. Work as a right has a longer history than disability rights as a movement, but the earlier approaches to disability in ILO conventions did not have enough protection to persons with disability. Nevertheless, ILO conventions were an important step in the recognition of persons with disability’s rights at the work place. In recognition of the significance of work for persons with disability’s autonomy and inclusion, and the challenges they face in realizing the right to work, Article 27 of the CRPD back the existing right to work provisions in the international and regional instruments, in particular, the ICCPR, ICESCR and the *Banjul Charter*. These international norms are useful for setting common standards for disability legislation.<sup>1099</sup>

---

Section 37 (1) and 37(4), Act No. 6 of 2012 (Zmb), *supra*, n. 569; Section 10(1), and Act No. 715 of 2006 (Gh), *supra*, n. 702.

<sup>1095</sup> Section 12(3), Act No. 14 of 2003 (Kn), *supra*, n. 197; Section 32 (2), 37(5), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>1096</sup> Section 35(3), Act No. 14 of 2003 (Kn), *supra*, n. 197. Also see *The Persons with Disability (Access to Employment, Services and Facilities) Regulations* (L. N No. 62 of 2009) (Kenya) ;

<sup>1097</sup> Section 87(1), Act No. 651 of 2003 (Gh), *supra*, n. 687; Section 12(2)(i), The Persons with Disabilities Act (Ug), *supra*, n. 702. Section 35(3)(c), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>1098</sup> For example, Section 5(1), *The Labour Relations Act, 2007* (Act No. 14 of 2007) (Kenya) ; Section 5(1), *The Labour Relations Act, 1995* (Act No. 66 of 1995) (South Africa) .

<sup>1099</sup> UN Enable (2007) *Overview of International Legal Frameworks for Disability Legislation*, accessed: 7.11.2011.

In fulfilling their international obligations, Tanzania and several African States have in place laws and policies on employment and disability. The quality and coverage of these instruments vary from one country to another, although there are some similarities with respect to some matters. One thing which is clear is that in Africa, the trend is to combine both quota schemes and anti-discrimination approaches. Generally, while both equality and quota approaches have their advantages, “they each have serious problems that cannot be ignored, and it is difficult to argue that one system is superior to the other.”<sup>1100</sup> Combining both quota and anti-discrimination approaches serves two purposes: First, quota schemes address the fact that some persons with disability are still unable to find jobs even in the presence of anti-discrimination measures. I hold the view that in the area of employment, quota schemes are an appreciation of the fact anti-discrimination can be very effective, but in most cases after employer-employee relationship has been established. Although anti-discrimination measures serve to eliminate barriers prior and during employment, it is still a fact that there are still some prejudices against persons with disability brought by social stigmatisation. These prejudices affect persons with disability even before they meet employers. An imposition of quota obligation upon employers is one among the ways to facilitate the “meeting” of employers and job seekers with disability.

Stipulation of norms in legislative instruments is one thing quite different from their actual realization. The implementation of measures stated in this chapter requires effective institutional mechanisms and involvement of persons with disability whether through the organizations of persons with disability, employers’ associations or other human rights organizations. This necessitates an analysis of the institutional mechanism in place for implementing relevant laws and policies on matters related to the employment and persons with disability. Such an analysis is contained in the next chapter.

---

<sup>1100</sup>Hasegawa, T. (2007), *supra*, n. 829, at p. 56.

## CHAPTER 4

### ADMINISTRATION, MONITORING AND ENFORCEMENT, AND INVOLVEMENT OF CIVIL SOCIETY

#### 4.1. Introduction

The protection of human rights in legal or policy documents is only a step towards their actual realization. The enforcement of human rights standards also depends on how effective the institutional mechanisms for implementation of these standards are. Considering a general concern that it is easier to provide for human rights than it is to implement them,<sup>1101</sup> the enforcement of rights of persons with disability could be even more difficult, because of many years of sidelining disability not only in human rights documents, but also in their respective institutional mechanisms. Lack of comprehensive approach to disability issues, and the neglect of human rights approach to disability in policy making, meant that disability rights required the transformation of social structures and not just the adoption of isolated measures.<sup>1102</sup> In developing States, lack of institutional capacities for implementing disability policies is the one among the major problems that hinders, *inter alia*, effective delivery of services (and for that matter, realization of rights) to persons with disability.<sup>1103</sup> The CRPD tackles the sidelining of disability by providing for means through which the rights of persons with disability can be implemented internationally as well as domestically. Generally, the means are through institutional/administrative as well as legislative measures; and there is also emphasis on the participation of persons with disability.<sup>1104</sup> Compared to CRPD, the relevant ILO Conventions which were adopted many years before the CRPD have been less specific about national implementation mechanisms to be adopted by States. The *Discrimination (Employment and Occupation) Convention* gives States the freedom to adopt appropriate methods<sup>1105</sup> to national conditions and practice”,<sup>1106</sup> and according to the *Vocational*

---

<sup>1101</sup>Peter, C. M. (2009), 'Human Rights Commissions in Africa: Lessons and Challenges', in A. Bösl and J. Diescho (Eds.), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, at p. 351.

<sup>1102</sup>Beco, G. de (2011), *supra*, n. 234, at p. 87.

<sup>1103</sup>Yokoyama, A. (2012) 'A Comparative Analysis of Institutional Capacities for Implementing Disability Policies in East African Countries: Functions of National Councils for Disability, *Disability, CBR & Inclusive Development*, Vol. 23, No. 2, at p. 23, accessed: 19.2.2014

<sup>1104</sup>Article 33(1), (2), and (3), CRPD, *supra*, n. 24.

<sup>1105</sup>Beco, G. de (2011), *supra*, n. 234

*Rehabilitation and Employment Convention*, States are allowed to adopt “laws or Regulations or by any other method consistent with national conditions and practice”.<sup>1107</sup>

In fulfilling their obligations with respect to matters related to employment of persons with disability, States have established different institutions, and conferred upon them the authority to perform such functions as stipulated in their respective laws or policies. In this chapter, I give an account of institutional mechanisms for the promotion, monitoring and enforcement of the rights of persons with disability. Considering the fact that Tanzania and all other States selected for the purposes of this study have ratified the CRPD, and considering the specific nature CRPD provisions on national implementation mechanisms, the discussion in this chapter is focused first on the CRD requirement on national action, and second, the extent to which national measures in Tanzania and selected African States are in compliance with the CRPD standards on equality generally, and employment in particular.

#### **4.2. CRPD and Domestic Structural Mechanisms**

Before the adoption of the CRPD, it was in 1994 that for the first time the international instrument placed significant emphasis on the need of specific organs within States to deal with matters of persons with disability. The earliest UN instrument to specifically address matters of persons with disability (albeit only a particular group), the DRMRP, did not place emphasis on domestic monitoring and administrative measures to ensure its implementation. The same was with the DRDP, save for the requirement of consultation of organisations of persons with disability. There were significant improvements in late 1993, as the *Standard Rules* required States to establish and strengthen national coordinating committees, or similar bodies, to serve as national focal points on disability matters. These ought to be permanent and based on legal as well as appropriate administrative Regulation.<sup>1108</sup> In addition, the *Standard Rules* emphasized on the representation of private and public organisations, in particular government ministries, organizations of persons with disability and non-governmental organizations.<sup>1109</sup> Significantly, the *Standard Rules* required that the national coordinating committee should be provided with sufficient

---

<sup>1106</sup> Article 3, ILO Convention No. 111 of 1958, *supra*, n. 242.

<sup>1107</sup> Article 6, ILO Convention No. 159 of 1983, *supra*, n. 243.

<sup>1108</sup> Rule 17(1), *Standard Rules*, *supra*, n. 226

<sup>1109</sup> Rule 17 (2), *ibid*.

autonomy and resources to fulfill its responsibilities in relation to its decision-making capacities.<sup>1110</sup>

The non-binding nature of the previous disability rights instruments necessitated the insertion of similar provisions in the CRPD. Article 33 of the CRPD provides:-

- (1) States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
- (2) States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.
- (3) Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process

Article 33 is “arguably the most complete provision on national level implementation and monitoring ever in international human rights,”<sup>1111</sup> and one of the far reaching structural innovations.<sup>1112</sup> It must therefore not be interpreted as a mere incentive for States to implement the Convention, but as an extension of a general duty which falls upon states authorities by virtue of international human rights law.<sup>1113</sup> The structural shifts with respect to implementation creates “obligations of conduct,” defining how States should reach the desired goals.<sup>1114</sup> By focussing on both international and domestic mechanisms, the CRPD bridges the gap between the international and national monitoring and implementation mechanisms, and between human rights standards and their practical application.<sup>1115</sup> This

---

<sup>1110</sup> Rule 17(4), *ibid.*

<sup>1111</sup> OHCHR 'Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe, OHCHR, at p. 4.

<sup>1112</sup> Beco, G. de and Hoefmans, A. (2013), 'National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities', in G. de Beco (Ed.), *Article 33 of the UN Convention on the Rights of Persons with Disabilities*, at p. 21; OHCHR, *supra*, n. 1111.

<sup>1113</sup> Beco, G. de and Hoefmans, A. (2013), *supra*, n. 1112, at p. 21.

<sup>1114</sup> Hoefmans, A, Beco, G. de (2010) *Background Document prepared for the International Conference*, at p. 18, [http://www.socialsecurity.fgov.be/eu/docs/agenda/18-19\\_11\\_10\\_background\\_document.pdf](http://www.socialsecurity.fgov.be/eu/docs/agenda/18-19_11_10_background_document.pdf), accessed: 8.2013; Beco, G. de (2011), *supra*, n. 234, p. 85.

<sup>1115</sup> *Ibid*, p. 90



approach is not found in older human rights treaties, like ICCPR and ICESR.<sup>1116</sup> Article 3 of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* contained just “partial” domestic mechanisms,<sup>1117</sup> although the focus of both international and national implementation mechanisms is a standard feature of environmental and other international agreements.<sup>1118</sup>

Article 33 should be read together with other provisions of the CRPD, and should in no way limit measures intended to be taken for the realisation of the rights of persons with disability, and for purposes of this study, the right to work. The CRPD allows states to adopt measures “which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State”.<sup>1119</sup> Therefore, Article 33 seems to be an expansion of Article 4(1)(a) (on the adoption of all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention); and that in recognizing that some measures mentioned in Article 27 (right to work) or 33 may require changes in legislation or practices, Article 4(1)(b) requires the adoption of appropriate measures “to modify or abolish existing laws, Regulations, customs or practices that constitute discrimination of persons with disability[y]”.

#### **4.2.1. Disability Focal Points and Co-ordination Mechanisms**

Article 33(1) provides for two components of implementation: first, one or more entities for matters related to the implementation of the CRPD; and second, the coordination mechanism that aims at boosting cooperation between ministries and to avoid that policymakers adopt isolated measures.<sup>1120</sup> This is a recognition of the fact that implementation of international human rights treaties are ultimately domestic issues, and also an acknowledgement that the responsibility at the national level extends across a wide range of government sectors, which brings significant coordination and coherency challenges.<sup>1121</sup> However, the establishment or designation of a coordination mechanism is optional, since obligation is only “to give due consideration” on the designation of a

---

<sup>1116</sup>Gatjens, L. F. A. (2011) 'Analysis of Article 33 of the UN Convention: The Critical Importance of National Implementation and Monitoring, *SUR - International Journal on Human Rights*, Vol. 8, No. 14, at p. 87.

<sup>1117</sup>*Ibid*, at p. 72..

<sup>1118</sup>Lord, J. E. and Stein, M. A. (2008), *supra*, n. 244, at p. 462.

<sup>1119</sup> Article 4(4), CRPD, *supra*, n. 24.

<sup>1120</sup>OHCHR, *supra*, n. 1111, at p. 4; Gatjens, L. F. A. (2011), *supra*, n. 1116, at p. 73..

<sup>1121</sup>Lord, J. E. and Stein, M. A. (2008), *supra*, n. 244, at p. 463.

coordination mechanism.<sup>1122</sup> Article 33(1) also creates the possibility of mainstreaming disability rights throughout the public administration and the different levels of powers, and under the circumstances, coordination is necessary to avoid isolated and at times inconsistent measures.<sup>1123</sup>

States have wide options of designing the disability focal point “in accordance with their system or organisations.” A disability focal point within a government can be either an independent statutory body or an administrative unit within a government ministry.<sup>1124</sup> There are differences between the two types of arrangements, mainly in the nature of their functions and operations; the extent of their powers and influence; and the nature of inclusiveness. Yokoyama (2012), while analyzing East African national disability focal point institutions, outlined three major differences: -

First, the functions of statutory bodies are clearly defined by law, while those of disability divisions within government ministries are not, which makes the latter’s roles and responsibilities indistinct. Secondly, different ministries may be required by law to take part in an NCD, which enables the promotion and the development of disability laws and Regulations across the different ministries. However, the disability division within a ministry does not have any influence over other ministries on the development of disability laws and Regulations. Thirdly, an NCD can fulfil its functions by using the network of those members who are representatives from ministries and DPOs. On the other hand, disability divisions within a ministry can only fulfil functions as a disability unit within the institutions in the same ministry.<sup>1125</sup>

Although the CRPD gives the States the freedom to find appropriate ways within their system of organization within governments, it is important that focal points be availed with the necessary resources to carry out their function and be sufficiently accessible to persons with disability.<sup>1126</sup> Gatjens lists seven conditions which the focal points mentioned under Article 33(1) should meet:

First: The designated entity should be part of the government or the executive branch, which is primarily responsible for implementing the CRPD... It is important to designate a specific entity within the executive branch ‘to avoid blurring of responsibility across government....’

Second: The designated entity should be close to the central authority (for example, a ministry, a secretariat, or the Office of the President) that issues instructions and policies that have an effect on the rest of the ministries and

---

<sup>1122</sup>OHCHR, *supra*, n. 1111, at p. 4.

<sup>1123</sup>Beco, G. de (2011), *supra*, n. 234, at p. 100.

<sup>1124</sup>Yokoyama, A. (2012), *supra*, n. 1103, at p. 29.

<sup>1125</sup>*Ibid.*

<sup>1126</sup>OHCHR, *supra*, n. 1111, at p. 4.

government institutions... The entity should not be part of the Ministry of Health (which is typically a component of the medical model that treat s persons with disabilities as patient s), or of the Ministry of Social Welfare (which tends to consider persons with disabilities as objects in a government welfare system), and neither should it belong to the Ministry of Labor (which addresses only the labor aspect of the needs of persons with disabilities).

Third: The designated entity should have the necessary human resources, equipment, and budget to perform its duties. It should not render services directly to persons with disabilities but [it] should promote inclusive development in the field of the rights of persons with disabilities.

Fourth: The designated entity should play a very active role in coordinating with other government agencies that implement the treaty, developing policies, programs, projects, and actions that fall within their competence. [Such inter-institutional coordination measures are important], since the designated entity will interact – providing expertise on the matter- with other government agencies...

Fifth: In the performance of their functions, the directors and staff of the entity tasked with promoting implementation should be guided by the social model of disability.

Sixth: The designated entity should be open to coordination and consultation with organizations of persons with disabilities and it is advisable for it to have among its leaders and staff persons with disabilit[y] who are socially and politically empowered.

Seventh: The entity should be willing to collaborate and receive criticism and comments from the monitoring institution or mechanism established under Paragraph 2 of the same Article 33<sup>1127</sup>

The oversight role of the entity tasked with promoting and coordinating implementation of CRPD should not be confused with the monitoring function of the national human rights institution (*Paris Principles Institutions*) stated in Article 33(2) (discussed in the followingsubsection).<sup>1128</sup>The difference between the focal points under Article 33(1) and the independent mechanisms (national human rights institutions) under Article 33(2) seems to be that the independent mechanisms are focused on how the state and its institutions are performing with regard to the rights of persons with disability.<sup>1129</sup> In other words, the independent mechanisms are entrusted with promotion, protection and monitoring of the focal point's implementation.<sup>1130</sup>In this case, monitoring by the entities mentioned in

---

<sup>1127</sup>Gatjens, L. F. A. (2011), *supra*, n. 1116, pp. 73 – 74.

<sup>1128</sup>*Ibid*, at p. 78.Carver, R. (2010) 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law, *Human Rights Law Review*, Vol. 10, No. 1, at p. 27..

<sup>1129</sup>Gatjens, L. F. A. (2011), *supra*, n. 1116, at p. 78.

<sup>1130</sup>Beco, G. de (2011), *supra*, n. 234, at p. 100.

Article 33(1) is aimed at promoting—in a coordinated manner—public policies and inclusive programs.<sup>1131</sup>

#### 4.2.2. National Human Rights Institutions

A precise definition of the National Human Rights Institutions (NHRIs) may be illusive, but they can be generally described as permanent and independent bodies, established by states through law, for the specific purpose of promoting and protecting international human rights norms domestically.<sup>1132</sup> NHRIs can be (and may not be limited to) ombudsmen, the rights commissions or “hybrid” human rights ombudsmen.<sup>1133</sup>

With the exception of ombudsman institutions which spread through Scandinavia in the early to mid-twentieth century, the history of international initiatives for the formation of NHRIs began shortly after the birth of the United Nations, and their formation expanded significantly in 1990s.<sup>1134</sup> In 1991, Principles relating to the Status of National Institutions (*The Paris Principles*) were adopted by an international conference of NHRIs, and were subsequently adopted by the UN General Assembly in 1993.<sup>1135</sup> These became the first instrument to state the role and functions of NHRIs, and are generally considered as the international minimum standards for NHRIs.<sup>1136</sup> These do not possess the quality of legally binding rules, but they have gained considerable political and moral weight due to the fact that various international and national organisations have welcomed these principles and

---

<sup>1131</sup> Gatjens, L. F. A. (2011), *supra*, n. 1116, at p. 75.

<sup>1132</sup> See: Koo, J. W. and Ramirez, F. O. (2009) 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004', *Social Forces*, Vol. 87, No. 3, at p. 1324; Pohjolainen, A. (2006) *The Evolution of National Human Rights Institutions: The Role of the United Nations*, Copenhagen: The Danish Institute for Human Rights, at p. 6; Reif, L. C. (2000) 'Building Democratic Institutions: Protection: The Role of National Human Rights Institutions in Good Governance and Human Rights', *Harvard Human Rights Journal*, Vol. 13, pp. 5 – 6; Smith, A. (2006) 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?', *Human Rights Quarterly*, Vol. 28, No. 4, at p. 909; Cardenas, S. (2003) 'Emerging Global Actors: The United Nations and National Human Rights Institutions', *Global Governance*, Vol. 9, No. 1, at p. 23; Pegram, T. (2010) 'Diffusion Across Political Systems Human Rights Quarterly: The Global Spread of National Human Rights Institutions', *Human Rights Quarterly*, Vol. 32, No. 3, at p. 739.

<sup>1133</sup> Koo, J. W. and Ramirez, F. O. (2009), *supra*, n. 1132, at p. 1324; Reif, L. C. (2000), *supra*, n. 1132, at p. 2; Pegram, T. (2010), *supra*, n. 1132.

<sup>1134</sup> See: Kumar, C. R. (2003) 'National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights', *American University International Law Review*, Vol. 19, No. 2, pp. 266 – 268; Reif, L. C. (2000), *supra*, n. 1132, pp. 7 - 8; Pohjolainen, A. (2006), *supra*, n. 1132, at p. 6; Cardenas, S. (2003), *supra*, n. 1132, at p. 23, 28, and 29; Pegram, T. (2010), *supra*, n. 1132, pp. 729, 730 and 732.

<sup>1135</sup> *Principles relating to the Status of National Institutions*, General Assembly resolution 48/134 of 20 December 1993 (Paris Principles)

<sup>1136</sup> See: Kumar, C. R. (2003), *supra*, n. 1134, pp. 266 – 268; Reif, L. C. (2000), *supra*, n. 1132, pp. 7 - 8; Pohjolainen, A. (2006), *supra*, n. 1132, at p. 6; Cardenas, S. (2003), *supra*, n. 1132, at p. 23, 28, and 29; Pegram, T. (2010), *supra*, n. 1132, pp. 729, 730 and 732.

encouraged governments to follow them.<sup>1137</sup> NHRIs have thus often been described as the “Paris Principle Institutions.” These institutions play a role as a bridge between international human rights standards on one hand, and their implementation at the national level on the other hand.<sup>1138</sup> They are therefore an answer to the question” of the implementation gap - the inconsistency between formal treaty obligations and actual respect for human rights on the ground.<sup>1139</sup>

In adhering to the *Paris Principles*, many states have formed the NHRIs. In Africa, a few ombudsman offices were established starting in the mid-1960s and 1970s, and the popularity of national human rights institutions had increased in Africa in 1980s and 1990s and recent years.<sup>1140</sup> The African States selected for purposes of this study have established the NHRIs prior to the CRPD. These institutions are stated in the respective constitutions, and often, detailed information can be found in Acts of parliament. The formation of NHRIs has given hopes for a possible avenue to address human rights concerns domestically.<sup>1141</sup>

Before the adoption of the CRPD, a survey had been made of the NHRIs across the world, including some African institutions,<sup>1142</sup> on matters related to disability rights. Although the analysis of the findings did not purport to be scientific or exhaustive, it did however give an indication of the steps taken by national institutions to give greater effect to the rights of persons with disability, and thereby demonstrates their potential.<sup>1143</sup> It was found, inter alia, that NHRIs are generally well aware of the human rights perspective on disability and relevant United Nations developments, and that:-

Disability ... rank[ed] high on the agenda of some national institutions, either because the law so require[d] or because the institutions ha[d] raised this standing. Most institutions ma[de] no genera operational distinctions between different impairments or disabilit[y], but work[ed] from a general human rights or non-discriminative perspective. Distinctions [was} made only where they [were] clearly required to do full justice to the individual. The respondents

<sup>1137</sup>Pohjola, A. (2006), *supra*, n. 1132, at p. 9.

<sup>1138</sup>Carver, R. (2010), *supra*, n. 1128, at p. 1. The expectation that NHRIs will act as links to the international human rights regime seems to be “a reprise of an idea conceived in the earliest years of the United Nations that national human rights committees should be established to monitor state compliance with the norms contained in the Universal Declaration of Human Rights.” (*ibid*).

<sup>1139</sup>*Ibid*, at p. 30.

<sup>1140</sup>Reif, L. C. (2000), *supra*, n. 1132, at p. 61; Pegram, T. (2010), *supra*, n. 1132, at p. 741.

<sup>1141</sup>Kumar, C. R. (2003), *supra*, n. 1134, at p. 275, citing Ghai (2000).

<sup>1142</sup>Quinn, G, 'National Human Rights Institutions: Catalysts for Change', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, at p. 169.

<sup>1143</sup>*Ibid*.

seem[ed] evenly divided over whether gender and disability require particular attention. Some national institutions ha[d] designated specific staff for members of the commissions) to deal with disability. Although this may not [have been] politically correct since it appear[ed] to militate against mainstreaming, it tend[ed] to have worked well in practice, perhaps because the institutions [were] in a transitional phase.<sup>1144</sup>

The above findings, about four years before the CRPD, indicated that there were still some issues to be settled as regards to how the NHRIs operated with respect to the rights of persons with disability.

Article 33(2) of the CRPD calls for the frameworks of one or more independent mechanisms which are in line with the *Paris Principles*, to promote, protect and monitor implementation of the CRPD. By “framework”, it is meant that the mechanisms, irrespective of their number or organizational structure, should form a coherent whole, and there is no standard model for such frameworks.<sup>1145</sup> The spirit of Article 33(2) is that these mechanisms should be independent and pluralist.<sup>1146</sup> By being independent, it is meant that the mechanisms should be functionally independent, be personally independent and financially independent.<sup>1147</sup> Pluralism links the NHRIs with civil society,<sup>1148</sup> such as the organisations of persons with disability or trade unions.

The CRPD’s inclusion of the obligation to align the independent mechanisms with *Paris Principles* is a recent trend in human right treaties, and reflects the increased presence of NHRIs in human rights processes in recent years.<sup>1149</sup> This obligation is a “call for change” that is aimed at enhancing implementation of the rights of persons with disability, by having independent bodies to constantly remind States of the of their CRPD obligations.<sup>1150</sup>

Because most of the national human rights institution that have been in existence before the CRPD focus on human rights generally, the use of *Paris Principles* should be construed in light of the specific mandate of the disability rights mechanisms, since Article 33(2) of CRPD deals with the mechanisms solely concerned with disability rights. It follows therefore, while some matters with respect to the practice of the existing NHRIs

---

<sup>1144</sup>*Ibid.*, at p. 176.

<sup>1145</sup>Beco, G. de (2011), *supra*, n. 234, at p. 97.

<sup>1146</sup>*Ibid.*, at p. 89.

<sup>1147</sup>*Ibid.*

<sup>1148</sup>*Ibid.*

<sup>1149</sup>*Ibid.*, at p. 97.; Gatjens, L. F. A. (2011), *supra*, n. 1116, at p. 75..

<sup>1150</sup>Beco, G. de (2011), *supra*, n. 234, pp. 87 – 88.

may not change, such as the principle of independence, it may be necessary to determine the inclusion of persons with disability (often through the organizations of persons with disability) in such mechanisms.<sup>1151</sup>

Because, as already pointed out, that States selected for purposes of this study had already in place NHRIs prior to CRPD, the designation or establishment independent mechanism depends on existing mechanisms.<sup>1152</sup> The current institutions can be maintained and given functions to promote, protect and monitor the implementation of the CRPD if what is missing is only a human rights approach to disability. It is also important to note that the reference to the *Paris Principles* in Article 33(2) of the CRPD supports that the said designation should be made by a legal instrument,<sup>1153</sup> which means that the designation of such independent mechanisms should be something more than internal administrative arrangement within the existing NHRIs.

An important question with respect to the existing NHRIs is whether it should be these institutions or others which should be conferred with the mandate stipulated under Article 33(2) of the CRPD. Despite the fact that the *Paris Principles* state that the human rights mandate of an NHRI should be as broad as possible,<sup>1154</sup> they do not give a clear guidance as to the numbers of NHRI within a state.<sup>1155</sup> An argument has been raised that the choice of single or multiple institutions will depend on which mechanism offers a more effective protection of human rights.<sup>1156</sup> It has also been suggested that other bodies, especially those already dealing with disability issues, might be designated as independent mechanisms, acting either alone or together with the existing NHRIs.<sup>1157</sup>

One argument against conferring the CRPD mandate to the existing NHRIs is that while existing NHRIs are obliged to pay attention on the disability rights, conferring to such institution an additional mandate with respect to CRPD presents a danger that these institutions may pay more attention to disability rights (than other human rights), and result

---

<sup>1151</sup> *Ibid*, at p. 93.

<sup>1152</sup> *Ibid*, at p. 97.

<sup>1153</sup> *Ibid*, at p. 92.

<sup>1154</sup> Competence and Responsibilities (2), *Paris Principles*, *supra*, n. 1135

<sup>1155</sup> Carver, R. (2010), *supra*, n. 1128, at p. 4.

<sup>1156</sup> Carver, R. (2011) 'One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights?: Lessons from the European Experience', *Journal of Human Rights Practice*, Vol. 3, No. 1, at p. 8.

<sup>1157</sup> Beco, G. de (2011), *supra*, n. 234, pp. 94, 104, 106. From De Beco's conclusion, the idea of designating the national human rights institutions as the independence mechanisms to monitor the CRPD is not totally rejected: "NHRIs should not blindly be designated independent mechanisms. In the hypothesis that there is an NHRI in a State, the best option could be either to designate the NHRI, to appoint other bodies, or to combine both."

into the “imbalance” of the mandates of the NHRIs, and that these institutions may not execute the mandate under Article 33(2) equally.<sup>1158</sup> On the other hand, the idea of separate institutions for separate groups has been criticised for, *inter alia*, portraying that “one particular vulnerable group is more entitled than others to have its ‘own’ institution.”<sup>1159</sup>

According to the General Observations of the *International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights* (ICC), the trend which is a strong national human rights protection system in a State by having one consolidated and comprehensive national human rights institution is encouraged. Only very exceptional circumstances, should more than one national institution seek accreditation by the ICC. Furthermore, the ICC Statute provides that “At General Meetings only one (1) NHRI per Member State of the United Nations shall be eligible to be a voting member. Where more than one (1) institution in a State qualifies for membership the State shall have one (1) speaking right, one (1) voting right, and if elected, one (1) ICC Bureau member. The choice of an institution to represent the NHRIs of a particular State shall be for the relevant institutions to determine.”<sup>1160</sup> It follows therefore that the model of a single national human rights institution is widely accepted, and if effectively utilized, is likely to lead to greater effectiveness, provided that it is designed to guarantee that the unique interests of particular vulnerable groups, such as persons with disability, will not be neglected.<sup>1161</sup>

#### **4.2.3. Civil Society and Consultative Mechanisms**

The DRDP provided for consultation of organisations of persons with disability, through their organisations, in all matters regarding the rights of persons with disability. However, the language used was such that the relevant provision did not address consultation strongly enough, because under Article 12, of the declaration, consultation was optional.<sup>1162</sup> The need to involve persons with disability was further emphasised in the *Standard Rules*<sup>1163</sup> which, *inter alia*, urged states to support and recognize the on-going

---

<sup>1158</sup> *Ibid*, pp. 94, 104, 106

<sup>1159</sup> Carver, R. (2011), *supra*, n. 1156, at p. 21

<sup>1160</sup> Article 39, *Statute of Incorporation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights*

<sup>1161</sup> Carver, R. (2011), *supra*, n. 1156, at p. 2.

<sup>1162</sup> Article 12 of the Declaration provided: “Organisations of disabled persons may be usefully consulted in all matters regarding the rights of disabled persons”.

<sup>1163</sup> *Standard Rules*, *supra*, n. 226.



advisory role of organizations of persons with disability in decision-making<sup>1164</sup> and in the development of disability policy.<sup>1165</sup> The advisory role of organisations of persons with disability is not limited to having persons with disability as permanent representation in government institutions, serving on public commissions or providing expert knowledge on projects.<sup>1166</sup> These organisations form part of a broader civil society to act as “pressure group”, and thereby propelling action from State actors.<sup>1167</sup>

The CRPD does not “reproduce” all what is stated in the *Standard Rules*, and as already stated, does not limit states to apply broader measures which are of benefit to persons with disability. States have unlimited options of ways through which to consult persons with disability. Article 33(3) of the CRPD requires civil society, in particular persons with disability and their representative organizations, to be involved and participate fully in the monitoring of the implementation of the Convention. Article 33(3) of the CRPD should be read together with other provisions of the CRPD, in particular Article 4(3), which requires States to consult persons with disability (through their representative organisations) in the development and implementation of legislation and policies, and in other decision-making processes concerning issues relating to persons with disability.

While the language of the CRPD is that organisations of persons with disability should be consulted, these organisations may also embark on self-initiative means of monitoring by demanding to be informed of what is going on, especially with regard to the entity designated to promote and coordinate implementation of the CRPD.<sup>1168</sup> They can be more active, for example by demanding to be informed and duly consulted during the preparation of reports submitted to the Committee on the Rights of Persons with Disabilities, review of such reports to assess their accuracy and objectivity, or even prepare shadow reports, if possible with the assistance and support of human rights non-governmental organisations.<sup>1169</sup>

---

<sup>1164</sup> According to Rule 17(6), of the *ibid*, “[T]he advisory role of organisations of persons with disability should be ongoing in order to develop and deepen the exchange of views and information between the State and the organisations.”

<sup>1165</sup> Rule 18 (1), *Standard Rules*, *supra*, n. 226. Furthermore, according to Rule 17(8), “[t]he role of local organisations of persons with disability should be developed and strengthened to ensure that they influence matters at the community level.”

<sup>1166</sup> Rule 18(5), *Standard Rules*, *supra*, n. 226.

<sup>1167</sup> Rule 18(6), *ibid*.

<sup>1168</sup> Gatjens, L. F. A. (2011), *supra*, n. 1116, at p. 80..

<sup>1169</sup> *Ibid*, at p. 81. The Committee on the Rights of Persons with Disabilities is the body of independent experts which monitors implementation of the CRPD (Article 34(1)). Each State Party to the CRPD shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on

Although the wording of Article 33(3) emphasises on the organisations of persons with disability, the Article does not prohibit the involvement of more actors from the civil society. The term civil society which is generally used to refer to “a domain mediating between State and society”<sup>1170</sup> - “a dense network of groups, communities, networks, and ties [standing] between the individual and the modern State.”<sup>1171</sup> Considering the complexity of defining the term civil society,<sup>1172</sup> the term should be used in a specific context and streamlined to specific organisations within it.<sup>1173</sup> It is for this reason that I adopt the definition of the term under Tanzania’s disability legislation, according to which civil society means a non-governmental actor, including *inter alia* organization of and for persons with disability, trade union and a professional organization.<sup>1174</sup> These are non-state actors which act as “a counterweight to state power”,<sup>1175</sup> and therefore crucial to development of not only the rights of persons with disability, but human rights in general.

The effectiveness of the role organisations of persons with disability and civil society generally is largely dependent on how well they organize and advocate in interaction with disability rights processes.<sup>1176</sup> In 2002, a survey had revealed more active role of organisations of persons with disability (across the world) in matters related to disability rights, but they still faced a number of challenges. Chapter 5 of this work elaborates some of the challenges.

---

measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned (Article 35(1)). Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests (Article 35(2)). Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention (Article 35(5)).

<sup>1170</sup>Karlström, M. (1999), 'Civil Society and its Presuppositions: Lessons from Uganda', in J. L. Comaroff and J. Comaroff (Eds.), *Civil Society and Political Imagination in Africa: Critical Perspectives*, pp. 33 - 50

<sup>1171</sup>Kenny, M. (2013), 'Civil Society', in *Britannica Encyclopedia*, <http://www.britannica.com/EBchecked/topic/1916880/civil-society>, accessed: 3.4.2013

<sup>1172</sup>Kenny’s definition is a generalised one. It has been argued that term “civil society” is very elusive, one of the most controversial concept ( Young, C. (1994), 'In Search of Civil Society', in J. W. Harbeson, et al. (Eds.), *Civil society and the State in Africa*, at p. 45; Tar, U. A. (2009) *The Politics of Neoliberal, Democracy in Africa* *State and civil society in Nigeria*, London, New York: Tauris Academic Studies, at p. 5. For some more examples on some other descriptions of the concept “civil society”, see: Bratton, M. (1989) 'Beyond the State: Civil Society and Associational Life in Africa, *World Politics*, Vol. 41, pp. 416 – 418.

<sup>1173</sup>Tar, U. A. (2009), *supra*, n. 1172.

<sup>1174</sup>Section 3, Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1175</sup>Fatton, R. (1995) 'Africa in the Age of Democratisation: The Civic Limitations of Civil Society, *African Studies Review*, Vol. 38, No. 2, at p. 67.

<sup>1176</sup>Lord, J. E. and Stein, M. A. (2008), *supra*, n. 244, at p. 464.

#### **4.2.4. Specific Labour-Related Mechanisms and Other Measures**

Article 27 which provides for the right to work does not describe any specific means through which the persons with disability are to realize their right to work. What States are urged to do is to take “appropriate steps, including through legislation”, to realize matters stated in Article 27. From the content of Article 27, if there are any institutional mechanisms to be implied, then these should be responsible implementation of employment or labour laws and policies, dispute settlement, vocational guidance/training and placement services, or industrial rehabilitation. The human rights approach to disability means that these institutions should not be isolated from the mechanisms mentioned in Article 33. That is, the activities of these employment-related institutions should be detached from the coordination of the focal points mentioned in Article 33(1); that their performance should also be monitored by the independent mechanisms in Article 33(2); and that civil society, including persons with disability organisations, trade unions, and employers’ associations, should be consulted pursuant to Article 33(3).

#### **4.3. Tanzania’s Institutional Mechanisms**

In Tanzania, there are several mechanisms which have been established for matters related to human rights generally, persons with disability, and employment. Because of the political administration of Tanzania, each side of the union (i.e. Tanzania Mainland and Zanzibar) has separate institutions, save for national human rights institution – the Commission for Human Rights and Good Governance, and the Court of Appeal of Tanzania (for purposes of this work, for appeals against decision of the Zanzibar Industrial Court).<sup>1177</sup> An examination of the institutional mechanisms under this part is therefore divided between Tanzania Mainland and Zanzibar.

##### **4.3.1. Tanzania Mainland**

In Tanzania Mainland, matters of employment, disability and human rights are administered by separate entities. The Ministry responsible for labour matters is in charge of the general supervision of employment related laws and policies,<sup>1178</sup> while the ministry

---

<sup>1177</sup> Section 87(1), Act No. 1 of 2005 (Znz), *supra*, n. 82.

<sup>1178</sup> Section 4 of Act No. 6 of 2004 (Tz MInd), *supra*, n. 79 defines the Minister to mean “the Minister for the time being responsible for labour.”

responsible for matters of persons with disability<sup>1179</sup> is in charge of the supervision of the relevant law and policy on disability. Under these ministries there are several divisions and departments (including focal points), dealing with specialized issues. The complex nature of disability makes it difficult to draw boundaries (in theory), especially with respect to matters related to the right to work, because of overlapping legal provisions in disability and employment laws (administered by different ministries). An account must also be taken of the fact that some ministries have been changed (or had their functions changed) under various governments. For example, the first disability policy was prepared by the Ministry of Labour, Youth Development and Sport, which is now not responsible with the administration of the current disability legislation. Separate from these ministerial arrangements are the mechanisms for dispute settlement (right enforcement) and human rights promotion, protection and monitoring mechanism. Discussed in this part are: the disability focal point(s) and co-ordination mechanisms, the Commission for Human Rights and Good Governance, civil society and consultative mechanisms, employment-specific institutions, and enforcement (dispute resolution) mechanisms.

#### **4.3.1.1. Disability Focal Point(s) and Co-ordination Mechanism**

##### **(a) The Ministry of Health and Social Welfare**

The current disability legislation defines a minister to mean “the Minister responsible for persons with disability”,<sup>1180</sup> who is apparently the Minister for Health and Social Welfare. The Minister is in charge of overall supervision of the disability legislation, despite the fact that the legislation also provides for responsibilities of other ministries, including the ministry responsible for labour matters.<sup>1181</sup>

The disability legislation requires Minister to undertake measures to comply with the rights of persons with disability,<sup>1182</sup> and to take appropriate steps to ensure the realization of such rights in all national policies, programmes and legislation.<sup>1183</sup> Among such steps is to ensure that relevant ministries or institutions, including those responsible for labour, prepare and publish "sectoral plans", outlining programmes of measures proposed to be

<sup>1179</sup> Section 3 of the Act No. 9 of 2010 (Tz MInd), *supra*, n. 80 defines the Minister to mean “the Minister responsible for persons with disability.”

<sup>1180</sup> Section 3, *ibid*.

<sup>1181</sup> Section 41 to 46, *Ibid*.

<sup>1182</sup> Section 5 (1)(a),(c), (d) and 5(2), *ibid*.

<sup>1183</sup> Section 5 (1)(b), *ibid*.

taken by such ministries or institutions for matters relating to the provision of services to persons with disability.<sup>1184</sup> While performing the activities concerned with the development and implementation of the rights under the disability legislation, and in other decision making processes concerning issues related to persons with disability, the Minister is bound to consult representative organizations and other established mechanisms.<sup>1185</sup>

## **(b) The National Advisory Council for Persons with Disabilities**

The *Persons with Disabilities Act* re-establishes the national advisory body known as the National Advisory Council for Persons with Disabilities,<sup>1186</sup> which replace the former council established under the repealed the *Disabled Persons (Employment) Act*.<sup>1187</sup> While the council is set at the national level, the *Persons with Disability Act* also establishes “disability committees” which trickle down to the grassroots.<sup>1188</sup> The disability committees

---

<sup>1184</sup> Section 41(1), *Ibid*. The sectoral plan for labour and employment matters shall contain information relating to mainly programmes and measures on the provision of: (a) employment support services in accordance with National Policy on Disability, employment promotion policy, labour laws and labour standards as may be recognized by Tanzania; (b) appropriate vocational training to facilitate the integration of persons with disability into employment, and the review of the delivery of such training and services; and (c) the review the delivery of such training and services. (Section 46(1)(a) – (e)). Other responsibilities of the minister include: the promotion of disability (Section 7); the provision of information to persons with disability on technical aids (Section 5 (1) (f)); the promotion of training of professionals and staff who are working with persons with disability, on the rights recognized in the disability legislation, so as to provide better assistance and services guaranteed by those rights. (Section 5 (1) (g)); and working with relevant institutions, in promotion of researches on matters relevant to disability, and new technologies suitable for persons with disability (Section 5 (1)(e) (i), (ii)). The Minister is also duty bound to take appropriate legislative and administrative measures available, with a view to achieving the full realisation of rights of persons with disability as set out under the provisions of The Persons with Disabilities Act. (Section 5 (2)). The legislative measures include the making of regulations for industrial rehabilitation, quota schemes, or registration of employers (Section 30(1) and (2); 31(2) and (3); 61(a) – (r)).

<sup>1185</sup> Section 5(3); 41(2); and 46(2), *ibid*.

<sup>1186</sup> Section 8(1), *ibid*. The former council was known as the “National Advisory Council”.

<sup>1187</sup> See Section 3, [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>1188</sup> Section 14 (2) and (2), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80. NOTE. Under the current legislation, the committees are established in three levels of government administration (Regional, Council and Village/Mtaa), compared to the previous two (Regional and District). The Council committees appear to take the position of the former District Committees. These committees can be compared with the “lower councils” in Uganda (provided under sections 18 to 24 of the Uganda’s *The National Council for Disability Act, 2003* (Uganda) , and are expected to work very closely with the National Advisory Council for Persons with disability and other administrative authorities. The committees have general functions with respect to the coordination and implementation of matters related to persons with disability. Despite representation of persons with disability in these committees, there is no clear link between these committees and employers or trade unions, which may have a lot to do with the way these entities are organised, since some of them do not trickle down to the grass root levels. The former disability legislation did include, among others, members from trade unions, employers association officers responsible for the enforcement of labour laws, into Then persons with disability’ committees (Second and Third Schedules to [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75). Experience from the previous disability legislation indicates that the committees were initially established in then existing Regions and Districts, but they had not been operating due to various reasons, notable being scarcity of staff (Social workers) and lack of funds ( LRCT (2008), *supra*, n.

work closely with local governments, whose matters are dealt with by the Ministry of Regional Administration and Local Government (Prime Minister's Office - Regional Administration and Local Government). The Council is comprised of: the chair person appointed by the president,<sup>1189</sup> one member from the office of the attorney general;<sup>1190</sup> six members from different ministries, including the ministry responsible for labour matters;<sup>1191</sup> one member from the employer's association;<sup>1192</sup> one representative from the apex organization of persons with disability;<sup>1193</sup> one member from the Commission for Human Rights and Good Governance;<sup>1194</sup> and five other members to be appointed by the Minister (responsible for matters of persons with disability) from organizations of persons with disability. This composition is not very different from the composition of the former council, save for some minor differences in the nature of representation, and also the fact that under the former disability legislation, the Chairperson was to be appointed by the minister.<sup>1195</sup> Surprising is the fact that the council does not include representation from trade unions, which were considered in the former disability legislation.

Perhaps a step further compared to the former legislation, the current legislation lists the general objectives of the Council which are:-

- (a) promote the implementation and the equalization of opportunities for persons with disability;
- (b) advise on the impact of policies and programmes designed for equality and full participation of persons with disability;

---

71, pp. 17 – 18). To this, the Law Reform Commission observed that “that it would make no sense to enact a new piece of framework legislation to address the rights of persons with disability if the problems facing the implementation of current laws are not addressed” ( *ibid*, at p. 18). This observation means that the success of the work of the current committees is dependent upon solving problems which exist outside the legal framework.

<sup>1189</sup> Section 11(1)(a), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1190</sup> Section 11(1)(b), *ibid*.

<sup>1191</sup> Section 11(1)(c)(i) – (vi), *ibid*.

<sup>1192</sup> Section 11(1)(d), *ibid*.

<sup>1193</sup> Section 11(1)(e), *ibid*.. The first “umbrella organisation” of Persons with disability was established in 1992, about ten years after the enactment of the first Disability Legislation. The Official name of the said Organisation is “Shirikisho la Vyama vya Watu Wenye Ulemavu Tanzania”, hence the acronym SHIVYAWATA. The direct English translation of the Organisation's name is: “The Tanzania Federation of Organisations of Persons with Disability”.

<sup>1194</sup> Section 11(1)(g), *Ibid*.

<sup>1195</sup> See the 1<sup>st</sup> Schedule to [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75. The Council was composed of the Chair Person (appointed by the Minister), the Commissioner for Social Welfare (the Secretary to the council), four members appointed by the Minister representing each of the following: The Office of the Prime Minister; ministry responsible for health, ministry responsible industries, ministry responsible for education, ministry responsible for man power development, ministry responsible for legal affairs, the Association of Tanzanian Employers, National Council of Social Welfare Services; Trade Union; Association of Persons with disability (The Law uses the term “Association of Disabled Persons), and five other persons appointed by the minister.

- (c) advocate for, and promote effective service delivery and collaboration between service providers and persons with disability;
- (d) advise on the enactment of laws and the reviewing of existing laws with a view to complying with the equalization of opportunities; and
- (e) encourage best practices in the treatment of persons with disability in all aspects of life.<sup>1196</sup>

These general objectives represent the equality (human rights) approach of the Council's functions. Generally, the Council acts as the national advisory body through which the needs, problems, concerns, potentials and abilities of persons with disability can be communicated to the Government and its agencies, for action.<sup>1197</sup> The Council is therefore tasked to advise the government on a wide range of issues, that one could be justified in concluding that the council is tasked with advising almost everything related to the rights of persons with disability.<sup>1198</sup> In matters specific to the employment of persons with disability, the Council shall "endeavour" to secure the reservation of casual and contractual positions in the private and public sectors for persons with disability.<sup>1199</sup>

Any changes in the role of the new Council and its impact in the lives of persons with disability would depend on how it operates, which could also mean political will on the part of the responsible authorities. This is due to the fact that although the former National Advisory Council ought to have been centre piece for the implementation of the old disability legislation,<sup>1200</sup> the LRCT found that the former council had not been given the opportunity to play its statutory role properly. The operation of the former council was not sustained for long after its establishment, and it could eventually "stopped" to operate due to was termed as lack of funds.<sup>1201</sup> The LRCT report revealed lack of concerted efforts on part of the responsible officials to operationalize the Council. The relevant Paragraph of the commission's report reads:-

The Commission was not informed whether any positive efforts were made by the Social Welfare Department to request for funds and whether these funds were denied. The only explanation, which the Social Welfare Department could offer, was to the effect that the Council has not been operating successfully because the Acts relating to persons with disability are outdated and need review. They also pointed out that it is difficult for the National

---

<sup>1196</sup> Section 10 (a) to (e), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1197</sup> Section 12(1)(a), *ibid*.

<sup>1198</sup> See Section 12 (1) (a) – (l); 12 (2) (a) – (j) *Ibid*.

<sup>1199</sup> Section 12(1)(i), *ibid*.

<sup>1200</sup> LRCT (2008), *supra*, n. 71, at p. 14.

<sup>1201</sup> *Ibid*, at p. 15.

Advisory Council to operate while certain aspects of the law are not being implemented.

The Commission wonders whether mere review of the laws without concerted efforts to implement the laws will remedy the enabling legal environment favourable to the disabled persons.

The Commission was further informed that the Social Welfare Department had no records of the Meetings of the Council because the last meetings were conducted about 20 years ago.

The Commission observes that public officers responsible for the implementation of the two pieces of legislation should bear some of the blame over their failure to operationalize and sustain the National Advisory Council.

The Above findings of the LRCT may also be enough explanation for lack of data with respect to coordination mechanisms related to the employment of persons with disability actually organised by the former council. The new council may need to start almost right from the scratch.

With respect to the current council, it took more than three years for the Chairperson of the council to be appointed since the enactment of new disability legislation.

### **(c) Office of the Commissioner for Social Welfare**

The Commissioner for Social Welfare is the head of the welfare division in the Ministry of Health and Social Welfare. Previously, the department had belonged to different ministries, including the Ministry of Labour, Youth Development and Sport, the Ministry of Social Development (present day Ministry of Community Development, Gender and Children).<sup>1202</sup> Pursuant to the organisational structure of the Ministry approved by the President in 2011, the welfare division contains three Sections, one of which is the People with Disability and Elderly Persons Section.<sup>1203</sup>

During a review of the former disability legislation by the LRCT, there was a concern that disability issues should not be under one department, that is, the Social Welfare Department currently under the Ministry of Health and Social Welfare - the reason being that usually the department had no command towards other ministries and government departments to enforce any plan or programme concerning persons with disability.<sup>1204</sup> Furthermore, the department has also been experiencing lack of enough human resources,

---

<sup>1202</sup>Yokoyama, A. (2012), *supra*, n. 1103, at p. 26..

<sup>1203</sup>Other sections are: the Family, Child Welfare Services and Early Childhood Development Section; and the Juvenile Justice Services Section.

<sup>1204</sup>LRCT (2008), *supra*, n. 71, pp. 124 – 125.



funds and working facilities.<sup>1205</sup> It was proposed that disability matters should be shifted from the department level to the ministry level, which will fall under the President's Office, and this argument was backed with examples of South Africa, Mexico, Malawi and Namibia.<sup>1206</sup> In addition to the establishment of independent ministry or government department to deal with disability issues, another view was given that there should be a disability desk or unit in every ministry, government department or institution to handle all disability matters.<sup>1207</sup> The LRCT proposed that the then proposed legislation on disability should provide that the Social Welfare Department be promoted to an extra-ministerial government department, and that proposed department to be under the Ministry of Health and Social Welfare so that it can deal with matters of persons with disability and other related matters effectively.<sup>1208</sup> Apparently, the department is not an extra-ministerial department.

Under the current disability legislation, the Commissioner for Social Welfare has, in addition to the administrative and coordination functions,<sup>1209</sup> certain powers with respect to matters related to the employment of the persons with disability. The legislation provides for the registration of employers for the effective monitoring and implementation and compliance with employment requirements for persons with disability;<sup>1210</sup> and the register shall be kept and maintained by the commissioner on behalf of the minister.<sup>1211</sup> Employers are to submit annual reports to the Commissioner on the employment status of persons with disability.<sup>1212</sup> The requirement of registration of employers is in fact "re-enactment" of the provisions of the former disability legislation.<sup>1213</sup> To keep employers under check, the Commissioner of social welfare also retains the power of entry and inspection, similar to the powers conferred to him under the repealed disability legislation. Under the current

---

<sup>1205</sup> *Ibid*, pp. 123 – 124.

<sup>1206</sup> *Ibid*, p. 125.

<sup>1207</sup> *Ibid*.

<sup>1208</sup> *Ibid*, p. 125 – 126.

<sup>1209</sup> The Commissioner of Social Welfare is the head of the Council's secretariat and manager the Council's funds (Section 9 (g), 57 (1), (2), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80). The Commissioner is also the overall coordinator of all activities of persons working under his authorisation for purposes of implementation of disability legislation. (Section 9 (h), *Ibid*.). The Commissioner may also delegate his functions (Section 59 (2). *Ibid*.).

<sup>1210</sup> Section 61 (g), Act No. 9 of 2010; Regulation 40(1), 41(1), GN No. 152 of 2012 (Tz Mlnd), *supra*, n. 544.

<sup>1211</sup> Regulation 41(2), *ibid*.

<sup>1212</sup> Section 31 (4), Act No. 9 of 2010 (Tz Mlnd), *supra*, n. 80. Similar provisions were found in Regulation 11(1)(b) of G.N. No. 464 of 1985 (Tz Mlnd), *supra*, n. 963. However, under the said regulations, the employers were to submit yearly returns to Regional and District social welfare officers.

<sup>1213</sup> See Section 14(1) and (2), [Cap 184 R.E. 2002] (Tz Mlnd, repealed), *supra*, n. 75, and Reg. 9 of G.N. No. 464 of 1985 (Tz Mlnd), *supra*, n. 963.

disability legislation, the Commissioner or authorized officer may enter any premises of an employer for the purpose of inspection and ensuring compliance with the provisions of the disability law.<sup>1214</sup>

Despite the fact that the employer register was provided for under the previous disability law, it never in fact existed due to lack of funds to operate the register. Another reason was said to be the introduction of private sector which made it difficult to implement the law, since the private sector was not covered by the repealed disability (employment) legislation.<sup>1215</sup> Without specific information on how much it could cost to maintain such a register, and lack of explanation as to the failure to register public sector employers, this Social Welfare Department could not escape some blame. The LRCT noted that:-

the introduction of private sector poses only difficulties to implement the law, but it does not waive the statutory obligation of the Commissioner for Social Welfare of maintaining the Employers Register, then in the interim period while waiting for the new framework legislation, he should play his part as required by the law.<sup>1216</sup>

The failure to maintain the employer's register in the past can be seen as lack of commitment on the part of law enforcers. On the other hand, while the current legislation is also applicable to private employers,<sup>1217</sup> the challenge is to have a workable mechanism to easily identify such employers. This calls for cooperation of all relevant entities, such as trade unions, employers association or social security funds. Employees with disabilities may also help in identifying employers who are required to be registered under the law.

#### **4.3.1.2. The Commission for Human Rights and Good Governance**

The Commission for Human Rights and Good Governance (CHRGG) was established after under *The Constitution of The United Republic of Tanzania*,<sup>1218</sup> following the Constitutional amendments in the year 2000,<sup>1219</sup> and became operational in 2001 after the coming into force of the *Commission for Human Rights and Good Governance Act*.<sup>1220</sup> But the history of the Commission dates back to 1960s. *The Interim Constitution of Tanzania*,

---

<sup>1214</sup> See Section 59 (1), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1215</sup> LRCT (2008), *supra*, n. 71, at p. 29.

<sup>1216</sup> *Ibid.*

<sup>1217</sup> Section 3 of Act No. 9 of 2010 (Tz MInd), *supra*, n. 80 defines employer as: "any person who have entered into a contract of service to employ any person or group of persons and it shall include employee defined and recognized under other existing written laws".

<sup>1218</sup> Article 129(1), *The Constitution of Tanzania*, *supra*, n. 499.

<sup>1219</sup> Section 18, Act No. 3 of 2000 (Tz), *supra*, n. 517.

<sup>1220</sup> Cap 391 R.E. 2002 (Tz), *supra*, n. 502.

1965, established the Permanent Commission of Inquiry,<sup>1221</sup> and in 1966, the National Assembly passed the *Permanent Commission of Inquiry Act*,<sup>1222</sup> which prescribed the procedures, powers and privileges of the said Permanent Commission.

The permanent commission, which was believed to be the first “ombudsman” in the Continent,<sup>1223</sup> was designed to function as a mechanism by which citizens could be protected from the abuse of governmental power.<sup>1224</sup> As already stated in this work, there was no Bill of Rights in the Constitution after independence. Some extensive powers and discretion were also given to the government officials as well as to party officials, the situation which probably increased the possibility of friction between officials and citizens.<sup>1225</sup> Some type of protection was therefore required in order to control the executive and administrative mistake and abuse of power, in a country with “vast bureaucracy, great illiteracy and a basically rural population.”<sup>1226</sup> In addition, Tanzania courts were not apparently effective in controlling administration.<sup>1227</sup> Frank (1972) gave a detailed account of the process that led to the establishment of the Permanent Commission of Inquiry, and its functions. Considering the period in which the Permanent Commission of Inquiry was operational, it should not be a surprise that disability rights did not feature in the work of the past commission.

The Permanent Commission was carried into the Permanent Constitution of 1977. After the incorporation of the Bill of Rights in 1984, the enforcement of these rights was hampered by the many oppressive and unconstitutional laws, and the government had been under pressure, *inter alia*, to create a human rights commission.<sup>1228</sup> Eventually, the Constitutional amendment of 2000 brought the CHRGG, which replaced the Permanent Commission of Inquiry. The CHRGG is legally an autonomous department,<sup>1229</sup> and has a range of functions, under both the Constitution and its respective legislation, which include receiving and resolving of complaints and conducting of inquiry in relation to violation of

---

<sup>1221</sup> Chapter VI, *Interim Constitution of Tanzania, 1965* (repealed).

<sup>1222</sup> *The Permanent Commission of Inquiry Act, 1966* (Act No. 26 of 1966) ((United Republic of Tanzania, repealed).

<sup>1223</sup> Mallya, E. T. (2009) *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: Tanzania's Commission for Human Rights and Good Governance*, Johannesburg: EISA, at p. 6, Citing (Maloka 2005).

<sup>1224</sup> Frank, B. (1972), *supra*, n. 510, at p. 255.

<sup>1225</sup> *Ibid*, at p. 256.

<sup>1226</sup> *Ibid*.

<sup>1227</sup> *Ibid*, at p. 257.

<sup>1228</sup> Mallya, E. T. (2009), *supra*, n. 1223, pp. 6 – 7.

<sup>1229</sup> Article 130(2), *The Constitution of Tanzania, supra*, n. 499.

human rights;<sup>1230</sup> and the institution of proceedings (if necessary) in court in order to prevent violation of human rights or to restore the realization of the violated right(s).<sup>1231</sup> Other functions are with respect to research and promotion of human rights,<sup>1232</sup> and advising the Government and other public Institutions and private sector in respect of human rights and good governance.<sup>1233</sup>

With respect to the rights of persons with disability, the CHRGG works closely with human rights and persons with disability organisations.<sup>1234</sup> The CHRGG had also established a desk/departments dealing with “special groups”, which includes, *inter alia*, persons with disability.<sup>1235</sup> In charge of this unit is an employee with disability.<sup>1236</sup> In addition, the CHRGG has one representative in the National Advisory Council for Persons with disability.<sup>1237</sup> However, the mode of working relationship between the Commission and the Disability Council is yet to be ascertained, considering the fact that it is just recent that the Chairman of the Council has been appointed.

The CHRGG has been issuing country human rights reports, but disability rights have not been featuring strongly. The CHRGG report issued in June 2011 indicates that there were 131 complaints from “special groups”. However, the report does not specify which from the 131 complaints involved persons with disability (if there was any). Commission has not had a significant impact with respect to the rights of persons with disability, although it has handled numerous labour related issues.<sup>1238</sup>

The CHRGG’s approach towards disability may have been a reflection of the general past approaches to disability in Tanzania, and the history of the commission itself. The activities of CHRGG are undermined by a number of challenges and limitations which are discussed in Chapter 5.

---

<sup>1230</sup> Article 130(1) (b), (c), (f) and (g), *ibid*; Section 6(1)(b), (c), (f), and (g), Cap 391 R.E. 2002 (Tz), *supra*, n. 502.

<sup>1231</sup> Article 130(1) (e), The Constitution of Tanzania, *supra*, n. 499; Section 6(1)(e), Cap 391 R.E. 2002 (Tz), *supra*, n. 502.

<sup>1232</sup> Article 130(1)(a) and (d) of The Constitution of Tanzania, *supra*, n. 499; Section 6(1)(a), (d), (k), (l), (m) and (o), Cap 391 R.E. 2002 (Tz), *supra*, n. 502.

<sup>1233</sup> Article 130(1)(g), The Constitution of Tanzania, *supra*, n. 499; Section 6(1)(j), Cap 391 R.E. 2002 (Tz), *supra*, n. 502.

<sup>1234</sup> Mtulya, F. (5th June 2014), Interview (Email).

<sup>1235</sup> Mallya, E. T. (2009), *supra*, n. 1223, at p. 15.

<sup>1236</sup> Anastaz, A. (24.5.2014) Telephone

<sup>1237</sup> Section 11(1)(f), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1238</sup> CHRAGG (2011) 'Review of the United Republic of Tanzania: Individual Report of the Tanzania National Human Rights Institution Submission to the Human Rights Council Universal Periodic Review Mechanism, CHRAGG

#### 4.3.1.3. Civil Society and Consultative Mechanisms

The right to freedom of association is enshrined in the *Constitution of the United Republic of Tanzania*,<sup>1239</sup> and there is a growing civil society, including organisations of persons with disability, trade unions, human rights and professional organisations, registered under various laws.<sup>1240</sup> The development of disability rights in Tanzania has progressed through the relationship between government and civil society, especially the organisations of persons with disability, which have been reported to persistently supported and cooperated with the authorities to keep the services on course.<sup>1241</sup> The relationship between the Government and organisations of persons with disability has so far not been problematic.<sup>1242</sup>

Organisations of persons with disability have a significant role in identifying the needs and the promotion or provision of services to persons with disability. They act as representative bodies and a forum for persons with disability to voice opinions on their needs and determine their own development destiny.<sup>1243</sup> They are involved in researching and reporting on the human rights status of persons with disability; creating awareness to persons with disability and the public in general on disability rights; monitoring government's adherence to different international commitments on the rights of persons

---

<sup>1239</sup> Article 20(1), CRPD, *supra*, n. 24.

<sup>1240</sup> *The Non-Governmental Organisations Act, 2002* (Act No. 24 of 2002); *The Societies Act*, [Cap 337 R.E. 2002]; and the *Companies Act* [Cap. 212 R.E. 2002] (all applicable in Tanzania mainland). Some of the Organisations of Persons with Disability include: *Action on Disability and Development (ADD)*; *Chama cha Viziwi Tanzania (CHAVITA)* (literally translated in English as 'Tanzania Deaf Society'); *Tanzania Society for Blind (TSB)*; *Chama cha Walemavu Tanzania (CHAWATA)* (literally translated as 'Tanzania Disabled Organisation'); *Chama cha Watu Wenye Ulemavu wa Akili (TAMH)* (literally translated as ... ); *Disability Organisation for Legal Assistants for Social Economic Development (DOLASED)*; *Sauti ya Wanawake Wenye Ulemavu Tanzania (SWAUTA)* (literally translated in English as 'The Voice of Women with Disabilities'); *Tanzania Albino Society (TAS)*; *Tanzania League for the Blind (TLB)*; *Tanzania Users of Psychiatric Organisation (TUPO)*. The umbrella organisation is *Shirikisho la Vyama vya Watu Wenye Ulemavu (SHIVYAWATA)* (literally translated in English as 'The Tanzania Federation of Organisations of Persons with Disability'). Literature detailing the performance of these organisations is scarce. Nevertheless, it suffices to state that most of these organisations are better represented in urban areas, especially in big cities.

<sup>1241</sup> Bagandanshwa, E. T. T. (1999), *supra*, n. 605, at p. 55.

<sup>1242</sup> PWDO have not been very "aggressive" in championing for their rights, and at times it appears that some leaders of these organisations are not willing to use other means available. For example, while there have been some development of human rights litigations, there was only one attempt by Tanzania Albino Society (TAS) to petition the court for the protection of the rights of persons with disability. However, TAS withdrew from the case, leaving only the Legal and Human Rights Centre (LHRC) as the sole petitioner.

<sup>1243</sup> LRCT (2008), *supra*, n. 71, at p. 116..

with disability; providing services to person with disability; and providing expertise in disability rights.<sup>1244</sup>

Apart from having representation in the National Advisory Council of Persons with disability, organizations of persons with disability are to be consulted by the minister in matters related to the development and implementation of the rights of persons with disability.<sup>1245</sup> Through consultative role or public awareness activities, these organisations can be very assistive in promoting the human rights approach to disability in various issues, including employment. An analysis of the reports of one of the seemingly more active human rights organisations in the country, the Legal and Human Rights Centre (LHRC),<sup>1246</sup> shows the signs of more engagement (by the LHRC) on disability rights issues.<sup>1247</sup> Generally, Organisations of Persons with Disability have occasionally been invited to present their plans, and a mechanism has been formed to coordinate their activities, and further to ensure that they are involved in development programmes.<sup>1248</sup> According to the official parliamentary records, organisations of persons with disability had been consulted in the process that culminated into the new disability legislation in Tanzania,<sup>1249</sup> according to which organizations of persons with disability have been given an advisory role to the government in promotion of the rights of persons with disability.

Organisations for persons with disability can also be very significant in such matters as recruitment and job placement. A good example is the RADER Development, which has been providing job recruitment and placement services for persons with disability. RADER's primary aim is to assist people with disability in finding employment and to promote disability awareness in the workplace. It was established in 2008, in close collaboration with the Comprehensive Community Based Rehabilitation in Tanzania (CCBRT). RADER registers job seekers with disability, conduct interviews, seek

---

<sup>1244</sup>Rukwago, N. (4.6.2014) (E-Mail)

<sup>1245</sup>Section 5 (3), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1246</sup>Another known organisation is the National Organisation for Legal Assistance (NOLA), which was formed in 2002 by practising lawyers so as to use the law to further the cause of legal and social justice as well as human rights Tanzania. Although there are various publications and research report by NOLA, very little have been done with respect to persons with disability.

<sup>1247</sup>LHRC and ZLSC (2013), *supra*, n. 72; LHRC and ZLSC (2012), *supra*, n. 73, pp. 155 – 156; LHRC and ZLSC (2010), *supra*, n. 70, pp. 89 – 92; LHRC and ZLSC (2009), *supra*, n. 39, pp. 93 – 94; LHRC and ZLSC (2008) 'Tanzania Human Rights Report 2007, LHRC; ZLSC, pp. 67 - 69; LHRC and ZLSC (2007), *supra*, n. 70, pp. 75 - 78;

<sup>1248</sup>Mwendwa, T. N, *et al.* (2009) 'Mainstreaming the Rights of Persons with Disabilities in National Development Frameworks, *Journal of International Development*, Vol. 21, No. 5, at p. 670.

<sup>1249</sup>Hansard, 13 April 2010 (1), *supra*, n. 528, pp. 47 – 49.

appropriate jobs, recruit and support people with disability in the workplace.<sup>1250</sup> In addition, RADER seeks to promote and include disability in the workplace, raising awareness of the value of employing people with disabilities and reducing stigma.<sup>1251</sup> RADER also offers a free recruitment service to employers and also aims to support employers in recruiting people with disabilities through a comprehensive information, training and support service.<sup>1252</sup>

#### **4.3.1.4. Labour Law and Policy Mechanisms**

##### **(a) Ministry for Labour and Employment**

The ministry is in charge of overall employment and labour laws and policies.<sup>1253</sup> Being one of the oldest ministries in the country since independence, the ministry has assumed various responsibilities including social welfare matters (between 1972 and 1984). In 2004 when the first National Disability Policy was issued by the Ministry, although this time the ministry had been renamed as the Ministry of Labour, Youth Development and Sports.<sup>1254</sup>

##### **(b) Office of the Commissioner for Labour**

The powers of labour officers are related to the enforcement of labour laws generally.<sup>1255</sup> For purposes of this work, one needs to consider the enforcement of anti-discrimination provisions present in the labour legislation. To that extent, the Labour Commissioner or officers acting under him, have a duty to ensure that persons with disability enjoy all employment rights under the employment legislation. Labour Commissioner and Labour Officers' powers under the employment legislation are wider than those of the Commissioner of Social Welfare under the disability legislation. These powers include institution of proceedings and prosecution in a Resident Magistrate's or

---

<sup>1250</sup> Radar Development (2011) *About Radar Development*, <http://www.radardevelopment.com/about-us/>, accessed: 4.6.2014.

<sup>1251</sup> *Ibid.*

<sup>1252</sup> *Ibid.*

<sup>1253</sup> Section 4 of the Act No. 6 of 2004 (Tz Mnd), *supra*, n. 79. defines the Minister to mean "the Minister for the time being responsible for Labour"

<sup>1254</sup> Wizaru ya Kazi na Ajira (2013) *Historia*, <http://www.kazi.go.tz/historia.php>, accessed: 24.8.2014.

<sup>1255</sup> The Labour Commissioner is appointed by the President, and may delegate his duties to other officers. i.e. the Deputy Labour Commissioner, Assistant Labour Commissioners or Labour Officer (Section 43(1) and 44 (1), Act No. 7 of 2004 (Tz Mnd), *supra*, n. 170.). The Deputy Labour Commissioner is also appointed by the president (Section 43(1), *Ibid.*). The Assistant Labour Commissioner is appointed by the Minister responsible for Labour, and the heads the sections of Labour Relations, Labour Inspection and Social Security (Section 43(3), *Ibid.*). There shall be as many labour officers as are necessary to administer and enforce the labour laws ((Section 43(4), *Ibid.*).

District court.<sup>1256</sup> The Labour Officer may also issue a compliance order to any employee upon reasonable grounds that an employer has not complied with a provision of the labour laws.<sup>1257</sup> The compliance order must be complied with within a specified period<sup>1258</sup> unless objected.<sup>1259</sup> The Labour Commissioner may apply to the Labour Court to enforce compliance orders if the employer has not complied with it.<sup>1260</sup>

The similarity and overlapping of some functions of the offices of the Commissioner of Social Welfare and the Labour Commissioner for matters related to the employment of persons with disability (especially with respect to inspections) is not without coordination challenges, which are discussed in Chapter 5 of this work.

### (c) Tanzania Employment Services Agency

In 1999, the *National Employment Promotion Service Act*<sup>1261</sup> was enacted, and it established the National Employment Promotion Service (NEPS),<sup>1262</sup> responsible for, *inter alia*, the provision or making arrangement for the registration, employment, counselling, vocational rehabilitation and placement of persons with disability.<sup>1263</sup> While the *National Employment Promotion Service Act* was still in operation (and still in force), the Tanzania Employment Services Agency (TaESA) was established in 2001 under another law - the *Executive Agencies Act*.<sup>1264</sup> Among the functions of TaESA is to offer vocational guidance service to jobseekers for the purpose of helping them to develop and accept an integrated and adequate picture of themselves and their role in the world of work. In practice, the NEPS appears to be subsumed under TaESA.<sup>1265</sup> It is unfortunate that TaESA does not have special job placement arrangements for persons with disability,<sup>1266</sup> and neither the *Persons with Disabilities Act*, nor the *Employment and Labour Relations Act* which mentions job placement services for persons with disability.

---

<sup>1256</sup> Section 45(1), *ibid.*

<sup>1257</sup> Section 46(1), *ibid.*

<sup>1258</sup> Section 46(5), *ibid.*

<sup>1259</sup> For the procedure of objection, see the provisions of Section 47, 48 and 49, *ibid.*

<sup>1260</sup> Section 46(6) *Ibid.*

<sup>1261</sup> Cap 243 R.E. 2002 (Tz Mld), *supra*, n. 78.

<sup>1262</sup> Section 3(1), *ibid.*

<sup>1263</sup> Section 4 (2)(i), *ibid.*

<sup>1264</sup> *The Executive Agencies Act* [Cap 245 R.E. 2002] (Tanzania Mainland)

<sup>1265</sup> Ackson, T. (20.5.2014) Interview (E-Mail).

<sup>1266</sup> Muhanza, T. R. (2.2.2014) Interview (E-Mail); Anastaz, A. (24.5.2014), *supra*, n. 1236



While government mechanisms appear not to be working, the non-governmental project of the RADER Development (See 4.3.1. (c)) seems to have been moving in the right direction in providing job recruitment and placement services for persons with disability.<sup>1267</sup>

#### **4.3.1.5. Enforcement (Dispute Resolution) Mechanisms**

Administrative or monitoring mechanism is different from enforcement of rights. Often, enforcement measures are required to ensure effective implementation of the rights. Therefore, it is essential that there are effective enforcement mechanisms to guarantee proper redress for the victims of violation of rights. Under this part, I discuss the following: (i) the standard human rights adjudication procedure; (ii) the complaint procedure through the Commission for Human Rights and Good Governance; (iv) the complaint procedure under the employment legislation; and (iii) complaint procedure under the disability legislation.

##### **(a) Standard Human Rights Adjudication Mechanisms**

According to the *Constitution of the United Republic of Tanzania*, the Judiciary shall be the authority with final decision in dispensation of justice.<sup>1268</sup> Therefore, every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of the Constitution and the laws of the land.<sup>1269</sup> The jurisdiction of hearing human rights petitions is vested in the High Court, and the procedure in that respect is outlined under the *Basic Rights and Duties Enforcement Act*.<sup>1270</sup>

The formal-equality dominated approach in the Bill of Rights, and many years of the absence of effective disability rights legislation in Tanzania, (coupled with less effective human rights activism in the area of disability rights and awareness issues generally), could be the reason that the standard human rights adjudication mechanisms have not been used by persons with disability or human rights organizations to enforce the rights of persons with disability. From the date where the Bill of Rights became operational, there is no record of any court decision originating from an action taken either by individuals or organizations to enforce any of the constitutional rights. Despite the stringent nature of the

---

<sup>1267</sup>Rukwago, N. (4.6.2014), *supra*, n. 1244.

<sup>1268</sup> Article 107 A, The Constitution of Tanzania, *supra*, n. 499.

<sup>1269</sup> Article 26 (2), *Ibid*.

<sup>1270</sup> Article 33 (3), and (4), *ibid*; Section 4 to 15, Cap 3 R.E. 2002 (Tz), *supra*, n. 501.

Bill of Rights, there is still a room under the standard human rights enforcement procedure to broaden the notion of equality.

## **(b) Employment and Labour Relations Dispute Resolution Mechanisms**

*The Labour Institutions Act*<sup>1271</sup> establishes the Commission for Mediation and Arbitration<sup>1272</sup> and the Labour Division of the High Court.<sup>1273</sup> The two organs are responsible for resolving labour disputes. The main function of the Commission for Mediation and Arbitration is to mediate and arbitrate labour disputes.<sup>1274</sup> The Labour Court, on the other hand, is vested with, subject to the Constitution, exclusive civil jurisdiction over the application, interpretation and implementation of the labour laws including powers of appeal, review and revision over decisions of all labour institutions, among them the Commission for Mediation and Arbitration.<sup>1275</sup> The CMA and the Labour Court became operational in 2007. Before their establishment, there existed another mechanism of dissolving labour dispute under the repealed labour laws.

As already indicated in Chapter 1, for purposes of this work, about 200 decisions of the Labour Court, decided between 2007 and 2011 were reviewed, points of interest being, *inter alia*, discrimination and sickness/disability in the course of employment. The research revealed that with the exception of few cases related to job retention discussed in the previous chapter, the Labour Court jurisprudence in matters related to disability is emerging, albeit still at infancy. There were a number of cases which contained allegations of discrimination (not on the ground of disability), but they were mostly concluded on procedural grounds or material irregularities which were found to affect “merits” of the respective cases, such as mixing constitutional rights issues in employment based claims, or mixing discrimination and unfair termination claims.<sup>1276</sup> However, these were less than

---

<sup>1271</sup> Act No. 7 of 2004 (Tz Mlnd), *supra*, n. 170.

<sup>1272</sup> Section 12, *Ibid*.

<sup>1273</sup> Section 50 (1), *ibid*.

<sup>1274</sup> Section 12 and 14, *ibid*.

<sup>1275</sup> Section 51, *ibid*; Section 94, Act No. 6 of 2004 (Tz Mlnd), *supra*, n. 79.

<sup>1276</sup> For example: *General Manager, Mufindi Paper Mills Ltd v Masoya Magoti and Cosmas Jimbo Msigwa*, High Court (Labour Division) at Dar es Salaam, Revision No. 7 of 2007; *J. W. Ladwa (1977) Ltd v Peter Kimote*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 52 of 2008; *Wazalendo Secondary School v Zainul Koshuma*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 89 of 2009. In *Mufindi Paper Mills’ case*, the Commission for Mediation and Arbitration had decided that the respondent had been terminated on discriminatory grounds. However, upon revision, the High Court of Tanzania found that what was on the record did not measure up to the definition of proceedings, and for that reason the award must be vacated. In *Ladwa’s case*, the respondent had referred a dispute to the Commission for Mediation and Arbitration alleging unfair termination based on discrimination. Although the award was granted by the commission in favour of the respondent, the High Court of Tanzania quashed

10% or the reviewed decisions. Nevertheless, the small number of decisions of the Labour Court on job-retention should be viewed as a good starting point towards the development of employment law principles compatible with disability legislation that seeks to ensure job-retention for persons with disability.

It should be noted that the new mechanism brought by the new labour laws cannot alone make the transformations required for persons with disability without comprehensive substantive legislation. The old institutions could not have done much in the area, as the substantive employment and labour legislation of the time did not provide for essential matters for the protection of persons with disability at work. As the new institutions are responsible for the enforcement of new employment and labour relation legislation which, provides for, *inter alia*, protection of persons with disability, then they have the required “tools” for the protection of persons with disability at work places. Despite the fact that the recent decisions in *Martin Oyier v Geita Gold Mine Ltd*<sup>1277</sup> and *Vodacom Tanzania v Zawadi Bahenge and 6 others*<sup>1278</sup> have been decided with respect to injuries at work place, and that disability rights perspective did not feature heavily in these decisions, the courts have applied the statutory principles of the ELRA which conform to the principles of reasonable accommodation under the disability legislation. Therefore, the new institutions created for the enforcement of new employment and labour relations laws can be effective in protecting persons with disability’ right to employment, when effectively utilised.

### **(c) Disability Legislation Complaint Procedure**

The current disability legislation sets out a separate complaint procedure which also touches matters related to employment, notwithstanding the existence of the complaint procedure under the employment legislation. However, this mechanism appears to be both inefficient and unnecessary because of the reasons stated in Chapter 5 of this work.

---

proceedings on the grounds that the Commission had decided a matter outside the period allowed under the law for referring disputes to it. In *Wazalendo’s case*, there were allegations of discrimination in the proceedings referred to the Commission for Mediation and Arbitration, and the Commission awarded the respondents, but upon revision, the High Court of Tanzania quashed the proceedings on the grounds that the Commission had mixed both discrimination and unfair termination issues. The Court then ordered fresh proceedings to be conducted separately. Although these cases were not about disability issues, a decision on merit on discrimination could have perhaps indicated to which length the court could go in defining discrimination under the labour laws, and this could have been crucial to persons with disability as well.

<sup>1277</sup> *Martin Oyier. v Geita Gold Mine Ltd, supra*, n. 864.

<sup>1278</sup> *Vodacom Tanzania. v Zawadi Bahenge and 6 others, supra*, n. 890.

### **4.3.2. Zanzibar**

Zanzibar has several bodies dealing with matters of employment, disability and human rights. As already mentioned in 4.3 above, except for the Commission for Human Rights and Good Governance and the Court of Appeal of Tanzania (for appeals against decision of the Zanzibar Industrial Court), which operate in both sides of the Union, the mechanisms in Zanzibar are separate from those in Tanzania Mainland. A discussion in this part is focused on focal point(s) and co-ordination mechanisms; the Commission for Human Rights and Good Governance; civil society and consultative mechanisms; employment-specific institutions; and enforcement (dispute resolution) mechanisms

#### **4.3.2.1. Disability Focal Point(s) and Co-ordination Mechanisms**

##### **(a) Zanzibar National Advisory Council for Persons with Disability**

The Zanzibar National Council for Persons with Disabilities was established by Zanzibar's first disability legislation in 2006, and unlike its sister council in Tanzania mainland, is a corporate body.<sup>1279</sup> The Council is composed of thirteen members,<sup>1280</sup> from the government, organisations of persons with disability, employers and employees. The Chairperson is appointed by the President,<sup>1281</sup> and other members include principal secretaries for ministries responsible for persons with disability; health and social welfare; youth, employment, and development of women and children; and education and vocational training.<sup>1282</sup> Representation of persons with disability does not exceed six members, half of whom should be women;<sup>1283</sup> while employers and workers have been given one representation each.<sup>1284</sup> Persons with disability are to be consulted before members are appointed, although except for the chairman and the principle secretary of the ministry responsible for persons with disability.<sup>1285</sup> The Council may also invite any person who is not member to participate in the deliberation at any Council's meeting.<sup>1286</sup> The Director of the council, who is also appointed by the President,<sup>1287</sup> is the chief

---

<sup>1279</sup> Section 26(1) and (2), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1280</sup> Article 26 (3), *Ibid.*

<sup>1281</sup> Paragraph 1(a), First Schedule, *Ibid.*

<sup>1282</sup> Paragraph 1(b) and (c), *Ibid.*

<sup>1283</sup> Paragraph 1(d), *Ibid.*

<sup>1284</sup> Paragraph 1(e) and (f), *Ibid.*

<sup>1285</sup> Paragraph 2, *Ibid.*

<sup>1286</sup> Paragraph 6, *Ibid.*

<sup>1287</sup> Section 34(1), *Ibid.*

executive officer of the Council and supervisor of other staff of the Council,<sup>1288</sup> and therefore responsible for day to day activities of the council.<sup>1289</sup>

The council is vested with a number of functions, which include, monitoring and coordinating functions, advisory as well as some implementation functions. With respect to the employment of persons with disability, it is also within the mandate of the council to endeavour to secure the reservation of casual and contractual positions in the private and public for persons with disabilities;<sup>1290</sup> and to provide assistive devices or appliances.<sup>1291</sup> The council shall establish and maintain a register of person with disability,<sup>1292</sup> in which there shall be recorded, *inter alia*, their various levels of skills and training.<sup>1293</sup> The use of the entries therein is restricted to job placement, identification and statistical purposes.<sup>1294</sup> Furthermore, the council is empowered, *inter alia*, to enter or cause to be entered at all reasonable times any premises of an employer or public premises for the purpose of inspection and ensuring compliance with the provisions of the disability law.<sup>1295</sup>

**(b) Department of Persons with Disability Affairs in the Office of First Vice President**

From 2010, the Office of First Vice President of Zanzibar has been responsible for matters relating to persons with disability. Under the office, there is a special Department of Persons with Disability Affairs which is an integral part of the government of Zanzibar dealing with affairs of persons with disability.<sup>1296</sup> The Department of Persons with Disability Affairs in the office of the First Vice President is the secretariat of the Zanzibar National Council for Persons with Disabilities, which meets once in three months.<sup>1297</sup> Previously, the disability matters were placed under Ministry of Health and Social Welfare until they were moved to the Prime Minister's Office

---

<sup>1288</sup> Section 34(4), *Ibid.*

<sup>1289</sup> Section 34(2), *Ibid.*

<sup>1290</sup> Section 29(1)(viii), *Ibid.*

<sup>1291</sup> Section 29(1)(x), *Ibid.*

<sup>1292</sup> Section 36(1), *Ibid.*

<sup>1293</sup> Section 36 (3), *Ibid.*

<sup>1294</sup> Section 36 (4), *Ibid.*

<sup>1295</sup> Section 30, *Ibid.*

<sup>1296</sup> LHRC and ZLSC (2013), *supra*, n. 72, at p. 396; LHRC and ZLSC (2012), *supra*, n. 73, p. 353.

<sup>1297</sup> Section 1(5)(a), Act No.9 of 2006 (Znz), *supra*, n. 82.

#### 4.3.2.2. The Commission for Human Rights and Good Governance

The Commission for Human Rights and Good Governance operates in both Tanzania Mainland and Zanzibar.<sup>1298</sup> This means that the challenges with respect to the activities of the commission in the area of disability rights in Tanzania Mainland are in one way or another similar to the challenges faced by the Commission in Zanzibar. One administrative matter peculiar to Zanzibar is that the commission started to operate in Zanzibar later (in 2007) than it did in Tanzania, because there were contentions whether, human rights are ‘union matters’,<sup>1299</sup> this despite the fact that the Constitution of the United Republic of Tanzania (which contains the Bill of Rights) is listed among the union matters.

#### 4.3.2.3. Civil Society and Consultative Mechanisms

In 1985, the registration of *Umoja wa Walemavu Zanzibar* (UWZ) (Organisation of Persons with Disability in Zanzibar) marked the start of disability rights movement in Zanzibar.<sup>1300</sup> Just like in many other places in Africa, the disability movement was sparked by the International Year of Disabled People.<sup>1301</sup> Among the successes of the UWZ was the enactment of Zanzibar’s current disability law, which *inter alia*, creates the Zanzibar National Advisory Council for Persons with Disability. Other organisations dealing with the promotion of interests of persons with disability in Zanzibar include the Zanzibar Association of the Blind (ZANAB) and Zanzibar Association for People with Developmental Disabilities (ZAPDD).<sup>1302</sup>

When it comes to cooperation among civil society organisations (for example organisations of persons with disability and trade unions, government institutions or human rights organisations), there seems to exist a normal relationship among organisations, which depends on the matter at hand. The secretary of UWZ, Mr. Rashid Ali Mohamed clarified that:-

The working relationship is normal, and depends on the issue at hand. When the rights of persons with disability are violated, the respective organisations cooperate as a way of fulfilling their duties. When, say in a respective organisation, the victim is a member, then the said organization provides assistance to the victim as its member. Other organisations as the Commission for Human Rights and Good Governance provide assistance because it is their

---

<sup>1298</sup> Section 3, Cap 391 R.E. 2002 (Tz), *supra*, n. 502.

<sup>1299</sup> LHRC and ZLSC (2013), *supra*, n. 72, at p. 418.

<sup>1300</sup> Khalfan, H. K. (17.11.2008) (Print), at p. 1.

<sup>1301</sup> *Ibid.*

<sup>1302</sup> LHRC and ZLSC (2013), *supra*, n. 72, at p. 418.

duty. Zanzibar legal center assists in legal service because it is a part of their obligation.<sup>1303</sup>

The above answer suggest that there have not been a tradition of having specific and pro-active joint projects among organisations of persons with disability and other organisations or government entities, apart from simply fulfilling what fall under their respective mandates. Enhanced cooperation among organisations of persons with disability, trade unions, employers associations, and other entities is likely to enhance equal opportunities of persons with disability in work places.

#### **4.3.2.4. Ministry for Labour and Employment, and the Labour Commission**

The overall administration of the labour matters in Zanzibar falls under the Ministry of Labour, Economic Empowerment and Cooperatives. The *Employment Act* also establishes the Labour Commission, which is responsible for the administration of the provisions of the Act,<sup>1304</sup> including the provisions related to the employment of persons with disability, which are contained in the employment legislation. The Commission acts under the authority of the Minister responsible for labour matters.<sup>1305</sup> The powers of officers of the labour commissions are not more or less the same to those of labour officers in Tanzania Mainland.

#### **4.3.2.5. Enforcement (Dispute Resolution) Mechanisms**

Like in Tanzania Mainland, persons with disability can utilize dispute resolution mechanisms to enforce their rights. This could be through general human adjudication under the *Basic Rights and Duties Enforcement Act* (which applies in both Tanzania Mainland and Zanzibar); dispute mechanisms as set out under the Labour Relations Act; or through complaint mechanisms under the *Persons with Disabilities (Rights and Privileges) Act*.

With respect to the “normal” adjudication channels, to date, there has been no court decision with respect to the rights of persons with disability from Zanzibar. It is also important to note that while under Zanzibar’s disability legislation, the Council is empowered to receive complaints and conduct formal investigations with respect to any alleged offence under the Act, no investigation will be conducted where it is satisfied that

---

<sup>1303</sup> Muhammed, R. A. (15.5.2014) Interview (E-Mail).

<sup>1304</sup> Section 13.(1), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1305</sup> Section 14, *Ibid*.

the subject matter will be more effectively or conveniently dealt with by another statutory body.<sup>1306</sup> It is unfortunate that while the disability law recognizes the potential role of other organs in dealing with matters of violations of rights of persons with disability, like the judiciary, it is unfortunate that the judiciary appears not to have been utilized effectively in as far as the rights of persons with disability are concerned.

### 4.3.3. Comparative Experience

#### 4.3.3.1. Disability Focal Points and Co-ordination Mechanisms

Several African countries have in place national disability councils/agencies, which function as disability “focal points” in governments. Unlike the council in Tanzania, the councils of Ghana, Kenya, Uganda and Zambia are body corporates.<sup>1307</sup> These councils draw members from different entities, including government ministries, organisations of persons with disabilities as well as employers (and employees in the case of the Kenyan council),<sup>1308</sup> and undertake various monitoring, coordinating, promotion/advocacy and advisory functions.<sup>1309</sup>

<sup>1306</sup> Section 32(3)(iii), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1307</sup> Section 41(1), Act No. 715 of 2006 (Gh), *supra*, n. 702; Section 3(1) and (2), Act No. 14 of 2003 (Kn), *supra*, n. 197; Section 3 (1) and (2), The National Council for Disability Act (Ug), *supra*, n. 1188; Section 11(1), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>1308</sup> Section 43. Act No. 715 of 2006 (Gh), *supra*, n. 702; Section 4, Act No. 14 of 2003 (Kn), *supra*, n. 197; Section 7, The National Council for Disability Act (Ug), *supra*, n. 1188; Section 13(1), Act No. 6 of 2012 (Zmb), *supra*, n. 569. Perhaps in an attempt to address the disability diversity, Zambia’s disability legislation has listed representation of persons with disability based on fixed categories of impairment – mental, visual, physical and hearing (Section 13(1)(i) – (iv), *ibid*). Although the Kenyan disability legislation does not mention the “specific categories of impairment” to be considered in the membership of the disability council, the language used in the legislation is that the membership shall consist of “not more than eight persons nominated... by organisations representing persons with various categories of disabilities” (Section (1)(a), Act No. 14 of 2003 (Kn), *supra*, n. 197). The assumption could be that the stated number is exhaustive in as far as the diversity of disability is concerned. Considering the social approach to disability recognizes disability as an evolving concept, these approaches (having a fixed number of members according to categories of impairment) may not be correct.

<sup>1309</sup> Section 42(1), Act No. 715 of 2006 (Gh), *supra*, n. 702; Section 7, Act No. 14 of 2003 (Kn), *supra*, n. 197; Section 6, The National Council for Disability Act (Ug), *supra*, n. 1188; Section 14, Act No. 6 of 2012 (Zmb), *supra*, n. 569. There are however some variations as related to some functions of the councils – that is, some functions are not common among all the councils. For example, Zambia’s council is authorized to provide legal representation for persons with disability or, like the Kenyan council, register persons with disability (Section 11(1) (e), (j), (k), *ibid*; and Section 7(1)(c), Act No. 14 of 2003 (Kn), *supra*, n. 197). The Ugandan council has a clear mandate to carry out or commission surveys and investigations in matters or incidents relating to violation of rights of persons with disability, and non-compliance with programmes, policies or laws relating to disability; and take appropriate action or refer the matter to the relevant authorities (Section 6(1)(f), The National Council for Disability Act (Ug), *supra*, n. 1188. In exercising this function, the Ugandan council has powers to call witnesses and demand the production of documents that it may require (Section 6(2), *Ibid*.). One of the functions of the Kenyan council is to provide assistive devices, appliances and other equipment to persons with with disability (Section 7(1)(d)(i), Act No. 14 of 2003 (Kn), *supra*, n. 197). The Kenyan council shall also “endeavour to secure the reservation of five percent of all



South Africa does not have an entity similar to the “disability councils”. Instead, the National Department of Women, Children and People with Disabilities was instituted 2009 under the *Public Service Act, 1994*<sup>1310</sup> to “monitor other government departments to ensure the mainstreaming of, *inter alia*, disability considerations into all programmes of government and other sectors. The overall goal of the departmental strategic plan is to promote the achievement of equality and eradicate discrimination against women, children and persons with disability. The mandate of the department is not governed by specific framework legislation – it is informed by a range of national laws that inform equality, empowerment, human rights and human dignity processes. The department, in execution of its mandate draws on and informs, where necessary, a range of legislation and policies, including those pertaining to employment of persons with disability.<sup>1311</sup>

In addition to the disability focal points or similar institutions, labour ministries and departments are responsible for enforcing employment legislation, most of which prohibit discrimination on the ground of disability. The powers given to officers working under these bodies are generally similar to the powers of the labour officers in Tanzania.<sup>1312</sup> How much they would enforce disability related provisions would therefore very much depend on either the nature of the disability provisions in the respective employment laws, or the legal connection between general employment laws and specific disability or equality legislation.<sup>1313</sup>

---

casual, emergency and contractual positions in employment in the public and private sectors for persons with disability[y]” (Section 13, *Ibid.*).

<sup>1310</sup> Section 7(5)(a) *The Public Servic Act, 1994* (Proclamation No. 103 of 1994) (South Africa), . Previously, the South African government had established the Office on the Status of Disabled Persons (at the national level government and within the provinces). (For more information about this office, see: Matsebula, S, *et al*, 'Integrating Disability within Government: the Office on the Status of Disabled Persons', in B. Watermeyer, et al. (Eds.), *Disability and Social Change: A South African Agenda.*) However, lack of inter-ministerial implementation or monitoring process resulted in considerable frustration among persons with disability. A new Ministry for Women, Children, and Persons with Disabilities was established in 2009 as a fully operational ministry, and functions of the OSDP were transferred to this ministry (Flynn (2011), *supra*, note 280, p. 104).

<sup>1311</sup> Examples include: Act No. 66 of 1995 (SA), *supra*, n. 1098; Office on the Status of Disabled Persons (South Africa) (1997), *supra*, n. 686; *The Technical Assistance Guidelines on the Employment of People with Disabilities, 2007*, Act No. 55 of 1998 (SA), *supra*, n. 687, Act No. 4 of 2000 (SA), *supra*, n. 350; and *The Basic Conditions of Employment Act, 1997* (Act No. 75 of 1997) (South Africa) .

<sup>1312</sup> For example: Section 5 (1), Act No. 11 of 2007 (Kn), *supra*, n. 687; Sections 45 and 47, Act No. 651 of 2003 (Gh), *supra*, n. 687; Sections 8, 9, 10 and 11, *Act No. 6 of 2006 (Ug)*, *supra*, n. 687; Section 65 and 66, Act No. 75 of 1997 (SA), *supra*, n. 1311; Section 35, Act No. 55 of 1998 (SA), *supra*, n. 687; Sections 4, 5 and 6, *The Employment Act* Cap. 268 (Zambia).

<sup>1313</sup> For example, in South Africa, laobur inspectors under the Act No. 55 of 1998 (SA), *supra*, n. 687, can exercise the powers conferred to them under the Act No. 75 of 1997 (SA), *supra*, n. 1311.

#### 4.3.3.2. National Human Rights Institutions

In several African States, there have been established NHRIs and equality bodies, which are authorised to undertake monitoring functions with respect to human rights and equality matters.<sup>1314</sup> Like Tanzania, in both Zambia and Ghana there is a single national human rights institution for each country, while Kenya, Uganda and South Africa have more than one entities mandated to perform functions similar to those of *Paris Principles Institutions*. However, for each of these countries, only one institution has been accredited by the ICC – namely: Kenya National Commission on Human Rights, South Africa Human Rights Commission, and Uganda Human Rights Commission.

In Kenya, in addition to the accredited NHRI,<sup>1315</sup> there is also the National Gender and Equality Commission established in accordance with the Constitution of Kenya, which creates a possibility of restructuring the NHRI into two or separate commissions.<sup>1316</sup> Among the functions of the Gender and Equality Commission are to co-ordinate and facilitate mainstreaming of issues of persons with disability,<sup>1317</sup> and conduct audits on the status of special interest groups including persons with disability.<sup>1318</sup> These are in addition to the investigative,<sup>1319</sup> monitoring, and promotion functions.<sup>1320</sup> Furthermore, the National Gender and Equality Commission is authorized to establish Committees, in whose membership the committee may co-opt other persons whose knowledge and skills are necessary for the function of the commission (which may include expertise knowledge in disability matters)<sup>1321</sup> Within the National Gender and Equality Commission, matters of persons with disability are dealt with under the Disability and Elderly department.

---

<sup>1314</sup> Kenya National Commission on Human Rights; Uganda Human Rights Commission; South African Human Rights Commission; Human Rights Commission (Zambia); Commission on Human Rights and Administrative Justice (Ghana); Equal Opportunities Commission (Uganda); National Gender and Equality Commission (Kenya)

<sup>1315</sup> The Kenya National Human Rights and Equality Commission is established by Article 59(1) of The Constitution of Kenya, *supra*, n. 693, as a successor to the previous national human rights institution (with the same name) established by the repealed law of 2002.

<sup>1316</sup> In accordance with Article 59(4) and (5) of *ibid*, there is a room for the restructuring of the national human rights and equality commission into two or separate commissions; and in case of such a restructuring, duties of the new commissions shall be specified by the law, and the new commissions shall have the status and powers of a national human rights commission.

<sup>1317</sup> Section 8(d), *Ibid*.

<sup>1318</sup> Section 8(m), *Ibid*.

<sup>1319</sup> Sections 28 to 41, *Ibid*.

<sup>1320</sup> Section 8 generally, *Ibid*.

<sup>1321</sup> Section 18(1) and (2) (a) and (b), *Ibid*.

Under Chapter Four (titled Protection and Promotion of Fundamental and Other Human Rights and Freedoms) of the Constitution of Uganda,<sup>1322</sup> two entities are established: the Uganda Human Rights Commission,<sup>1323</sup> and the Equal Opportunities Commission.<sup>1324</sup> The former is accredited by the ICC, and enjoys more elaborate provisions in the Constitution compared to the latter.

Uganda's Equal Opportunities Commission is tasked to monitor, evaluate and ensure compliance with equal opportunities and affirmative action in favour of groups marginalized on various grounds, including disability.<sup>1325</sup> The Commission is empowered, *inter alia*, to investigate or inquire into, complaints made by individual persons or groups of persons, with respect to matters of perpetrating discrimination, marginalization or otherwise undermining of equal opportunities.<sup>1326</sup> This function seem (in some way) to be in overlap with the function of the Uganda's Human Rights Commission, which is also mandated to investigate complaints made by persons or groups of persons against the violation of any human right.<sup>1327</sup> There also seems to be an overlap of functions of the Equal Opportunities Commission, the National Council for Disability and the Human Rights Commission, especially with respect to self-initiated investigation on violation of human rights of persons with disability, if related to discrimination in particular, and such other matters related to awareness, research, or monitoring of compliance with international obligations.

The accredited NHRI in South Africa is the South African Human Rights Commission established under the Constitution of South Africa.<sup>1328</sup> In addition to the South African Human Rights Commission, the South African Constitution establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,<sup>1329</sup> and the Commission for Gender Equality.<sup>1330</sup> The Human Rights commission has been issuing equality reports, containing chapters on disability. Compared to other reports from the human rights institutions of the countries selected for this study,

---

<sup>1322</sup> The Constitution of Uganda, *supra*, n. 350

<sup>1323</sup> Article 51(1), *ibid*.

<sup>1324</sup> The Equal Opportunities Commission is established pursuant to Article 32(2), *ibid*, *Ibid*, and Section 2 of *The Equal Opportunities Commission Act, 2007* (Uganda) .

<sup>1325</sup> Section 14, *ibid*

<sup>1326</sup> Section 14(2)(a), *Ibid*.

<sup>1327</sup> Article 52(1)(a), The Constitution of Uganda, *supra*, n. 350.

<sup>1328</sup> Article 181(1)(b), The Constitution of South Africa, *supra*, n. 696.

<sup>1329</sup> Article 181(1)(c), *Ibid*.

<sup>1330</sup> Article 181(1)(d). *Ibid*.

the equality reports of the South African Human Rights commission look more comprehensive.

In Zambia, the Human Rights Commission<sup>1331</sup> is authorized, like the Kenyan commissions, to establish such committees as it considers necessary for purposes related to its functions vested in it by the law.<sup>1332</sup> It is however unfortunate that among the established committees, none seems to be dealing directly with disability issues.<sup>1333</sup> This could explain why Zambia's HRC has not been active in monitoring the rights of persons with disability.<sup>1334</sup> Ghana's Commission for Human Rights and Administrative Justice<sup>1335</sup> does not have statutory stipulated committees, creating lesser capabilities of dealing with disability issues effectively.

There is no international law clearly forbidding the establishment of more than one entity mandated to perform the activities of Paris Principles Institutions. This and the practice in Kenya, South Africa and Uganda show that such a move is possible also with disability related entities. However, the fact that the accreditation criteria of NHRIs is restricted to one institution per State, means that the other (extra) institutions may be, in some ways, lacking the full qualities of the "bridge aspect" between the international law and the domestic implementation. The accreditation limitations notwithstanding, the establishment of more *Paris Principles-like bodies* in some States to deal with the marginalised groups is an indication that more emphasis is placed on the protection of the rights of those groups. In those States where other institutions have been established in addition to the accredited NHRIs, there ought to be a strong cooperation between NHRIs and those other institutions.

<sup>1331</sup> Article 125(1), The Constitution of Zambia, *supra*, n. 522, establishes the Human Rights Commission of Zambia. *The Human Rights Commission Act* (Cap 48) (Zambia) makes further provisions for the Commission. The *Draft Constitution of Zambia* provides for the establishment of two commissions: the Human Rights Commission and Gender Equality Commission (Articles 73 and 74, *The Draft Constitution of Zambia*, 2012 ).

<sup>1332</sup> Section 15(1), Cap 48 (Zmb), *supra*, n. 1331.

<sup>1333</sup> The established committees are: Children's Rights Committee; Committee against Torture; Economic, Social and Cultural Rights Committee; Civil and Political Rights Committee; and Gender Equality Committee. More information about the administrative structure of the Zambian Human Rights Commission can be accessed at <http://www.hrc.org.zm/structure.php> , Accessed 20.1.2014; Zambian Human Rights Commission (2007) 'Statement Of Compliance With The Paris Principles, Presentation of the Zambian Human Rights Commission at the Commonwealth Conference of National Human Rights Institutions, Zambian Human Rights Commission, [http://secretariat.thecommonwealth.org/Shared\\_ASP\\_Files/UploadedFiles/EAD2B633-38F9-4317-9DE8-A1CD03F3663E\\_ZambiaHumanRightsCommissionPresentation.pdf](http://secretariat.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/EAD2B633-38F9-4317-9DE8-A1CD03F3663E_ZambiaHumanRightsCommissionPresentation.pdf), accessed: 20.1.2014.

<sup>1334</sup> Birtha, M. (2013), "'Nothing About CRPD Monitoring Without Us": A Case Study On The Involvement of the Disability Movement In Policy-Making In Zambia', in *African Disability Rights Yearbook*, at p. 129.

<sup>1335</sup> The Commission is established by Article 216 of The Constitution of Ghana, *supra*, n. 350. *The Human Rights and Administrative Justice Act, 1993* (Act No. 456 of 1993) (Ghana) makes further provision for the Commission.

Furthermore, when an extra entity is desired, it is much more practical (in terms of resource and shared experience of marginalisation) to establish to combine disability and other equality entities, in order to avoid a danger of having too many entities dealing with different marginalised groups.

#### **4.3.3.3. Civil Society and Consultative Mechanisms**

Organisations of Persons with Disability, Human Rights Organisations and Trade Unions exist in various African countries. For example, at the national levels, organisations of persons with disability include: Disabled People South Africa (DPSA), Ghana Federation of the Disabled (GFD) (formerly Federation of Disabled Associations), National Union of Women with Disabilities of Uganda (NUWODU), and the United Disabled Persons of Kenya (UDPK), Zambia Federation of Disability Organizations (ZAFOD). The mentioned organisations were formed between 1980s and late 1990s. Since their formation, these organisations have been the centre of disability right movements in their respective countries. They have been involved in general issues of advocacy and some specific issues like involvement of persons with disability in decision-making processes. In other words, they represent the voice of persons with disability.

Without downplaying their general role in political involvement, or involvement of persons with disability in NHRIs or the focal points, there are many more possibilities of enhancing persons with disability's participation with the view of incorporating their views to improve the implementation of specific disability rights, including those related to work. South Africa's "disability imbizo" provides a good example. The South African government has been engaging with persons with disability, and this includes the direct interaction between the government and persons with disability public forums - "disability imbizo", through which the public hears directly from the government about action taken to reduce the problems they have experienced, and the communities also get opportunities to air their concerns, and share their ideas on how to overcome problems and speed up implementation.<sup>1336</sup> In these forums, public representatives, often from the highest level of government, make themselves to answer questions from persons with disability who would not usually have the opportunity to make contact with government departments.<sup>1337</sup>

---

<sup>1336</sup>Flynn, E. (2011), *supra*, n. 295, at p. 219.

<sup>1337</sup>*Ibid*, at p. 220.

In order to give more power to their voice, persons with disability organisations should also consider strengthening their corporation with other professional organisations, especially human rights organizations, and for the case of employment rights, trade unions. A good example of collaboration between the disability movement and other professional organisations is the collaboration between the Disabled People South Africa and the Lawyers for Human Rights, who together launched the Disability Rights Charter of South Africa in 1992, which declared a range of persons with disability's rights.<sup>1338</sup> Another good example is ZAFOD's cooperation with local law firms for purposes of providing for legal advice and engaging in litigation on behalf of indigent persons with disability who experience disability rights abuses.<sup>1339</sup> Involvement of Organisations of Persons with Disability in human rights litigation is also evident in Kenya.<sup>1340</sup>

#### 4.3.3.4. Enforcement (Dispute Resolution) Mechanisms

States selected for this study have in place mechanisms to deal with human rights and labour disputes. These include human rights (constitutional) procedures, or labour dispute resolution mechanisms. Of all the selected countries, South Africa is the only one with "equity courts", established under the *Promotion of Equality and Prevention of Unfair Discrimination Act*.<sup>1341</sup> Equity courts not deal with employment matters, since such matters are dealt with under the dispute resolution mechanisms in the *Employment Equity Act*.<sup>1342</sup>

Generally, despite some progress in legislation, judicial progress in the area of disability and employment in the States selected for purposes of this study appears to be slow. In South Africa, the first ever reported case on disability and employment (having consideration of disability as a prohibited ground of discrimination) appears to be the case of *IMATU v City of Cape Town*,<sup>1343</sup> which was delivered in 2005, approximately seven years after the enactment of *Employment Equity Act*. The case concerned the definition of disability under Section 6(1) of the *Employment Equity Act*. However, the decision has

<sup>1338</sup>Nhlapo, C. M, *et al*, 'Disability and Human Rights: The South African Human Rights Commission', in B. Watermeyer, et al. (Eds.), *Disability and Social Change: A South African Agenda*, at p. 100.

<sup>1339</sup>Kalaluka, L. (2013), 'Towards an effective Litigation strategy of Disability rights: The Zambia Experience', in *African Disability Rights Yearbook*, at p. 170.

<sup>1340</sup>See for example: *Kenya Society for the Mentally Handicapped (KSMH) v the Attorney General and 7 Others*, High Court of Kenya at Nairobi, Petition 155A of 2011; *Federation of Women Lawyers Kenya and 5 others v Attorney General and Judicial Service Commission*, *supra*, n. 710.

<sup>1341</sup>Section 16(1)(a) and (b), Act No. 4 of 2000 (SA), *supra*, n. 350.

<sup>1342</sup>Act No. 55 of 1998 (SA), *supra*, n. 687.

<sup>1343</sup>*IMATU v City of Cape Town*, *supra*, n. 714. For a detailed discussion about this case and equality of persons with disability in the work place in South Africa, see: Ngweni, C. G. (2010), *supra*, n. 715.

been criticised for being “overly aligned with an individual impairment model.”<sup>1344</sup>In Kenya, almost all cases on reasonable accommodation were instituted after the promulgation of the new constitution of 2010, but provisions on reasonable accommodation and general protection of persons with disability at the work were in existence since the coming into force of the disability legislation in 2004.

#### **4.4. Conclusive Summary**

The CRPD is one of the few international instruments prescribing the institutional mechanism for the domestic implementation of the rights. The institutional mechanisms envisage under the CRPD include the NHRIs, the disability focal points and the participation civil societies. Already Tanzania and other African States selected for this study have in place NHRIs and disability focal points. Some of these had been in existence before the CRPD, and others have been recently formed (despite already been provided for in the respective statutory instruments). The disability movement and civil society in general also appear to be making some progress, inviting more expectations of increased cooperation between governments and civil societies in matters related to persons with disability. In addition to these arrangements, there are also specific institutions established for purposes related to the implementation of labour laws. There are general similarities of functions of these institutions across the countries selected for purposes of this study, with some exceptions as regards the nature of disability focal points and the formation of equality bodies and NHRIs.

Human rights commissions and disability focal points may be dealing with matters related to the right to work of persons with disability, but it is the labour institutions which have the broader mandate and the required experiences to enforce labour laws and policies. Coordination of the activities of human rights commissions, disability focal points and labour institutions, among others, is therefore important for realization of persons with disability’s rights to work. Meanwhile, the activities of organisations of persons with disability, human rights organisations, as well as trade unions are essential in raising awareness on disability rights generally, and needs of persons with disability at work.

It is difficult to evaluate the performance of various entities dealing with disability matters, and in particular concerning employment, the main reason being lack of comprehensive

---

<sup>1344</sup>*Ibid*, at p. 417.

data. Nevertheless, courts seem to have started developing meaningful jurisprudence on matters related to the employment of persons with disability, and in particular reasonable accommodation. Apparently, there have been only a few decisions, and this could be either because of the fact that only a few persons with disability are employed, or that even fewer of them are prepared to pursue matters in court. More research on this would be necessary. Institution mechanisms discussed in this chapter are not without challenges. These are discussed in the next chapter.



## CHAPTER 5

### LIMITATIONS, CHALLENGES AND PROSPECTS

#### 5.1. Introduction

The holistic nature of disability necessitates a combination of measures towards realization of persons with disability's rights, including the right to work. It follows therefore, that a comprehensive discussion on challenges or limitations of measures employed towards promotion, protection, or realization of persons with disability's right to work must take into consideration issues concerning not only specific disability matters, but also general human rights and equality matters, labour standards matters, or such other matters which may, in one way or another, be affecting persons with disability's equal chances of realizing rights.

The concepts and measures discussed in the previous chapters (with respect to equality and disability generally, and the measures aimed at enhancing and protecting persons with disability's right to work) are not without challenges or limitations. Despite the fact that many States, including those selected for the purposes of this work, have ratified the CRPD, and adopted legislation and policies influencing approaches to disability and employment, the effectiveness of the required measures would depend, *inter alia*, on how States implement their policies and laws.<sup>1345</sup> This is due to the fact that "implementation gaps" – differences between the content laws and policies on one hand, and their implementation on the other hand, have been hampering people's disability's enjoyment of human rights.<sup>1346</sup> The difficulties or weaknesses of implementation are many, and are the result of combination of factors, not only limited to legal or institutional weaknesses. Some of these may be due to the limited nature of the concept of disability and the "multi-dimensional" nature of the human rights approach to disability (theoretical limitations), which do not necessarily originate from laws or policies (although might be influencing them); and some other challenges or limitations are related to the general problems of enforcing legal rights; weaknesses among non-state actors (including low awareness on disability matters); poor general infrastructure (not under the employers' jurisdiction); or

---

<sup>1345</sup>Kanter, A. S. (2007), *supra*, n. 237, at p. 309.

<sup>1346</sup>*Ibid.*

education, among others. This chapter explains some of the major challenges or limitation directly or indirectly affecting the enforcement or full realisation of persons with disability's right to work in Tanzania. However, the chapter may not exhaust all the challenges and limitations.

The challenges or limitations notwithstanding, it should also be noted there are also promising signs with respect to the future of disability rights generally, and specific aspects of labour rights applicable to persons with disability. This is due to the increasing recognition of persons with disability rights in international and domestic fora, the situation which has galvanized disability movements and generated awareness of disability rights. Disability is thus increasingly becoming an equality issue.

## **5.2. Limitations and Challenges**

### **5.2.1. Limitations of Human Rights Approach to Disability**

#### **5.2.1.1. Disability Impairment Dichotomy**

The human rights approach to disability which I have adopted in this work is built upon the social approach to disability (the social model), whose essential feature is the disability-impairment dichotomy. It follows that the human rights approach cannot completely avoid some operational limitations of the social conceptualization of disability. The following theoretical limitations mean that measures like job accommodation or anti-discrimination provisions cannot alone guarantee employment for persons with disability.

#### **(a) Real Limitations of Impairment**

The social approach to disability has been criticized for sidelining the phenomenological aspects of functional limitations<sup>1347</sup> by disowning individual and medical approaches, and thereby risking implying that impairment is not “at all” a problem,<sup>1348</sup> or even being interpreted as rejecting helpful medical solutions to impairments.<sup>1349</sup> The basic health care and functional ability influence life activities and often survival,<sup>1350</sup> and that the negative

---

<sup>1347</sup> Grech, S. (2009), *supra*, n. 41, at p. 776.

<sup>1348</sup> Shakespeare, T. (2006), *supra*, n. 453, at p. 200.

<sup>1349</sup> *Ibid.*

<sup>1350</sup> Grech, S. (2009), *supra*, n. 41, pp. 776, 777.

impact of inadequate medical services have resulted into worsening conditions of impairment, and also deaths.<sup>1351</sup>

### **(b) Effects of Poverty on Disability**

Individual attributes of a person with disability are more exposed in situations of extreme poverty, because poverty and dependence, *inter alia*, represent the principal economic conditions that may be associated with human rights violations.<sup>1352</sup> In addition, the distinction between rights and charity is made difficult where there are urgent needs of daily necessities to ensure survival. In such cases, immediate interventions are in forms of needs-based material and service provision, making charity inevitable for improving the quality of life of persons with disability.<sup>1353</sup> Abstract advocacy of rights is unlikely to have any meaning to the poor,<sup>1354</sup> and this means that matters like elimination of barriers may not always be the first priority, and even if they are, they may not be achieved over a short period of time.<sup>1355</sup> Poverty also exposes limitations of impairment in cases where poor livelihoods are often dependent on hard physical labour: e.g. agriculture, because in these circumstances, a healthy body becomes imperative.<sup>1356</sup>

### **(c) Limits of Barrier-Free Environment**

The social approach to disability is rooted on the notion of a “barrier-free” environment, which may not be practically fully implemented. Over generalisation of this concept (and problems of persons with disability in general) runs the risk of overlooking that persons with disability are not a homogeneous group;<sup>1357</sup> and that “one-fit-all approach” may not always be appropriate.<sup>1358</sup> Not only is the fact that some forms of environment will always remain inaccessible to some persons with some types of impairments, but also is the fact that accommodations are sometimes incompatible because people with different impairments may require different solutions, and that practicality and resource constraints

---

<sup>1351</sup>Mboya, M. W. and Possi, M. K. (1996), *supra*, n. 605, at p. 62.

<sup>1352</sup>Mitchell, N. J. and McCormick, J. M. (1988) 'Economic and Political Explanations of Human Rights Violations, *World Politics*, Vol. 40, No. 4, at p. 479. However, according to the authors, “poor countries do not necessarily violate their citizens' human rights; among those that do, the extent varies.” ( *ibid*, at p. 498).

<sup>1353</sup>Katsui, H. (2008), *supra*, n. 91, at p. 17.

<sup>1354</sup>Shivji, I. G. (1999), *supra*, n. 6, at p. 257.

<sup>1355</sup>Katsui, H. (2008), *supra*, n. 91, at p. 16.

<sup>1356</sup>Grech, S. (2009), *supra*, n. 41, at p. 776.

<sup>1357</sup>*Ibid*, at p. 777; Katsui, H. (2008), *supra*, n. 91, at p. 13.

<sup>1358</sup>*Ibid*, pp. 13, 14.

make it unfeasible to overcome every barrier.<sup>1359</sup> For example, the challenges facing persons with visual impairment may not completely be overcome by the provision of information in Braille or the provision of white canes, which means some degree of real limitations reducing one's employment opportunities (if the job requires one to regularly communicate with non-verbal communication or to recognize people).<sup>1360</sup> Furthermore, the diversity within the larger disability group also means that some methods of eliminating barriers for persons with some types of impairments may themselves be barriers for persons with other types of impairments.<sup>1361</sup> For example, increasing light in a work place to accommodate the needs of a person who needs more light to see (people with nyctalopia/night blindness) may be a barrier to another employee whose sight is affected by bright light (Hemeralopia or Glare Disability). Therefore, "even in the most accessible world, there will always be residual disadvantage attached to impairments".<sup>1362</sup>

#### **5.2.1.2. General Limitations of Human Rights**

##### **(a) Weak Human Rights Language**

Before I proceed to discuss this challenge, I should make clear that not all disability rights are economic rights. My discussion of social economic rights is only with respect to the right to work under both the ICESCR and the CRPD (discussed in Chapter 3). In this part, I give a brief description of "measures" to be taken in accordance with Article 4(2), and then proceed to elaborate the challenges with respect to the said measures. Among the challenges associated with the human rights approach to disability, and especially where such rights fall under the category of social economic rights, is the broad language in social economic rights.

To begin with, Article 4(2) of the CRPD provides:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law

<sup>1359</sup>Shakespeare, T. (2006), *supra*, n. 453, pp. 201 - 202.

<sup>1360</sup>Mmatli, T. O. (2010), *supra*, n. 194, at p. 78, citing French (1993).

<sup>1361</sup>Shakespeare, T. (2006), *supra*, n. 456, at p. 201.

<sup>1362</sup>Shakespeare, T. and Watson, N. (2001), 'The Social Model of Disability: An Outdated Ideology?', in S. N. Barnartt and B. M. Altman (Eds.), *Exploring Theories and Expanding Methodologies: Where We are and Where We need to go. Research in Social Science and Disability*, at p. 50.

The wording is not very different from the provisions of Article 2(1) of the ICESCR.<sup>1363</sup> Therefore, based on the interpretation of Article 2(1) of the ICESCR, it is correct to state that article 4(2) of the CRPD also imposes obligations of conduct (to take measures) and obligations of result (to achieving progressively).<sup>1364</sup>

The Committee on Economic, Social and Cultural rights had issued General Comment No. 3, elaborating on the nature of States parties' obligations with respect to Article 2(1) of ICESCR. According to the General Comment, the obligation "to take measures" is of immediate application, just as it is the obligation to guarantee that the relevant rights are exercised without discrimination; and the measures should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>1365</sup>

The taking of measures depends on the availability of resources, and admittedly, resources are a core problem in realizing economic, social, and cultural rights.<sup>1366</sup> It is impossible to have a precise list of the types of resources which must be mobilised by States,<sup>1367</sup> and it is the state of a country's economy that most vitally determines the level of its obligations as they relate to any of the enumerated rights under the Covenant.<sup>1368</sup> Under the ICESCR, the expression "to the maximum of its available resources" was intended to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.<sup>1369</sup>

---

<sup>1363</sup> Article 2(1) of the ICESCR provides: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

<sup>1364</sup> Paragraph 1, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* E/1991/23, 01 Jan 1991

<sup>1365</sup> Paragraphs 1 and 2, *ibid*

<sup>1366</sup> Robertson, R. E. (1994) 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social, and Cultural Rights, *Human Rights Quarterly*, Vol. 16, No. 4, at p. 694.

<sup>1367</sup> *Ibid*, at p. 695.

<sup>1368</sup> Alston, P. and Quinn, G. (1987) 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 9, No. 2, at p. 177.

<sup>1369</sup> Paragraph 13, General Comment No. 3 (The Nature of States Parties Obligations), *supra*, n. 1364. While resources may include potential international resources, the wording in the CRPD is different from that of ICESCR. Under the ICESCR, steps are to be taken individually (by states) "and through international assistance and co-operation." Under the CRPD, it is only "when needed" that measures are to be taken within the framework of international cooperation.

The requirement to fulfil minimum cores means that States are required to fulfil their minimum core obligations irrespective of the availability of resources of the country concerned or any other factors and difficulties, although resource constraints are taken into account in assessing whether a state is meeting its minimum core obligations.<sup>1370</sup> Minimum cores, according to the General Comment No. 3, mean at the very least, minimum essential levels of each of the rights under the ICESCR.<sup>1371</sup> Any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.<sup>1372</sup> In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>1373</sup>

The above notwithstanding, responses to violations of economic, social and cultural rights have not been as strong as the responses to the infringements of civil and political rights.<sup>1374</sup> Thus, despite having a powerful language, the human rights approach been criticized for having broad and often contradictory language, and therefore weak in its operational strategies. The rights claim are presented in general language which, standing on its own, is vague and difficult to pin down.<sup>1375</sup> While human rights are inter-dependent, the operation of some specific rights is weak in that some rights require the progressive realization subject to availability of resources.<sup>1376</sup> “Words like ‘maximum’, ‘available’, ‘progressively’ [and] ‘appropriate means’ are so ambiguous that almost any position can be taken in that respect.”<sup>1377</sup> The wide discretion created by such words blurs the future progress with respect to the implementation of economic rights,<sup>1378</sup> including disability rights falling under that category. Concrete ascertainment of the parameters of such rights (economic rights) and the obligations they might impose upon States are lacking, and the

---

<sup>1370</sup>Chenwi, L. (2013) 'Unpacking “Progressive Realisation”, its Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for Assessing Compliance, *De Jure*, Vol. 46, No. 3, at p. 753, citing, Paragraph 10, General Comment No 3.

<sup>1371</sup> Paragraph 10, General Comment No. 3 (The Nature of States Parties Obligations), *supra*, n. 1364.

<sup>1372</sup>*Ibid.*

<sup>1373</sup>*Ibid.*

<sup>1374</sup>Leckie, S. (1998) 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 20, No. 1, pp. 81, 82.

<sup>1375</sup>De-Vos, P. 'Experience of Human Rights in Africa: Challenges of Implementing Economic, Social and Cultural Rights', in C. M. Peter (Ed.), *The Protectors Human Rights Commissions and Accountability in East Africa, Kampala: Kituo cha Katiba*, at p. 4.

<sup>1376</sup>Katsui, H. (2008), *supra*, n. 91, pp. 9 – 10.

<sup>1377</sup>Riedel, E. (2007), *supra*, n. 787, at p. 9..

<sup>1378</sup>Flynn, E. (2011), *supra*, n. 295, at p. 111.

process of clarifying them has been slow.<sup>1379</sup> Because of this vagueness, it has been argued, that rights claims are broad and unmanageable territory for the courts.<sup>1380</sup>

The concept of the “minimum core” is itself not without problems. On one hand, the reference to the “minimum essential levels” may carry a presumption that these are the things without which the very survival of man is at threat – that no derogation therefrom should be allowed. Yet on the other hand, an assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints “applying within the country concerned”. It means here that the “basic needs” element is measured in accordance with the resources “applying within a country concerned”. There is therefore no universally defined content of the “minimum core”, which has also been described as a “[c]oncept in [s]earch of [c]ntent.”<sup>1381</sup>

---

<sup>1379</sup>Eide, A. (1995), 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, et al. (Eds.), *Economic, Social, and Cultural Right*, at p. 10.

<sup>1380</sup>Mbazira, C. (2009) *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice*, Pretoria: Pretoria University Law Press, at p. 26, citing Scott & Macklem (1992), Andreassen (1988), Neier (2006) and the Report of the Working Group, UN Doc E/CN.4/2004/44.

<sup>1381</sup>Young, K. G. (2008) 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *The Yale Journal of International Law*, Vol. 33, No. 1. According to Young, the concept of the “minimum core” seeks to establish a minimum legal content for the notoriously indeterminate claims of economic and social rights. (*ibid*, at p. 113). However, an attempt to seek a minimum legal content of the right threatens the broader goals of economic and social rights. (*ibid*, at p. 114). The definition of minimum core notwithstanding, the difficult question remains as to the exact content of the minimum core. Young’s comprehensive description of minimum core gives elaborates three approaches to the concept of minimum core: “normative essence”, “minimum consensus”, or “minimum obligation”. Approached as “normative essence”, the minimum core can mean either minimum requirements for survival, relying on the basic needs (life, survival and basic needs); or the minimum requirements for human flourishing (dignity, equality and freedom) (*ibid*, pp. 126 – 140). While the former interpretation of the “normative essence” appears to be narrow and “misses the important connections between dignity and human flourishing that are intrinsic to many interpretations of the right to life” (*ibid*, at p. 130); the major challenge to the latter interpretation is “human dignity can be measured subjectively or objectively.” (*ibid*, at p. 135, citing Schachter, 1983 and Weinrib, 2002). The difficulties of having “the essential normative boundaries” of the “minimum essence” prompt a consideration of a second approach to the interpretation of the minimum core – treating it as the “minimum consensus” agreed upon by States (*ibid*, at p. 141.). In ascertaining the consensus, it is important to have a consideration of not only the additional (widely ratified) treaties with overlapping content with respect to economic and social rights (and the international jurisprudence flowing from them), but also the national measures contained in constitutional texts, legislation or judicial precedent (*ibid*, at p. 142). But even the “minimum consensus” approach has its limitations, especially “the uncertainty as to whose agreement counts” (*ibid*, at p. 164). The problems of Essence and Consensus approaches point to the third approach – minimum core as minimum obligation, which focusses on “the duties required to implement the rights, rather than the elements of the rights themselves” (*ibid*, at p. 151.). Not only does this approach enable the analysis of realistic strategies for rights protection (what it actually takes to protect rights), the minimum obligation approach also answers to the problem of categorisation of rights (justiciable and non-justiciable rights) by making clear how all rights contain both negative and positive duties upon States (*ibid*, pp. 151 – 152).<sup>1381</sup> However, eve the Obligations approach is “incompatible with a ‘core’ designation, due to the polycentric obligations that correlate with each economic and social right, the relativity between their ‘negative’ and ‘positive’ formulations, and the danger of capture into vocabularies of institutional jurisdiction or justiciability” (*ibid*. pp. 174 -175).

Furthermore, the question of cost (resources) constitutes “the hidden but powerful agenda” that equality should not impose ‘burdens on business’,<sup>1382</sup> and may perhaps explain why for many years, the emphasis has mostly been placed on “the most urgent needs”, such as basic healthcare and education and minimum standard of living only.<sup>1383</sup> Despite the “desire” to improve the life conditions of persons with disability, it has been argued for example, that lack of adequate resources (in Uganda) to deal with the more persistent and seemingly overwhelming problems such as HIV/AIDS, conflict and political stability makes disability a low priority,<sup>1384</sup> since there seems to be a very high cost associated with the implementation of the disability law.<sup>1385</sup>

Proceeding from the above observations, there could less priority with respect of implementing programs (falling under the category of economic rights) aimed at enhancing persons with disability’s access to employment; and in the circumstances, the human rights approach to disability risks being a mere “moral high ground”<sup>1386</sup>

#### **(b) Limited Legal-Dominated Approach to Human Rights**

Human rights have often been narrowly construed in legal perspective, and thereby subjecting it to all sort of problems associated with the enforcement of legal rights. It has been argued that too much reliance on human rights professionals and lawyers tend to alienate the targeted groups,<sup>1387</sup> since the “legal system and courts are too often inaccessible due to illiteracy, lack of information, unawareness of rights, financial deficiency and/or physical inaccessibility.”<sup>1388</sup> Furthermore, human rights judicial activism has been described as “an elitist top-down project, [which] in many ways paternalistic, in which good-hearted and sensitive judges substitute themselves for the people....”<sup>1389</sup> Nevertheless, this does not mean that human rights law is of no use to persons with disability. While it is a reality that human rights law alone cannot bring major social transformation, human rights legal practitioners can expose the real problems of the people, and thereby develop legitimacy to the organized activities of the people

---

<sup>1382</sup>Fredman, S. (2005), *supra*, n. 460, at p. 208.

<sup>1383</sup>Flóvenz, B. G. (2009), *supra*, n. 18, at p. 259.

<sup>1384</sup>Muyinda, H. and Whyte, S. R. (2011), 'Displacement, Mobility and Poverty in Northern Uganda', in A. H. Eide and B. Ingstad (Eds.), *Disability and Poverty: A Global Challenge*, at p. 134.

<sup>1385</sup>Disability Rights Promotion International (2013), *supra*, n. 210.

<sup>1386</sup>Katsui, H. (2008), *supra*, n. 91, at p.10, citing Uvin, (2002 & 4):

<sup>1387</sup>*Ibid*, at p. 11, citing Kennedy (2004).

<sup>1388</sup>*Ibid*, at p. 12, citing Lundström Sarelin, (2007).

<sup>1389</sup>Shivji, I. G. (1999), *supra*, n. 6, at p. 272.



themselves, and at the same time undermine the legitimacy of the reaction of the forces of the status quo.<sup>1390</sup> Therefore, where institutions of judicial enforcement are properly utilized, they stand in a better position to develop useful jurisprudence in human rights, and in particular in countries like Tanzania, where there is still a little judicial jurisprudence in the area of disability rights. This also calls for more awareness rising, and engagement of legal professionals in the area of disability rights. The challenge may be the fact that most of the legal practitioners may not be ready to engage themselves in areas perceived as “non-rewarding”.

### **5.2.1. Specific Issues Relating to Disability and Employment Law**

Disability and employment laws in Tanzania and several African states have a number of limitations. Some constitutions (for example of Tanzania and Zambia) provide very little for persons with disability; and in some States, despite a shift in approach to disability matters, there appears to be some lenience towards the medical definition of disability among. There are also challenges with respect to enforcement of the respective legislation. This work cannot exhaust all legal limitations. Only selected issues are discussed under this section.

#### **5.2.1.1. Legal Definition of Disability**

The “pure” social definition of disability in law might be unrealistic or even inappropriate. While disability laws may define disability as a result of both impairment and barriers (which may include discrimination); on the other hand, one can easily find either in constitutions or disability laws that “disability” (not impairment) is mentioned as a prohibited ground of discrimination. Having “disability” in place of “impairment” in anti-discrimination provision tends to overlook the fact that the principle of non-discrimination contained in disability laws or in constitutions (where disability is mentioned as a prohibited ground of discrimination) is aimed at preventing unequal treatment against some persons because of some “uncontrollable” individual characteristics – impairments.<sup>1391</sup> This means that “[d]isability discrimination laws thus need to define discrimination as well as disability and it therefore makes no sense to define disability as the outcome of discrimination.”<sup>1392</sup> A good example here can be taken from labour and

---

<sup>1390</sup> *Ibid.*

<sup>1391</sup> Hendriks, A. C. (2002), *supra*, n. 305, at p. 209.

<sup>1392</sup> Degener, T. (2006), *supra*, n. 390.

disability legislation of Tanzania Mainland. While the former prohibits discrimination on the ground of disability, the later define disability to include a condition resulting from societal factors (which may include discrimination).<sup>1393</sup>

Furthermore, in ascertaining that a person is covered by the disability law, or is entitled to job accommodation, he needs to prove at least prima facie proof of an impairment or similar condition in order to be recognized as a member of the protected class.<sup>1394</sup> The significance of medical reports has featured in a number of reasonable accommodation cases discussed in Chapter 3. This argument does not mean that law should revert to the medical definition of disability, but acts as a reminder of the significance of holistic approach to disability.

#### **5.2.1.2. Complaint Procedure under Disability Law**

The current disability law in Tanzania Mainland sets out a separate complaint procedure which also touches matters related to employment, notwithstanding the existence of a complaint procedure under the employment law. Regulation 42 of the *Persons with Disability (General) Regulations*<sup>1395</sup> provides:-

- (1) Any person who has been denied an employment opportunity by any employer on the ground stipulated in Section 31(3) of the Act may lodge a complaint to the Minister and the Council.
- (2) Subject to the provision of sub-regulation (1), where the decision of the Minister or the Council is in favour of the complainant, the employer concerned shall be ordered to offer employment to such complainant
- (3) Any aggrieved person on the decision made by the Minister or the Council may refer the matter to the relevant labour institution provided the Labour Institution Act.

The simple interpretation of the aforesaid provisions is that in matters related to the “denial of employment opportunity”, the complaint procedure is a “two-steps procedure” - First, a person who is denied an employment opportunity can file the complaint to the relevant authorities; and second, upon being aggrieved, one may refer the matter to the Commission for Arbitration and Mediation, an institution established under the Labour Institutions Act<sup>1396</sup> to deal with labour disputes. This procedure has three problems. First, the law is silent on how the order of the council or the minister is to be enforced. Second, the

---

<sup>1393</sup> See Chapters 2 and 3 of this work.

<sup>1394</sup> Hendriks, A. C. (2002), *supra*, n. 305, at p. 209.

<sup>1395</sup> GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

<sup>1396</sup> Act No. 7 of 2004 (Tz MInd), *supra*, n. 170.

procedure appears to be prolonging matters by requiring persons with disability to lodge complaints to the minister or the council before approaching the commission for mediation and arbitration upon being aggrieved by the decision of the minister or the council; while under employment law, complaints can be lodged directly to the Commission, since under Section 7(9)(b) of the *Employment and Labour Relations Act*,<sup>1397</sup> an "employee", for purposes of Section 7 (which promotes equality and prohibits discrimination on the ground of disability disability) includes an applicant for employment. The better explanation of the third problem necessitates the re-production of the content of Section 31 (1) to (3) of the *Persons with Disability Act* mentioned in the above quoted provision (Regulation 42 of the *Disability (General) Regulations*<sup>1398</sup>) as follows:

1. Every employer, public or private, shall, where there is a vacant post fit for a person with disability and the person applies for the vacancy, give the employment to the persons with disabilities who meet the minimum qualification for such an employment.
2. The Minister shall, in consultation with the Minister responsible for labour, make Regulations requiring every employer with the work force of twenty and above to employ persons with disabilities based on a quota system and to ensure that three percent of it constitutes persons with disabilities.
3. Notwithstanding subsection (2), the employers shall not contravene subsection (2) unless the employer can prove to the satisfaction of the Minister and the Council that-
  - (a) after reasonable efforts he has failed to find a person with disability or a qualified person with disability for that post;
  - (b) due to the nature of the employment, he could not get a person with disability with the skills or experience required;
  - (c) due to the nature of work or the circumstance of the working place it may not be possible to employ a person with disability; and
  - (d) taking into consideration of the conditions of the person with disability, he is not or would not be able to perform the work adequately as required.

From the above quoted provisions, it is clear that Section 31(3) which is referred to in Regulation 42(1) does not stipulate "grounds for the denial of employment" which may be the subject of complaint. Instead, Section 31(3) provides for the circumstances under which an employer may be exempted from the compliance with the employment quotas. While this might suggest that Regulation 42 should be applicable only when the denial of

---

<sup>1397</sup> Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>1398</sup> GN No. 152 of 2012 (Tz MInd), *supra*, n. 544.

employment opportunity means that the employer does not comply with the quota provision, such an interpretation would be extremely limited, and contrary to the spirit of general purposes of the disability legislation and anti-discrimination provisions contained in the constitution, employment legislation, as well as the disability legislation. It is reasonable to presume that the law intended to protect persons with disabilities against any unfair denial of employment opportunities. This means that any matter which amounts to discrimination under any provisions relating to the employment of persons with disability should be construed as a prohibited ground under Regulation 42 as quoted above. Regulation 42(1) is therefore unnecessary, and should be amended so as it becomes compatible with section 33(1) of the *Persons with Disabilities Act*,<sup>1399</sup> section 7(9) (b) of the *Employment and Labour Relations Act*,<sup>1400</sup> and regulation 34(1), (2) and (3), *Code of Good Practice Rules*.<sup>1401</sup>

In Zanzibar and other African countries, the disability law does not attempt to set separate complaint procedures with respect to matters of employment of persons with disability (which reduces bureaucracy). Zanzibar's disability legislation expressly provides that the complaint procedure under it does not restrain any aggrieved person from filing a suit before the High Court or any other competent body with jurisdiction to determine the complaint.<sup>1402</sup> The complaint procedure under Zanzibar's disability law relates to offences which include denial of employment to a person with disability.<sup>1403</sup> Since the prosecution of offences is not aimed at remedying the individual, this is therefore a different procedure from the normal labour disputes resolution mechanisms where complainants seek to enforce their labour rights.

In Kenya, a disability discrimination complaint by a person with disability against his employer goes through normal labour dispute resolution mechanism.<sup>1404</sup> This is also the case in South Africa, where the Commissioner for Mediation and Arbitration, and the Labour Courts, have jurisdiction over the *Employment Equity Act*.<sup>1405</sup> Also in Ghana and

---

<sup>1399</sup> Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1400</sup> Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>1401</sup> GN No. 42 of 2007 (Tz MInd), *supra*, n. 573.

<sup>1402</sup> Section 32(8), Act No.9 of 2006 (Znz), *supra*, n. 82.

<sup>1403</sup> Section 22(b), read together with Section 7, *Ibid*.

<sup>1404</sup> Section 15(3), Act No. 14 of 2003 (Kn), *supra*, n. 197.

<sup>1405</sup> See Chapter Seven of Act No. 66 of 1995 (SA), *supra*, n. 1098, and Section 46 – 50, Act No. 55 of 1998 (SA), *supra*, n. 687.

Zambia, the disability legislation does not provide for a “separate” complaint procedure to enforce employment rights of persons with disability.

The idea of relying on the same labour law dispute solution mechanisms with respect to complaints by persons with disability (related to employment) may be received with scepticism by those with the view that such dispute solution mechanisms do not adequately address the needs of persons with disability, especially considering such issues as accessibility and other general challenges affecting the current mechanisms. However, while these could be legitimate claims, it should be noted that already the current labour dispute solution mechanisms do have the required experience in labour disputes, and what is needed is to “accommodate” that experience to fit the needs of persons with disability, rather than setting up a new complaint procedure, or simply prolonging it.

#### **5.2.1.3. Judicial Technicalities**

The Labour Court in Tanzania Mainland has already issued a couple of decisions on discrimination (not related to persons with disability), which, either generally or when applied to persons with disability, appear to suggest that combating discrimination through labour law regime is also not completely free from judicial technicalities.

The general rule appears to be that under Section 37(3) (b) of the *Employment and Labour Relations Act*,<sup>1406</sup> discrimination (on whatever ground) makes termination automatically unfair, but a plea of unfair termination does not automatically include a plea of discrimination, since the two form different causes of action. In other words, it is possible for an employee to have a cause of action based on discrimination, even where such discrimination has not caused termination of employment. Both unfair termination and discrimination are aspects of unfair labour practice.<sup>1407</sup>

While both unfair termination and discrimination are aspects of unfair labour practice, mixing issues of labour disputes and breach of constitutional rights (which might include issues related to equality) is likely to hinder the complaint or an application before the Labour Court, and this is because of a separate human rights procedure introduced by the *Basic Rights and Duties Enforcement Act*, as already discussed in Chapter 4. In the case of

---

<sup>1406</sup> Act No. 6 of 2004 (Tz Mlnd), *supra*, n. 79.

<sup>1407</sup> *Abubakar Haji Yakubu. v Air Tanzania Co. Ltd.*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 162 of 2011.

*Job Mwakang'ata v Director, Kinondoni Municipal Council*,<sup>1408</sup> the employee was seeking revision of the decision of the Commission of Mediation and Arbitration (CMA) dated. The original complaint had “mixed claims”, including breach of constitutional rights. The Labour Court held, *inter alia*, that neither the CMA nor the Labour Court had jurisdiction in a claim involving breach of constitutional rights because the venue for accessing such right is as prescribed under the *Rights and Duties Enforcement Act*. The Labour Court referred to the case of *Zayurnba Abeid versus Tanzania Ports Authority*,<sup>1409</sup> in which it was held that although the Labour Court is empowered to be guided by the Constitution in interpreting the *Employment and Labour Relations Act*,<sup>1410</sup> the Constitution is not enforceable under the Act. This approach is problematic because, while, for example, it is true that one can file a constitutional petition to challenge discrimination, it is also established under the respective labour legislation (as already stated) that discrimination is prohibited. Considering the fact that the labour court is expected to operate with less technicalities, it would have been better for the court to inquire into the nature of the matter, that is, whether there was in fact discrimination and whether the said discrimination adversely affected the employee. Although the case at hand was not related to disability discrimination, it may negatively affect other matters in future, for example when an individual alleges unfair termination on the ground of disability discrimination.

Court decisions from South Africa and Kenya (discussed in this work), on matters related to the employment of persons with disability, do not show the essence of restricting the jurisdiction of labour courts (or similar avenues) to exclude constitutional issues, even if when such issues are related to the labour dispute at hand.

#### **5.2.1.4. Poor Drafting, Lack of Implementation and Abuse of the Law**

As already mentioned, among the measures aimed at enhancing persons with disability's access to employment have been the enactment of penal provisions. The major limitations to the enforcement of these provisions appear to be either the way they are drafted, or the general failure on the part of the law enforcers to take the required action.

---

<sup>1408</sup> *Job Mwakang'ata v Director, Kinondoni Municipal Council*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 66 of 2009.

<sup>1409</sup> *Zayurnba Abeid versus Tanzania Ports Authority*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 155 of 2008.

<sup>1410</sup> Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

The first disability law in Tanzania Mainland provided for penal sanctions in three circumstances: (1) offences related to the breach of employment quotas;<sup>1411</sup> (2) giving or offering to give employment to a person without disability in an employment of a class specified only for registered persons with disability;<sup>1412</sup> and (3) obstructing the Commissioner of Social Welfare (or his authorized officers) while exercising the power of entry for purpose of inspection and for ensuring compliance with the provisions of the law.<sup>1413</sup> While prosecuting the breach of quota provisions appeared to be “bureaucratic” because of the requirement of the consent of the DPP, I could not come across any reported case with respect to other offences under the formal disability legislation. This could be a sign of the failure on the part of the law implementers to take the required actions.

The current employment and disability laws also contain penal sanctions to back up anti-discrimination and equality measures.<sup>1414</sup> Different from the former disability law, there is no requirement of the consent of the DPP. But it remains to be seen to what extent the current laws may propel enforcers to act, because my research has not come across any criminal prosecution under the new laws in matters related to the employment of persons with disability. Apparently, there are two shortcomings of the penal provisions under the current laws. First, the disability and employment laws provide for different consequences of committing the same offence (discriminating an employee with disability). While the offence of discrimination attracts only a fine under the *Employment and Labour Relations Act*,<sup>1415</sup> discrimination offences under the *Persons with Disabilities Act* attract a fine or imprisonment, or both.<sup>1416</sup> The danger could be that where there develops a tendency to prosecute under less severe statute, the other statute might be rendered ineffective. Nevertheless, this should not be conclusive that the severity of punishment can alone solve the problem of discrimination of persons with disability at the work place. The second problem is that some penal provisions under the *Persons with Disability Act* appear to suffer from bad drafting, which may cause unnecessary confusion when it comes to enforcement. For example, Section 62(k) provides for an offence of “denying employment

---

<sup>1411</sup> Section 17 (1), [Cap 184 R.E. 2002] (Tz MInd, repealed), *supra*, n. 75.

<sup>1412</sup> Section 19(4), *ibid.*

<sup>1413</sup> Section 20(2), *ibid.*

<sup>1414</sup> Section 7(7), 8(2), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79; Section 62(b), and 62 (l) (i), (ii),; and Reg. 3(2), (3), GN No. 152 of 2012 (Tz MInd), *supra*, n. 544. Regulation 3(3) reproduces the provision of Section 62(l)(ii) of the Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1415</sup> Section 102(3), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79.

<sup>1416</sup> Section 33(3), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80. The fine under Section 33(3) amounts to two million Shillings.

to a person with a disability without good cause.”, while already Section 33(1) (b) prohibits discrimination in “recruiting a person for employment” (and a lesser punishment is provided in Section 33(3)). The *Persons with Disabilities Act* does not define “recruitment”. The definition of the term under the *Employment and Labour Relations Acts* intended only for purposes of Section 43 of the said law.<sup>1417</sup> Its application is therefore limited. Whether the legislature intended to distinguish between “denying employment without a good cause” and “discrimination in recruiting”, seems to be doubtful. If that was the case, the difference between the two, and purpose of prescribing different punishments are unclear. Having two different standards in two different statutes dealing with the same problem is prone to inconsistency.

Like in Tanzania Mainland, Zanzibar’s disability and employment laws contain penal sanctions against almost identical acts, although with differences in severity of punishments.<sup>1418</sup> Furthermore, there is still a requirement of consent to prosecute offences under the employment law,<sup>1419</sup> but such a requirement does not exist under the disability law. Implementation of the law in Zanzibar is made difficult because, to date, there is no subsidiary legislation which is needed for the effective operationalization of the law.<sup>1420</sup>

In some other African states, some penal provisions (on matters related to persons with disability) also appear to suffer from “inconsistency”. In Kenya, for example, the employment law makes discrimination in employment an offence, which attracts the punishment of a fine or imprisonment for a term not exceeding three months or to both.<sup>1421</sup> However, under the disability legislation, the offence of discriminating a person with disability in employment attracts a punishment of a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year; or to both fine and imprisonment.<sup>1422</sup> In Uganda, the employment law does not specifically prescribe discrimination in employment (on any prohibited ground) as an offence. Nevertheless,

<sup>1417</sup> Section 43(3), Act No. 6 of 2004 (Tz MInd), *supra*, n. 79. Recruitment is defined to mean “the solicitation of any employee for employment by the employer or the employer's agent.

<sup>1418</sup> Under Section 90 of the Act No. 11 of 2005 (Znz), *supra*, n. 82, offences of discriminating employees with disability, denial of employment or dismissal on the ground of disability, failure to provide reasonable accommodation or alternative job upon disability) attract the fine of not less than four hundred thousand shillings or in default of such fine to imprisonment of not less than three months. Under Section 22 (b), of Act No.9 of 2006 (Znz), *supra*, n. 82, offences of denying employment to a person with disability, or failure to effect reasonable accommodation attract a fine of not less than fifty thousand Shillings or imprisonment for a term of not less than 5 month or to both such fine and imprisonment

<sup>1419</sup> Section 22(1), Act No. 11 of 2005 (Znz), *supra*, n. 82.

<sup>1420</sup> Abdallah, R. A. (10.6.2014) Interview (E-Mail)

<sup>1421</sup> See Section 5 (6) and 88 (1), Act No. 11 of 2007 (Kn), *supra*, n. 687.

<sup>1422</sup> See Section 26 (1) (b) and 26 (2), Act No. 14 of 2003 (Kn), *supra*, n. 197.



nothing in the said law prohibits a person from being prosecuted for a criminal offence under any other law.<sup>1423</sup> While this suggests that a person can be prosecuted under another law, for example, disability law, on matters related to employment of persons with disability, the only penal provision under Uganda's disability law is too broad, and does not prescribe any specific offence. According to the said provision, a contravention of any provision of Uganda's disability Act is an offence which attracts a fine.<sup>1424</sup> In absence of a clear and specific description of an offence, enforcing such a provision is difficult to enforce.

It is also important to note that either because of ineffectiveness of laws or inactiveness of implementers, employers may not feel obliged to implement the respective legal or policy requirements, and some may even "take advantage" of loopholes within the legal provisions to the detriment of persons with disability. For example in Ghana, although the disability law was enacted in 2006, the statutory instrument necessary for the effective operationalisation of the act was yet to be adopted by the year 2013.<sup>1425</sup> In Uganda, there have been some complaints that some provisions of Uganda's disability legislation were prone to abuse, and the law has been criticized for not having effective quota provisions, and lack of clear system of enforcement and monitoring to protect persons with disability against exploitation by some employers who may employ them on casual or temporary basis for purposes of claiming tax refund.<sup>1426</sup>

### **5.2.2. Institutional Weaknesses**

In Tanzania, there had existed (before the ratification of the CRBD and the enactment of new employment/labour and disability laws), and still exist, some institutions tasked with the protection of human rights generally and implementation of labour laws. I have explained in Chapter 4, the functions and powers of these organs, including the CHRGG, the former disability council, and the relevant labour institutions. Where the problems with respect to the realization of the rights are within the laws or policies themselves, it could be right to assume that having new laws would enhance the performance of the primary institutions tasked with the supervision or implementation of the said laws and policies.

---

<sup>1423</sup> Section 95, Act No. 6 of 2006 (Ug), *supra*, n. 687.

<sup>1424</sup> See Section 43(1), (2), (3), (4), The Persons with Disabilities Act (Ug), *supra*, n. 702.

<sup>1425</sup> Gyamfi, E. A. (2013), 'Ghana's Report on Disability', in *African Disability Rights Yearbook*, at p. 243.

<sup>1426</sup> Serunkuma, P. (26.10.2009) 'Current Law on Disability and Employment Prone to Abuse <http://www.newvision.co.ug/D/8/459/699132>, accessed on, *New Vision*, accessed: 24.12.2013.

But where there are operational problems within the relevant institutions, not related to the content of laws or policies, then the new laws or policies may still be difficult to implement without first solving these problems.

#### **5.2.2.1. Health or Welfare Affiliation of Disability Focal Points**

The effectiveness of disability focal points would depend on whether or not these councils meet such standards as those listed by Gatjens. Among other conditions, Gatjens opposes tying the councils to ministries or departments which deal with limited disability issues (and thereby inclining to individual approaches to disability). In Kenya, Uganda and Zambia, members of the respective councils are appointed ministers responsible for disability affairs.<sup>1427</sup> The general practice in some countries appears to be that the ministers in charge are usually those in charge of social welfare, or labour,<sup>1428</sup> although specific laws do not expressly point to those ministries save for specific tasks. For example, in Ghana, the ministry of social welfare, through the public employment centres, is tasked with the responsibility of assisting persons with disability to secure jobs,<sup>1429</sup> or, where applicable, giving those persons with disability who could not find jobs to get appropriate training, providing them with working tools, and assisting them to access loan capitals.<sup>1430</sup> In Uganda, the Minister responsible for labor determines employment (disability) quotas (in consultation with the employers' organizations).<sup>1431</sup>

Tying disability focal points to ministries responsible for matters like health, labour or welfare tend to limit disability focal points' coordination and equality mandate, since while tied under one sectoral ministry (health, labour or welfare), a disability focal point may not easily overcome bureaucratic barriers to act for matters outside their respective ministries.

#### **5.2.2.2. Limited Capacity of Disability Focal Points**

The report of the LRCT had revealed several institutional challenges which severely affected the implementation of the previous disability laws in Tanzania Mainland. It is

---

<sup>1427</sup> Section 4, Act No. 14 of 2003 (Kn), *supra*, n. 197; Sections 2 and 7, The National Council for Disability Act (Ug), *supra*, n. 1188; Section 13(3), Act No. 6 of 2012 (Zmb), *supra*, n. 569.

<sup>1428</sup> Unlike the disability legislation of Ghana and Tanzania, the disability legislations of Uganda, Kenya and Zambia, by the definition of the term "minister", do not specifically attach the ministry responsible for person with disability to labour or social welfare issues. In South Africa, general issues of persons with disability fall under the Ministry of Women, Children and Persons with Disability (established in 2009), although the Ministry responsible for labour matter administers the Act No. 55 of 1998 (SA), *supra*, n. 687.

<sup>1429</sup> Section 9, Act No. 715 of 2006 (Gh), *supra*, n. 702.

<sup>1430</sup> Section 13, *ibid.*

<sup>1431</sup> Section 13(3), The Persons with Disabilities Act (Ug), *supra*, n. 702.

unfortunate that the “re-established” National Advisory Council for Persons with Disabilities seems to be just as weak as its predecessor because of its limited mandate (only advisory), and lack of greater autonomy compared to similar councils in Kenya, Uganda, Zambia or Zanzibar (although these may also be facing some other challenges).

Limited mandate and autonomy notwithstanding, effectiveness of disability councils may be severely limited when they are less prioritized in terms of budget. For example, because the Social Welfare Department (Tanzania Mainland) had been moved around different ministries, its uncertain long-term status could be impairing long term planning or secure adequate funding.<sup>1432</sup> To overcome this challenge, and perhaps as a way of seeking more attention to disability issues, it has been suggested that disability co-ordination should be shifted to the high commanding office of the government. In Tanzania Mainland, SHIVYAWATA has been pushing for the same, but without success so far.<sup>1433</sup>

In Zanzibar, although the disability council is not a part of labour, welfare or health ministry (which would have been perpetrating the health or welfare approach), the council has not been able to be fully autonomous, especially in terms of budgeting. The Council’s budget depends on the portion from the Office of the Vice President’s office.<sup>1434</sup> In Uganda, the disability council was reported not to have been able to function in an effective manner, this being the result of a multiplicity of complex and interrelated factors, among them being lack of sufficient organisational capacity to conduct its affairs in an efficient and effective manner, the major problem owing to insufficient funding from the government.<sup>1435</sup> In Ghana, it has been pointed out that the capacity of the country’s council to administrate state policy on the ground level is limited, funding also being among the problems facing the council.<sup>1436</sup> Resources issues have also been mentioned in South Africa.

### **5.2.2.3. Uncoordinated Operations of Labour and Disability Institutions**

Uncoordinated operations of institutions mandated to administer policy and laws on disability and labour respectively poses a real challenge to the realization of persons with disability rights, and in this case, the right to work. In Tanzania, the current disability

---

<sup>1432</sup>Yokoyama, A. (2012), *supra*, n. 1103, at p. 31.

<sup>1433</sup>Rukwago, N. (4.6.2014), *supra*, n. 1244.

<sup>1434</sup>Abdallah, R. A. (10.6.2014), *supra*, n. 1420.

<sup>1435</sup>DFID Uganda (2009), *supra*, n. 210, pp. 20 – 21.

<sup>1436</sup>Downing, A. (2011), *supra*, n. 63, at p. 43.

legislation sets up a separate procedure of monitoring of labour rights, despite the fact that there already exist mechanisms under the labour law regime. Like with the previous laws and policies, the persons and institutions tasked to administer disability laws and policies on one hand, and employment laws and policies on the other, are different, and this is despite the fact that both disability and employment legislation cover issues related to the employment of persons with disability. For example, I have shown in Chapter 4 that in Tanzania Mainland, the Commissioner for Social Welfare's powers of entry and inspection of employers' premises under the disability legislation are similar to those of the Labour Officer under the labour institution legislation. However, labour and social welfare departments administer their respective laws and policies without a clear legal or administrative coordination mechanism, and that labour officers cannot enforce employment-related provisions under the disability legislation. It is also unfortunate that officers acting under the Commissioner of Social Welfare "leave" matters with respect to employment to the labour office.<sup>1437</sup> Giving labour officers the mandate to supervise the compliance of employment-related provisions under the disability legislation would sufficiently put them in a position to ensure protection of the rights of employees with disability, by combining, *inter alia*, both the general principles of the disability legislation (similar to those of the CRPD) and the experience of the office of the Labour Commissioner in the enforcement of labour laws – hence creating possibilities of having broad interpretation of legal provisions concerning the employment of persons with disability. One should also not underestimate the fact that conferring to the office of the Commissioner of Social Welfare the power of administering employment-related provisions of the disability legislation could be a burden, because the Commissioner is concerned with administration of several other laws apart from the disability legislation.<sup>1438</sup> After all, the Commissioner of Social Welfare had failed to exercise the statutory duty of inspecting employers covered by the previous disability legislation.<sup>1439</sup>

---

<sup>1437</sup> Lyengi, J. (24.5.2014) Interview (Telephone).

<sup>1438</sup> The functions of the Commissioner of Social Welfare in Tanzania Mainland under disability legislation are similar to those of the Director and Executive Secretary of Councils of Persons with disability in Kenya and Uganda respectively, but who carry out only those responsibilities specified under the respective disability laws. In Tanzania, the Commissioner of Social Welfare is also a member of the National Community Service Orders Committee established under Section 7 of the *Community Services Act* [Cap 291 R.E. 2002] (Tanzania Mainland); and also a member of the National Parole Board established under section 3 of the *Parole Board Act* [Cap 400 R.E. 2002] (Tanzania Mainland). The Commissioner of Social Welfare is also responsible for issuing or renewing licences to persons carrying on children's homes under sections 3 and 4 of the *Children Homes (Regulations) Act* [Cap. 61 R.E. 2002] (Tanzania Mainland); registration of day care centres under Section 3 of the *Day Care Centres Act* [Cap. 180 R.E. 2002] (Tanzania Mainland); and

#### 5.2.2.4. Underutilised National Human Rights Institutions, and the General Challenges thereof

The developments of laws and policies do not appear to have influenced significant changes in the way some national human rights institution operates. For example, the absence of specific disability related provisions in the law which prescribe the mandate of the CHRGG means that CHRGG interprets its general mandate to cover persons with disability.<sup>1440</sup> In the disability legislation, CHRGG is mentioned only once, and this is with respect to the representative from CHRGG in the disability council.<sup>1441</sup>

Although equality provision under the Constitution of the United Republic of Tanzania are applicable to persons with disability (despite the fact that disability is not specifically mentioned in the Bill of Rights), disability has not been featuring strongly in CHRGG activities - despite its wide functions. For example, since its establishment, CHRGG reports have not been continuously and comprehensively covering disability issues. This is in addition to other general challenges facing CHRGG, for example budgeting,<sup>1442</sup> and the fact that CHRGG is not adequately spread in the country, which makes its accessibility by the general public difficult.<sup>1443</sup> CHRAG has also been generally accused of being “very protective of the government in power.”<sup>1444</sup> This “protective” approach of the CHRGG may diminish its efficiency in promoting human rights generally, including the rights of persons with disability.

In addition to the above operational issues, the major limitation in terms of the mandate of the commission is the fact that its decisions with respect to human rights complaints have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out, and they are therefore not binding.<sup>1445</sup>

---

making recommendations with respect to resettlement orders under Section 5 of The *Resettlement of Offenders Act* [Cap. 71 R.E. 2002] (Tanzania Mainland).

<sup>1439</sup> LRCT (2008), *supra*, n. 71, at p. 32.

<sup>1440</sup> Mtulya, F. (5.6.2014) Interview (E-Mail).

<sup>1441</sup> Section 11(1) (f), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1442</sup> Mtulya, F. (5.6.2014), *supra*, n. 1440.

<sup>1443</sup> Apparently, there are only four offices: Dar es Salaam (head quarters); Mwanza, Lindi and Zanzibar.

<sup>1444</sup> For better analysis on the CHRGG and some other human rights commissions (ombudsman) in Africa, see Peter, C. M. (2009), *supra*, n. 1101, pp. 348 – 374.

<sup>1445</sup> See, Section 17(1), Cap 391 R.E. 2002 (Tz), *supra*, n. 502, and Peter (2009), *supra*, note 1075, p. 366.

Elsewhere in Africa, some of these institutions do not have the necessary power of enforcement of their decisions in cases of non-compliance,<sup>1446</sup> let alone the fact that many of the inquiries by these commissions have been with respect to “traditional” civil rights,<sup>1447</sup> and little of disability rights is seen from the work of these entities. Broad mandates and resource deficits have also been affecting the performance of these institutions.<sup>1448</sup> More specific challenges can be seen in the respective reports of these organisations.

### **5.2.3. General Issues relating to Disability Movement and Other Civil Society Organisations**

Organisations of persons with disability in developing nations have been reported to lack various elements that are essential for making their voice heard.<sup>1449</sup> In Africa, these organisations have been perceived to be weak and experiencing financial, organizational and operational constraints,<sup>1450</sup> and their dependence on donor funding may also mean competing over funding.<sup>1451</sup> Financial problems were found to be among the reasons which have rendered many organizations of persons with disability (in Tanzania Mainland) ineffective,<sup>1452</sup> and lack of transparency among some of these organizations may have given room for some individuals to use them for their own interests.<sup>1453</sup> Furthermore, most of the “well known” organisations of persons with disability in Tanzania are urban

<sup>1446</sup> Examples: In Ghana, in case of non compliance with the Commission’s recommendation, the commission may commence proceedings in a competent court for a remedy to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures (Sections 18(2), Act No. 456 of 1993 (Gh), *supra*, n. 1335). In Kenya, if the recommendations of the Commission are not implemented within the specified time, the Commission may submit the report to Parliament as the Commission thinks fit. (Section 42 (4), *The National Gender and Equality Commission Act, 2011* (Act No. 15 of 2011) (Kenya) ). In Zambia, the appropriate authority shall, within thirty days from the date of such recommendation of the commission make a report to the Commission, on any action taken by such authority to redress any human rights violation. Failure to make a report within specified time amounts to an offence, unless it is proved before the court either that the act constituting the offence was done without the knowledge, consent or connivance of such person; or the accused attempted to prevent the commission of the offence having regard to all the circumstances of the case. (Section 13 (2) (3)(5), Cap 48 (Zmb), *supra*, n. 1331).

<sup>1447</sup> Peter, C. M. (2009), *supra*, n. 1101. p. 362.

<sup>1448</sup> See for example: Bossman, A. (2007) *Promoting and Protecting Human Rights, Ensuring Administrative Justice and Fighting Corruption in Ghana*, Presentation of the Ghana Commission of Human Rights and Administrative Justice at the Commonwealth Conference of National Human Rights Institutions'; *Zambian Human Rights Commission* (2007), *supra*, n. 1333, pp. 2 and 14).

<sup>1449</sup> Fritz, D, *et al.* (2009), *supra*, n. 39, at p. 675.

<sup>1450</sup> Generally civil society organisations in Africa face difficulties in effectively representing, promoting or protecting the interests of their supposed beneficiaries ( Makumbe, J. (2002) 'Is there a Civil Society in Africa?', *International Affairs*, Vol. 74, No. 2pp, 316 - 317; DFID Uganda (2009), *supra*, n. 210, at p. 26.

<sup>1451</sup> Haapanen, T. (2007) 'Civil Society in Tanzania: KEPA’s working papers No. 19, at p. 12.

<sup>1452</sup> LRCT (2008), *supra*, n. 71, at p. 115.

<sup>1453</sup> *Ibid*, p. 115 -116.

centered, which means that they are not easily accessible by many persons with disability living in rural areas, where poverty is very likely to aggravate the problems of persons with disability.

In Tanzania Mainland, in order to minimise organisational and financial challenges, it was suggested that it could be appropriate for the government to coordinate the activities of those organizations and to provide subsidies to them to improve and maintain their quality, but without interfering with the main objective of their establishment.<sup>1454</sup> Under the current disability law, the National Advisory Council may advise the government on matters related to co-ordination of policies, programmes and the provision of grants relating to the persons with disability.<sup>1455</sup> At the regional, district and local government levels, the activities of persons with disabilities are to be coordinated by the relevant disability committees.<sup>1456</sup> However, the provision of subsidies to the organisations of persons with disability is made difficult because of limited budgeting.<sup>1457</sup> Resource issues for Organisations of Persons with Disability have also been reported in South Africa.<sup>1458</sup>

The limitations of the organisations of persons with disability (and the disability movement in general)) call for the need to enhance their capacity in order to engage effectively with government, donors, the business community and other key stakeholders.<sup>1459</sup> This also means the need for more cooperation between the organisations of persons with disability and other organisations, like human rights organisations, and for purposes related to labour matters, employer and employee organisations. While human rights organizations and organizations of persons with disability are best placed to promote the rights of persons with disability, trade unions have traditionally been relied to promote the rights of employees. However, the cooperation between organisations of persons with disability and other non-governmental organisations appears not to be strong enough. It is therefore important for the organisations of persons with disability to review their strategies in terms of not only the ways they work, but also the societies with which they build alliances.<sup>1460</sup>

---

<sup>1454</sup> *Ibid*, p.116

<sup>1455</sup> Section 12(2)(c), Act No. 9 of 2010 (Tz MInd), *supra*, n. 80.

<sup>1456</sup> See the second to third schedules, *Ibid*.

<sup>1457</sup> Lyengi, J. (24.5.2014), *supra*, n. 1437.

<sup>1458</sup> Du Plessis, I G. and Grobler, G. (2013), 'South Africa's Report on Disability', in *African Disability Rights Yearbook*, at p. 333.

<sup>1459</sup> Mwendwa, T. N, *et al.* (2009), *supra*, n. 1248, at p. 670.

<sup>1460</sup> *Ibid*.

#### 5.2.4. Awareness Issues

Although awareness on disability issues is growing globally, the pace has not been fast enough.<sup>1461</sup> Lack of awareness poses a real challenge to the disability rights campaign, because the general inclusion of persons with disability will be much harder if the discriminatory attitudes are not challenged and eradicated.<sup>1462</sup> Where stereotypes and myths are prevalent, either in the society generally or in the workplace, they become significant obstacles to eliminating discrimination in employment.<sup>1463</sup> For example in (Mainland and Zanzibar), some employers still believe that persons with disability are incapable, and are highly demanding in terms of special needs.<sup>1464</sup> This perception is not very different from community's perception of disability, and is being reflected in the employment rates of persons with disability, and treatment of employees after acquiring disability, among others.<sup>1465</sup>

Awareness issues also extend to legal obligations and rights relating to persons with disability. A survey carried out in Tanzania's business capital, Dar es Salaam, revealed that many employers were not even aware that they had a legal obligation to adhere to the required employment quotas.<sup>1466</sup> The level of awareness among persons with disability may also be questionable, considering many years of marginalization which have negative impact on the education and self-emancipation persons with disability. For example in Zanzibar, among the challenges facing many job applicants with disability is their lack of awareness of their specific needs during interviews.<sup>1467</sup> Under the circumstances, strategies to ensure the compliance with the laws or policies aimed at enhancing persons with disability's access to the labour market should be aimed at ensuring that employers and employees are actually made aware of legal obligation to hire and accommodate persons with disability.<sup>1468</sup>

---

<sup>1461</sup>*Ibid*, pp. 662–672.

<sup>1462</sup>*Ibid*.

<sup>1463</sup>Aldersey, H. (2012) 'Disability and Work: The United Republic of Tanzania's Workplace Policies in The Persons with Disabilities Act of 2010, *Disability Studies Quarterly*, Vol. 32, No. 3, <http://dsq-sds.org/Article/view/3279/3111>, accessed: 13.3.2012, citing Edwards, D. *et al.* (2010) and Percy, S. L. (2001).

<sup>1464</sup>Rukwago, N. (4.6.2014), *supra*, n. 1244; Muhammed, R. A. (15.5.2014), *supra*, n. 1303.

<sup>1465</sup>*Ibid*.

<sup>1466</sup>Aldersey, H. (2012), *supra*, n. 1463.

<sup>1467</sup>Abdallah, R. A. (10.6.2014), *supra*, n. 1420.

<sup>1468</sup>Aldersey, H. (2012), *supra*, n. 1463.



### 5.3. Some Positive Signs

The preceding part has elaborated some limitations of or challenges associated with the human rights approach to disability generally, and some particular issues related to employment. The acknowledgement of these limitations or challenges should not be interpreted to predict a dark future for persons with disability, considering the fact that some of the theoretical limitations have been the subject of debate for quite some time, and that other limitations and challenges are solvable. Significantly, the on-going developments with respect to the rights of persons with disability are themselves a positive step.

#### 5.3.1. Emphasis on Indivisibility and Inter-dependence of Rights

Disability is now becoming an important issue in international human rights, and the adoption of the CRPD provides an excellent opportunity to enquire into the protection accorded to persons with disability,<sup>1469</sup> since the Convention blurs the traditional distinction between first and second generation rights, and thereby affirming the notion of indivisibility of rights.<sup>1470</sup>

While the implementation of the CRPD distinguishes categories of rights – civil and political rights on one hand, and economic social and cultural rights on the other,<sup>1471</sup> the recent human rights literature depicts how intertwined the two sets of rights are, and therefore this distinction appears questionable.<sup>1472</sup> The trend in the scholarly debate has been in favour of eliminating the distinction between the two categories. For example, Eide (1995) had argued that not all the assumption underlying the subsequent division of human rights into civil and political rights on one hand, and economic social and cultural rights on the other are founded, since many of these assumptions are either overstated or mistaken, because there are considerable similarities in some obligations with regard to both sets of rights.<sup>1473</sup> The assumptions are said to overlook the indivisibility and interdependence of rights as fundamental tenets of international human rights law.<sup>1474</sup> In this case, economic rights do not only serve as a basis for entitlements which can ensure an adequate standard of living, but also form a basis of independence and freedom.<sup>1475</sup>

---

<sup>1469</sup>Dimopoulos, A. (2010), *supra*, n. 239, at p. 217.

<sup>1470</sup>Kayess, R. and French, P. (2008), *supra*, n. 119, at p. 13.

<sup>1471</sup>Article 4(2), CRPD, *supra*, n. 24.

<sup>1472</sup>Flóven, B. G. (2009), *supra*, n. 18, at p. 261.

<sup>1473</sup>Eide, A. (1995), *supra*, n. 1379, at p. 11.

<sup>1474</sup>CESCR (1991) *Applicability of the Covenant within Domestic Law*,

<sup>1475</sup>Eide, A. (1995), *supra*, n. 1379, pp. 20 – 21.

The key question is on how to implement economic disability rights,<sup>1476</sup> and for purposes of this work, including those related to the right to work. Although it may be expensive for countries with weak economies to guarantee economic rights, there cannot be justifications for the failure to guarantee some rights,<sup>1477</sup> and the general challenges of enforcing economic rights can be overcome where their implementation, is considered in a specific local context where such rights could be implemented.<sup>1478</sup>

In determining whether or not the state's measures are reasonable, an account must be taken of the resources available to actually realise the right in question, hence the requirement of the balance between goal and means.<sup>1479</sup> Where resources are clearly insufficient to attain any meaningful access to rights, a lack of action on the part of the state may be found to be more reasonable, than in cases where the resource constraints are less severe.<sup>1480</sup> But all existing resources must be devoted in the most effective way possible to the realization of the rights.<sup>1481</sup>

The term "available resources" includes both domestic resources and any international economic or technical assistance or cooperation available to a State.<sup>1482</sup> The term also covers both public expenditure and all other resources that can be applied towards the full realization of economic rights.<sup>1483</sup> It is the State's responsibility to mobilise these resources, which means not to provide them all directly from its own sources.<sup>1484</sup> Furthermore, the concept of progressive realization of rights is a recognition of the fact that full realization of all economic rights will generally not be able to be achieved in a short period of time, and the phrase must be seen in light of the overall objective, which is to establish clear obligations for States Parties to move as expeditiously as possible towards the realization of these rights. Nevertheless, under no circumstances shall this be

---

<sup>1476</sup>Flóvenz, B. G. (2009), *supra*, n. 18, at p. 261.

<sup>1477</sup>Wambali, M. K. B. (2009), *supra*, n. 13, at p. 74.

<sup>1478</sup>*Ibid.*

<sup>1479</sup>De-Vos, P. (2003) 'So Much to Do. So Little Done: The Right of Access to Anti-Retroviral Drugs Post-Grootboom', *Law, Democracy and Development*, Vol. 7, No. 1, at p. 91, citing *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

<sup>1480</sup>*Ibid.*

<sup>1481</sup>Leckie, S. and Gallagher, A. (ed.) (2006) *Economic, Social and Cultural Rights A Legal Resource Guide*, at p. xviii.

<sup>1482</sup>OHCHR (2005), *supra*, n. 529, at p. 11; Paragraphs 26, 27 and 28, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Document E/CN.4/1987/17, 8 January, 1097 (Limburg Principles)

<sup>1483</sup>OHCHR (2005), *supra*, n. 529, at p. 11; Ssenyonjo, M. (2009) *Economic, Social and Cultural Rights In International Law*, Oxford, Portland: Hart Publishing Ltd, at p. 62.

<sup>1484</sup>*Ibid.*

interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. States parties have the obligation to begin immediately to take steps to fulfill their obligations in implementing economic, social and cultural rights.<sup>1485</sup>

The African Commission of Human and People's Rights had discussed the issue of resources in *Purohit and Moore v Gambia*.<sup>1486</sup> The communication was essentially not concerned with the right to work, but a violation of Articles 2, 3, 5, 7(1)(a) and 7(1)(c), 13(1), 16 and 18(4) the *Banjul Charter*, which protects, inter alia, the right against discrimination, dignity and health. It was stated in the Commission's decision, at Paragraph 84, that:

The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

This decision is likely to influence the approach in similar situations regarding other rights whose full realization is influenced by availability of resources, such as the right to work.<sup>1487</sup>

### **5.3.2. On-going Developments in the Area of Disability Rights**

Some recent legislation adopted immediately before or after the CRPD appear to be abandoning the old approaches to disability that dominated former laws and policies. For example, Tanzania and Zambia's legislation incorporate the "General Principles" to be applied to persons with disability, which include all the principles stated in Article 3 of the CRPD. The new disability and employment laws appear to have facilitated the emerging judicial jurisprudence in matters related to employment of persons with disability.

---

<sup>1485</sup> Paragraph 21, Limburg Principles, *supra*, n. 1482.

<sup>1486</sup> *Purohit and Moore v Gambia* (2003) AHLR pp. 96.

<sup>1487</sup> Article 3(1) of the *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), 1998 extends jurisdiction to the Court to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol itself, and any other relevant Human Rights instrument ratified by the States concerned. In addition, Article 7 of the same Protocol refers to documents other than the Banjul Charter, *supra*, n. 14 as the sources of Law. This could be another way through which the principle of progressive realisation in the ICESCR, *supra*, n. 11 can be transferred to the interpretation of rights which appear in both the *Banjul Charter* and the CESC.

Admittedly, these judicial decisions are only a few, and one cannot state with certainty that the few cases referred to in this work has improved human resource practices among employers. Nevertheless, the very fact that there are positive judicial decisions means that persons with disability can have their rights protected by judicial organs. Eventually, it is the quality of these judicial decisions that is essential for the development of disability rights.

Reviews of constitutions, sectoral legislation or policy are on process in some countries, promising some more developments in the area of disability rights. For example, in Tanzania and Zambia, the draft constitutions list “disability” as among the prohibited grounds of discrimination, and contain other disability right provisions. In Uganda, the Ugandan Human Rights Commission has recommended to the Government of Uganda to amend Uganda’s framework disability legislation in order to ensure that it complies with the CRPD.<sup>1488</sup> In Zanzibar, the Department of Persons with Disability Affairs in the office of the First Vice President has developed a proposed Policy on Persons with Disability in 2014. The proposed policy is about to be submitted the relevant organs before being officially adopted. This will be the first framework policy on disability in Zanzibar.

### **5.3.3. Emerging Signs of Cooperation among Civil Society Organisations**

Although joint projects by organisations of persons with disability and other entities have not been very common and vibrant, there is every reason to suggest that cooperation between persons with disability organisations on one hand, and other civil societies organisations (such as trade unions and human rights organisations) can bring good results. For example, between June and September 2010, CCBRT and RADAR Development, in collaboration with SHIVYAWATA and TUICO, conducted a survey to assess the number of persons with a disability who are employed in companies in Dar es Salaam, Tanzania and to analyse the category of jobs that persons with a disability are engaged in. Despite having found only very few persons with disability were employed, the survey revealed that with greater awareness, employers are willing to make the adjustments needed to encompass diversity.<sup>1489</sup> Recently, SHIVYAWATA in partnership with the Secretariat of

---

<sup>1488</sup> UHRC (2012) 'The 15th Annual Report of the Uganda Human Rights Commission: The Report Submitted to Parliament of the Republic of Uganda, UHRC, at p. 203, <http://www.uhrc.ug/?p=1873>, accessed: 17.1.2014.

<sup>1489</sup> CCBRT, et al. (2010) 'Report on Employment of Persons with Disabilities in Dar es Salaam, Tanzania: An Assessment of the Proportion of Persons with Disabilities in the Workplace, Dar es Salaam., CCBRT; RADAR; DAA, at p. 32

African Decade of Disabled Persons carried out the Disability Advocacy for Rights (DAR) Project which eventually led into the introduction of the National Disability Mainstreaming Strategy (in Tanzania). Other partners in the said project included Ministry of Finance, Ministry of Health, UWZ and several other organisations of persons with disability.<sup>1490</sup>

#### **5.4. Conclusive Summary**

Realisation of rights is not accomplished merely through legal or policy stipulations. It also depends on several other factors beyond laws and policies. For laws and policies to have any meaningful impact on the lives of the people they seek to protect, challenges or limitations which directly or indirectly affect proper implementation of such laws should not be ignored.

The main focus of this work has been on employment of persons with disability, and from the beginning of this work, I have supported the human rights approach to disability (an “extension” of the social approach to disability) which is also reflected in recent disability laws and policies. It should be noted however, that embracing the human rights approach alone does not mean the end of all problems facing persons with disability, and for purposes of this work, access to the labour market.

This chapter has revealed several issues which may directly or indirectly affect efforts taken to enhance persons with disability’s access to the labour market, and equality at work. Some general limitations, like issues surrounding “disability-impairment dichotomy” or “human rights language” should not necessarily be perceived that the human rights approach to disability is more or less the same like the previous approaches to disability. None of the known approaches to disability can be said to be 100% cure to the problem of marginalization of persons with disability. Nevertheless, the human rights approach to disability is a bigger step ahead from the old charity or welfare approaches to disability. The new approaches support “the principles of desegregation, de-institutionalisation, and the duty to provide reasonable accommodations, and thus to the active tackling of structural discrimination.”<sup>1491</sup> Other challenges or limitations, like those related to awareness issues, poor organization of civil society, or weaknesses of the law and relevant institutions are solvable. It is in this area that in order to move the relevant forces to take

---

<sup>1490</sup>Rukwago, N. (4.6.2014), *supra*, n. 1244

<sup>1491</sup>Degener, T. (2005), 'Disability Discrimination Law: A Global Comparative Approach', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, at p. 106.

the appropriate steps, more coordinated action is required from the civil society, in particular organization of persons with disability in collaboration with trade unions and human rights organisations.

Despite the limitations and challenges, there are some positive indications of progress in the area of disability rights, including in matters related to employment. There are signs of increased awareness of disability rights generally, and among employees with disability of their rights; and possibilities of more accessible judicial environment (at least in terms of legal aid). There are also increased activities of civil society, including organisations of persons with disability, human rights organisations, and trade unions.

New laws and policies adopted would definitely require some time (progressive realization) in order to achieve the true equalization of opportunities and integration of persons with disability in the society. To what extent will these promotions enhance persons with disability' access to employment, would largely depend on the political will of their implementation, and perhaps some more changes on the law to give more "teeth" to the existing disability and human rights institutions. It has been argued that the purpose of the modern international initiatives, in particular the CRPD, can be achieved as much, or as little, as states are prepared to permit,<sup>1492</sup> which might mean that "the impact of international efforts will depend on politics rather than law, and on economics rather than ethics."<sup>1493</sup>

It should therefore be acknowledged that while States appear to be working towards achieving the objectives of the CRPD, undoing the legacy of the past takes time and resources,<sup>1494</sup> and therefore there are still choices to be made between some set of priorities.<sup>1495</sup>

---

<sup>1492</sup>Light, R. (2005), *supra*, n. 233, at p. 15.

<sup>1493</sup>*Ibid.*

<sup>1494</sup>Quinn, G. (2010), *supra*, n. 45, at p. 44.

<sup>1495</sup>*Ibid.*

## **CHAPTER 6**

### **SUMMING UP**

Marginalisation of persons with disability has been common throughout the world, and Africa is not an exception. In a world full of complex social and cultural backgrounds, specific reasons for exclusion of persons with disability are many, but the general conclusion (or at least for purposes of this work) is that persons with disability have been perceived as “defect”.

The “defect” perception of disability found way into policies and legislation in various places in the world, and this is the main reason given to explain many years of dominance individual—linked (medical or welfare) approaches of disability in various places across the world. In Africa, some official approaches to disability traced their roots from colonial period.

Because of the dominance of the “defect” perception of disability, as well as the medical oriented laws and policies, human rights approach was given the required consideration for many years, hence making it difficult for persons with disability to live independently and to effectively participate in societal activities. In international human rights, it is only from 1970s that the world witnessed the beginning of some meaningful activities regarding the rights of persons with disability.

The study has inquired into the relationship between laws and policies on disability, and the employment issues they seek to address, hence an analysis of both the content of the laws and policies, and an evaluation of events linked with the adoption of respective laws and policies related to employment and disability. As these laws and policies are implemented through a network of institutional mechanisms, it is likely that their effective or otherwise would be impacted by such institutional mechanisms, and this necessitated an inquiry into the functions and performances of such institutions in matters related to the employment of persons with disability. The nature of research questions in this study required pragmatism in methodology, extending beyond legal means of defining problems and finding their solutions.

The study reveals that in States where disability legislation and policies have been adopted in recent years, there is a manifest of a shift of towards a more right – based approaches to disability. The current approaches in Africa have not been a result of African-oriented perceptions of disability, but a result of changes in perceptions of, and approaches to disability in international human rights. I hold the view that the international developments did significantly influence changes in African disability rights for two reasons: First, at least generally, the history of disability rights in each of the countries selected for this study clearly indicates an acknowledgement of the fact that significant turning points in international disability rights did influence domestic events. These are the *United Nations Decade of Disabled Persons 1983-1992* and the *International Year of Disabled Persons 1981*. Second, the new laws and policies do not appear to have concrete evidence to suggest that the current laws and policies are rooted upon African tradition. This stated however, does not completely reject the views of those who support the notion of African perspectives of rights based on duties and the respect for human dignity, because such values ought to support efforts aimed at achieving the equality of persons with disability. The internal factors in individual countries, such as the nature of domestic disability movement, or political circumstances prevailing in particular countries, should have an impact on not only the speed of the changes, but also the quality of new laws and policies.

Access to employment opportunities is among the major challenges facing persons with disability, and in dealing with the said challenge, Tanzania and several African States have in place laws and policies addressing matters of employment with respect to persons with disability. An examination of the current laws and policies (in their totality) makes it difficult to categorise African State's measures (with regard to employment of persons with disability) into distinct groups as “quota schemes” or “anti-discrimination” approaches. By combining quota schemes and anti-discrimination measures, governments seem to acknowledge that each of these measures alone cannot provide a satisfactory solution for unemployment of persons with disability, when the reasons for the unemployment is wholly attributed to disability.

It is somewhat complex to determine how adequately the new laws and policies address the fundamental challenges affecting persons with disability generally or with respect to employment issues. The quick answer to this seems to be that the changes to the rights approach, just by looking at the content of laws and policies, has done the job. However,



measuring the practical impact of these laws and policies on the lives of persons with disability is even more complex. The first assumption is that constitutional stipulations on disability rights have brought the required impetus. This is supported by a number of judicial claims and decisions, especially in Kenya and South Africa. In Kenya, just within few years after adopting the new constitutions, there have already been some interesting and promising decisions related to disability rights. The assumptions in favour of the role of constitutional protection for persons with disability are made stronger because of the fact that employment and disability legislation had been adopted before the new constitution in Kenya, and while these do also contain provisions with respect to employment of persons with disability, the research for this study did not encounter any decision on disability and employment dated before the adoption of the new constitution. Nevertheless, this should not be the reason not to push for better legislation and policy on disability. In judicial decisions discussed in this work, from Kenya and South Africa, disability and employment laws were discussed together with the relevant constitutional provisions. It means therefore that legislation and policies alone may not achieve so much when disability rights are not effectively provided for in the constitution. This is exactly the case in Tanzania, where there have already been some judicial decisions related to reasonable accommodation in work places, but despite their significance, these have failed short of proclaiming reasonable accommodation as a right.

The role of constitutions with respect to disability rights should not be over-emphasized, because other factors outside the legal stipulations are also significant. In Ghana and Uganda, despite having disability rights stipulations in constitutions (earlier than Kenya and democratic South Africa), there is yet to be a decision with respect to disability rights. Therefore, this study sets the ground for further research in some other matters, especially on possible other ways to support the existing laws and policies (in areas where changes in such laws and policies are not required) for the purposes of facilitating persons with disability's access to employment. It is also recommended that Human Rights NGOs and organisations of persons with disability should be more active in pushing for judicial interpretation or enforcement of rights, especially considering the fact that the judiciary has not been easily accessible for an individual with disability.

Having legislative or policy stipulations is just one among many steps needed to ensure actual implementation of the rights. Institutional mechanisms must also be in place to

perform all such functions needed, and stated in the respective policies in order to ensure actual realisation of rights. As a result of constitutional stipulation, as well as relevant provisions in administrative instruments, and specific legislation on employment, disability, human rights or equality, a number of institutions are needed to perform different, but coordinated tasks.

Tanzania and other African States selected for this study have in place institutional mechanisms with general human rights mandate, and others specifically mandated specifically to implement disability and labour laws and policies. The disability movement and civil society in general also appear to be making some progress. There are general similarities of functions of institutions across the countries selected for purposes of this study, with some exceptions as regards the nature of disability focal points and the formation of equality bodies and NHRIs. Lack of comprehensive data from these institutions makes it difficult to effectively assess their performance. In fact, some have been in existence only within few years. It is difficult to evaluate the performance of various entities dealing with disability matters, and in particular concerning employment, the main reason being lack of comprehensive data. Nevertheless, judicial jurisprudence is slowly emerging, especially in areas of reasonable accommodation.

The disability laws and policies, as well as their respective implementation institutions face a number of limitations which affect proper implementation of the respective laws and policies. The main idea behind the human rights approach to disability is the elimination of barriers. However, the current state of technology makes it difficult for this dream to be realised at any near future. Furthermore, issues like the real limitations of impairment cannot be easily dismissed, especially for persons with more complicated forms of impairment. Others have even questioned the general uncertainty of human rights language with respect to the enforcement of social economic rights (which also includes the right to work). In Tanzania Mainland, the major challenges appear to be:- limited autonomy of the disability focal point; low levels of cooperation between organisations of persons with disability and other human rights NGOs; less NHRI activities on disability rights; less coordination between disability focal point and institution for the implementation of labour laws; and legal technicalities for enforcing rights, among others. Some of these challenges require amendment of the laws, and other issues require only more commitment. The comparative analysis of experiences in some other African states has revealed more or less

similar challenges. This notwithstanding, there are a number of positive signs from on going constitutional and legal reforms, as well as the increasing activities of human rights organisations generally, and organisations of persons with disability. With respect to on going constitutional developments, the only worry for Tanzania seem to be the fact that matters which may determine the fate of the new constitution are more related to issues of power than rights.

In the course of comparing experiences, there are a number of good practices which the authorities Tanzania as well as civil society should follow. Specific are matters related to:-

(a) more engagement in disability rights litigation; (b) employment of persons with disability in the public sector; (c) equality approach and autonomy of monitoring and coordinating mechanisms; and (d) incentives to employers.

(a) *Disability Rights Litigation:* South Africa and Kenya have a number of judicial decisions specifically related to reasonable accommodation and discrimination at the work place on the ground of disability. As already indicated above, this could partly be an influence of the constitutional protection of the rights of persons with disability, and clear statutory stipulations (of disability rights) on judicial enforcement of matters of employment-related rights of persons with disability. Nevertheless, without initiatives of individuals or NGOs to approach judicial organs for interpretation of rights is essential in order to bring to effect relevant legal stipulation. Human Rights Organisations in Tanzania have been successful in a number of judicial claims, but none of these were related to persons with disability. Co-operation between Organisations of Persons with Disability and Human Rights Organisations, the Law Society or even private law firms offers some potential improvements. A good example is ZAFOD's cooperation with local law firms for purposes of providing legal advice and engaging in litigation on behalf of persons with disability for purposes of enforcing rights (See Chapter 4).

(b) *Employment of Persons with Disability in Public Sectors:* In Chapter 3, it has been revealed that the changes in economic dynamics were among the reasons for the failure to implement the old disability law in Tanzania Mainland, especially on the ground that the law applied only to public employers, while in the actual fact, privatisation meant that there were more private employers who were not covered by the law. This finding of the LRCT was surprising, especially considering the fact that

given the available infrastructure, it would be easier to monitor or gather information from the public employers, than to do so from private employers. Examples of judicial decisions from Kenya show that public employers are likely to have means to accommodate employees with disability, because of more resources and other possibilities available. This is an example of a good practice, which Tanzania and other countries (which have not made significant steps in the area) should follow.

- (c) *Institutional Mechanisms*: Two particular issues are of essence: the equality institutions and disability focal points. The common problem among NHRIs from the States selected for this study is the little emphasis on disability rights. Realising the need of a focussed approach on marginalised groups, Kenya, South Africa and Uganda have established equality bodies with functions similar to NHRs. Admittedly, this strategy may have its own limitations (with respect to the equality bodies), because of issues concerning the accreditation of NHRIs (see Chapter 4). In order to improve the status of monitoring the rights of persons with disability generally, Tanzania has two options: either to establish an equality body to look upon issues of marginalised groups; or to amend the law establishing CHRAGG in order to establish permanent committees (thereby creating an avenue for a disability committee), instead of the current approach of having only administrative “desks”.
- (d) *Incentives*: Experience from Zanzibar, Kenya, Ghana and Uganda shows that disability laws provides for tax deduction to private employers who employ persons with disability. It is unfortunate that such measures are missing from Tanzania Mainland’s disability legislation. Tanzania should adopt such measures, because they function not only to motivate employers, but also as a mechanism to remedy employers who incur actual costs of reasonable accommodation. Care must however be taken in order to avoid circumstances where employers abuse the law by employing only low cadres employees only for the purposes of enjoying tax refunds. Tanzanian disability law should also be amended to enable certain persons to receive some incentives, especially when they incur personal experiences in order to maintain personal assistants or procure assistive devices, without which the performance at the work place is reduced.

I should end with a comment on “africanisation of rights”. At the beginning of this work, I stated that the need to undertake a study with a focus in Africa was influenced by the lack of African-focussed literature on disability rights, compared to the west-oriented literature on the same. In my rejection of hard-relativism approach to human rights, I stated that the focus should not be on the content of the rights, but on how to implement rights. It was not a central theme of the study to inquire on how African cultural values could be used to implement rights. Nevertheless, it is interesting to note that none of the laws or policies referred to by this study was grounded on the “traditional values” for the protection of rights of persons with disability. The almost “unquestioned” acceptance of the principles of the CRPD, for example, by the disability legislation in Tanzania and Zambia appears to reject the notion of “Africanisation of rights”. Furthermore, the literature referred to in this work with respect to culture and disability (Chapter 1) reveals that there have been different reactions to disability, although generally, among the reasons for the marginalisation of persons with disability has been negative cultural practices (and beliefs), with some exceptions where community believe that persons with disability also ought to be treated with dignity. Therefore, with respect to the issue of “culture and disability”, my conclusion on the “focus on how to implement rights” means that African cultural values (positive practices), although based on “care” may be used as a means of educating communities about the dignity and equality of persons with disability. An overwhelming reliance on culture to define rights (as suggested by supporter of strict relativism approach) seems to be un-realistic with respect to disability rights, with respect to matters referred to in this study. This finding however should encourage further research on how cultural values may be used to promote the respect of rights of persons with disability generally.

## BIBLIOGRAPHY

### Books

- Barnes, C. (2000) *Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation*, London: C. Hurst and Co. Publishers.
- Böhning, W. R. (2005) *Labour Rights in Crisis: Measuring the Achievement of Human Rights in the World of Work*, Hampshire, New York: Palgrave Macmillan.
- Breining-Kaufmann, C. (2007) *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law*, Oxford and Portland: Hart Publishing.
- Bronstein, A. (2009) *International and Comparative Labour Law: Current Challenges: Palgrave Macmillan and International Labour Office*, Geneva.
- Burger, K. (2013) *Early Childhood Care and Education and Equality of Opportunity: Theoretical and Empirical Perspectives on Social Challenges*, Wiesbaden: Springer Fachmedien.
- Butterfield, J. (2013) *Oxford A-Z of English Usage*, Oxford: Oxford University Press.
- Clements, L. and Read, J. (2003) *Disabled People and European Human Rights: A Review of the Implications of the 1998 Human Rights Act for Disabled Children and Adults in the UK*, Bristol: The Policy Press.
- Cotter, A. M. (2007) *This Ability: An International Legal Analysis of Disability Discrimination*, Hampshire, Barlington: Ashgate.
- Craig, R. (2007) *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*, Leiden, Boston: Martinus Nijhoff Publishers.
- Dimopoulos, A. (2010) *Issues in Human Rights Protection of Intellectually Disabled Persons: Medical Law and Ethics*, Liverpool: Ashgate.
- Feinstein, S. and D'Errico, N. C. (2010) *Tanzanian Women in their own Words: Stories of Disability and Illness*, Lanham, Boulder, New York, Toronto, Plymouth: Lexington Books.
- Flick, U. (2011a) *Introducing Research Methodology: A beginner's Guide to Doing a Research Project*, London: SAGE.
- Flick, U. (2011b) *Introduction to Qualitative Research*, 4th (edn), London: SAGE.
- Flynn, E. (2011) *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities*, New York: Cambridge University Press.
- Forsythe, D. P. (2006) *Human Rights in International Relations*, 2nd (edn), New York: Cambridge University Press.
- Freeman, M. (2009) *Human Rights*, Cambridge: Polity Press.
- Freeman, M. (2011) *Human Rights*, 2nd (edn), Cambridge: Polity Press.
- Goodley, D. (2011) *Disability Studies: An Interdisciplinary Introduction*, London: SAGE.

- Hammell, K. W. (2006) *Perspectives on Disability & Rehabilitation: Contesting Assumptions; Challenging Practice*, Philadelphia: Elsevier Limited.
- Hantrais, L. (2009) *International Comparative Research: Theory, Methods and Practice*, Hampshire: Palgrave Macmillan.
- Henderson, G. and Bryan, W. V. (2011) *Psychosocial Aspects of Disability*, 4th (edn), Springfield, Illinois: Charles C Thomas Publisher.
- Hogelund, J. (2003) *In Search of Effective Disability Policy: Comparing the Developments and Outcomes of Dutch and Danish Disability Policies*, Amsterdam: Amsterdam University Press.
- Klein, T. J. (1990) *Interdisciplinarity History, Theory and Practice*, Detroit: Wayne State University Press.
- Kothari, C. R. (2011) *Research Methodology: Methods and Techniques*, 2nd (edn), New Dhelhi: New Age International Publishers.
- Kumar, R. (2011) *Research Mtthodology: A Step-by-Step Guide for Beginners*, 3rd (edn), London: SAGE.
- Landman, T. (2008) *Issues and Methods in Comparative Politics*, 3rd (edn), London, New York: Routledge.
- Lawson, A. (2008) *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, Oxford, Portland: Hart Publishing.
- Mallya, E. T. (2009) *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: Tanzania's Commission for Human Rights and Good Governance*, Johannesburg: EISA.
- Marks, D. (1999) *Disability Controversial Debate and Psychological Perspective*, London: Routledge.
- Mbazira, C. (2009) *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice*, Pretoria: Pretoria University Law Press.
- McRuer, R. (2006) *Crip Theory: Cultural Signs of Queerness and Disability*, New York, London: New York University Press.
- Mmatli, T. O. (2010) *Empowering the Phoenix: Relevance of the Social Model of Disability for Botswana*, Saarbrücken: LAMBERT Academic Publishing GmbH & Co. KG.
- Mulumba, M. (2011) *Mainstreaming Disability into the Poverty Reduction Process in Ugandathe Role of the Human Rights-Based Approach to the National Development Plan*, Saarbrücken: LAMBERT Academic Publishing GmbH & Co. KG.
- Oakes, W. T. (2005) *Perspectives on Disability, Discrimination, Accommodations, and LawA Comparison of the Canadian and American Experience*, New York: LFB Scholarly Publishing LLC.
- Oliver, M. (2009) *Understanding DisabilityFrom Theory to Practice*, Hampshire: Palgrave Macmillan.
- Olkin, R. (1999) *What Psychotherapists Should Know about Disability*, New York: Guildford Press.
- Olkin, R. (2002) *Could You Hold the Door for Me?Including Disability in Diversity*.

- Parekh, B. (2000) *Rethinking Multiculturalism Cultural Diversity and Political Theory*, London: Macmillan Press.
- Parkinson, C. O. (2007) *Bill of Rights and Decolonization The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories*, Oxford, New York: Oxford University Press.
- Pohjola, A. (2006) *The Evolution of National Human Rights Institutions: The Role of the United Nations*, Copenhagen: The Danish Institute for Human Rights.
- Robertson, P. S. (1952) *Revolutions of 1848 A Social History*, Princeton: Princeton University Press.
- Schneid, T. D. (2012) *Discrimination Law: Issues for Safety Professionals*, Florida: Taylor and Francis Group.
- Schweik, S. M. (2009) *The Ugly Laws Disability in Public*, New York, London: New York University Press.
- Sepúlveda, M. et al. (2004) *Human Rights Reference Handbook*, 3rd (edn), San Jose: University for Peace.
- Shakespeare, T. (2006) *Disability Rights and Wrongs*, London, New York: Routledge.
- Shaw, M. N. (2008) *International Law*, 6th (edn), New York: Cambridge University Press.
- Ssenyonjo, M. (2009) *Economic, Social and Cultural Rights In International Law*, Oxford, Portland: Hart Publishing Ltd.
- Swain, J., et al. (2003) *Controversial Issues in Disabling Society*, Berkshire, New York: Open University Press.
- Tar, U. A. (2009) *The Politics of Neoliberal, Democracy in Africa State and civil society in Nigeria*, London, New York: Tauris Academic Studies.
- Webster's New World (2008) *Webster's New World Medical Dictionary*, 3rd (edn), New Jersey: Wiley Publishing Inc.

## Chapters in Books

- Adams, M. (2011), 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law', in M. van Hoecke (Ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Oxford, Portland: Hart Publishing, pp. 229–240.
- Altman, B. M. (2001), 'Disability Definitions, Models, Classification Schemes and Applications', in Albrecht, G. L., Seelman, K. D. and M. Bury (Eds.), *Handbook of Disability Studies*, California, London, New Delhi: SAGE, pp. 97–122.
- Arnardóttir, O. M. (2009), 'A Future of the Multidimensional Disadvantage Equality', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, Leiden: Martinus Nijhoff Publishers, pp. 41–66.
- Beco, G. de and Hoefmans, A. (2013), 'National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities', in G. de Beco (Ed.), *Article 33 of the UN Convention on the Rights of Persons with Disabilities*, Leiden: Martinus Nijhoff Publishers, pp. 9–68.



- Bickenbach, J. E. (2001), 'Disability Human Rights, Law, and Policy', in Albrecht, G. L., Seelman, K. D. and M. Bury (Eds.), *Handbook of Disability Studies*, California, London, New Dhelhi: SAGE, pp. 565–584.
- Biegon, J. (2011), 'The Promotion and Protection of Disability Rights in the African Human Rights System', in Du Plessis, I. G. and T. van Reenen (Eds.), *Aspects of disability law in Africa*, Pretoria: Pretoria University Law Press, pp. 53–83.
- Birtha, M. (2013), '"Nothing About CRPD Monitoring Without Us": A Case Study On The Involvement of the Disability Movement In Policy-Making In Zambia', in *African Disability Rights Yearbook*, Pretoria: Pretoria University Law Press, pp. 115–138.
- Chalklen, S., *et al.*, 'Establishing the Secretariat for the African Decade of Persons with Disabilities', in B. Watermeyer, *et al.* (Eds.), *Disability and Social Change: A South African Agenda*, Cape Town: HSRC Press, pp. 93–98.
- Chenge, A. J. (1998), 'The Government and Fundamental Rights and Freedoms in Tanzania', in C. M. Peter and I. H. Juma (Eds.), *Fundamental Rights and Freedoms in Tanzania*, Dar Es Salaam: Mkuki na Nyota Publishers, pp. 1–8.
- Cooper, J. (2000), 'Improving the Civil Rights of People with Disabilities through Domestic Law: A Global Overview', in J. Cooper (Ed.), *Law, Rights and Disability*, London, New York: Jessica Kingsley Publishers, pp. 81–108.
- Cooper, J. (2000), 'Improving the Civil Rights of People with Disabilities Through International Law', in J. Cooper (Ed.), *Law, Rights and Disability*, London, New York: Jessica Kingsley Publishers, pp. 59–80.
- Deegan, M. (2010), 'Feeling Normal and 'Feeling Disabled'', in S. N. Barnartt (Ed.), *Disability as a Fluid State: Research in Social Science and Disability*, Bingley: Emerald Group Publishing, pp. 25–48.
- Degener, T. (1995), 'Disabled Persons and Human Rights: The Legal Framework', in T. Degener and Y. Koster-Dreese (Eds.), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, Dordrecht, Boston, London: Martinus Nihjoff Publishers, pp. 9–39.
- Degener, T. (2005), 'Disability Discrimination Law: A Global Comparative Approach', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, Oxford, Portland: Hart Publishing, pp. 87–106.
- Degener, T. and Quinn, G. (2002), 'Disability Anti-Discrimination Law: The state of the World', in M. L. Breslin and S. Yee (Eds.), *Disability Rights Law and Policy: International and National Perspectives*, New York: Transnational Publishers Inc.
- Devlieger, P. J. (2010), 'At the Interstices of Classification: Notes on the Category of Disability in Sub-Saharan Africa', in S. N. Barnartt (Ed.), *Disability as a Fluid State: Research in Social Science and Disability*, Bingley: Emerald Group Publishing, pp. 69–102.
- De-Vos, P., 'Experience of Human Rights in Africa: Challenges of Implementing Economic, Social and Cultural Rights', in C. M. Peter (Ed.), *The Protectors Human Rights Commissions and Accountability in East Africa*, Kampala: Kituo cha Katiba, Kampala: Kituo Cha Katiba, pp. 1–28.

- Dibinson, I. and Johns, F. (2007), 'Qualitative legal Research', in M. McConville and W. Hong Chui (Eds.), *Research Methods for Law*, Edinburgh: Edinburgh University Press, pp. 16–45.
- Du Plessis, I. G. and Grobler, G. (2013), 'South Africa's Report on Disability', in *African Disability Rights Yearbook*, Pretoria: Pretoria University Law Press, pp. 307–341.
- Du Plessis, I. G. and Van Eck (2011), 'Protection of Disabled Employees in South Africa: An analysis of the Constitution and Labour Legislation', in Du Plessis, I. G. and T. van Reenen (Eds.), *Aspects of disability law in Africa*, Pretoria: Pretoria University Law Press, pp. 231–260.
- Eide, *et al.* (2011), 'Living Conditions Among People with Disabilities in Developing Countries', in A. H. Eide and B. Ingstad (Eds.), *Disability and Poverty: A Global Challenge*, Bristol: The Policy Press, pp. 55–70.
- Eide, A. (1995), 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, *et al.* (Eds.), *Economic, Social, and Cultural Right*, Boston: Martinus Nihjoff Publishers, pp. 9–36.
- Flóven, B. G. (2009), 'The Implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, Leiden: Martinus Nihjoff Publishers, pp. 257–277.
- Francis, L. P. (2009), 'Understanding Autonomy in Light of Intellectual Disability', in K. Brownlee and A. Cureton (Eds.), *Disability and Disadvantage*, New York: Oxford University Press, pp. 201–215.
- Fredman, S. (2005), 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, Oxford, Portland: Hart Publishing, pp. 199–218.
- Fullinwider, R. (2013), 'Affirmative Action', in E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*.
- Ghai, A. (2001), 'Marginalisation and Disability: Experiences from the Third World', in M. Priestley (Ed.), *Disability and the Life Course: Global Perspectives*, New York: Cambridge University Press, pp. 26–37.
- Gottlieb, A., *et al.* (2012), 'Employment of People with Disabilities', in J. H. Stone and M. Blouin (Eds.), *International Encyclopedia of Rehabilitation*, <http://cirrie.buffalo.edu/encyclopedia/en/Article/123>, accessed: 13.5.2012.
- Gyamfi, E. A. (2013), 'Ghana's Report on Disability', in *African Disability Rights Yearbook*, Pretoria: Pretoria University Law Press, pp. 221 – 244.
- Hendriks, A. (1995), 'The Significance of Equality and Non-discrimination or the Protection of the Rights and Dignity of Disabled Persons', in T. Degener and Y. Koster-Dreese (Eds.), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, Dordrecht, Boston, London: Martinus Nihjoff Publishers, pp. 40–62.
- Hendriks, A. C. (2002), 'Different Definition - Same Problems - One Way Out?', in M. L. Breslin and S. Yee (Eds.), *Disability Rights Law and Policy: International and National Perspectives*, New York: Transnational Publishers Inc, pp. 195–240.

- Howell, C., *et al.*, 'A History of Disability Movement in South Africa', in B. Watermeyer, *et al.* (Eds.), *Disability and Social Change: A South African Agenda*, Cape Town: HSRC Press, pp. 46–92.
- Ingstad, B. (2001), 'Disability in the Developing World', in Albrecht, G. L., Seelman, K. D. and M. Bury (Eds.), *Handbook of Disability Studies*, California, London, New Dhelhi: SAGE, pp. 772-792.
- Jere, V. (2011), 'The Right to Equality in the Workplace for Persons with Physical Disabilities in Malawi: Does the Conention on the Rights of Persons with Disabilities offer any Hope?', in Du Plessis, I. G. and T. van Reenen (Eds.), *Aspects of disability law in Africa*, Pretoria: Pretoria University Law Press, pp. 261–280.
- Kabudi, P. J. (2006), 'The Directive Principles of State Policy in Tanzania', in W. Binchy and C. Finnegan (Eds.), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish perspectives*, Dublin: Clarus Press.
- Kahane, G. and Savulescu, J. (2009), 'The Welfarist Account of Disability', in K. Brownlee and A. Cureton (Eds.), *Disability and Disadvantage*, New York: Oxford University Press, pp. 14–53.
- Kalaluka, L. (2013), 'Towards an effective Litigation strategy of Disability rights: The Zambia Experience', in *African Disability Rights Yearbook*, Pretoria: Pretoria University Law Press, pp. 165–192.
- Källström, K. and Eide, A. (1999), 'Article 23', in G. Alfredsson and A. Eide (Eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Boston, London: Martinus Nihjoff Publishers, pp. 489–510.
- Karlström, M. (1999), 'Civil Society and its Presuppositions: Lessons from Uganda', in J. L. Comaroff and J. Comaroff (Eds.), *Civil Society and Political Imagination in Africa: Critical Perspectives*, Chicago: University of Chicago Press, pp. 104–123.
- Katsui, H. (2006), 'Human Rights of Disabled People in the South', in A. Teittinen (Ed.), *Vammaisuuden Tutkimus*, Helsinki: Yliopistopaino, pp. 86–119.
- Keith, R. A. and Aronow, H. U. (2005), 'Comprehensive Rehabilitation: Themes, Models, and Issues', in H. H. Zaretsky, *et al.* (Eds.), *Medical Aspects Disability: A Handbook for the Rehabilitation Professional*, 3rd (edn), New York: Springer, pp. 3–30.
- Kenny, M. (2013), 'Civil Society', in *Britannica Encyclopedia*, <http://www.britannica.com/EBchecked/topic/1916880/civil-society>, accessed: 3.4.2013.
- Koh, H. H. and Gostin, L. O. (2003), 'Introduction: The Human Rights Imperative', in S. S. Herr, *et al.* (Eds.), *The Human Rights of Persons with Intellectual Disabilities: Different but Equal*, New York: Oxford University Press, pp. 1–24.
- Kritzer, H. M. (2009), "'Research Is a Messy Business": An Archeology of the Craft of Sociolegal Research', in S. Halliday and P. Schmidt (Eds.), *Conducting Law and Society Research: Reflections on Methods and Practices*, New York, Melbourne, Cape Town, Singapore, Sao Paulo, New Dhelhi: Cambridge University Press, pp. 264–285.
- Lawson, A. (2005), 'Mind the Gap!: Normality, Difference and the Danger of Disablement Through Law', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, Oxford, Portland: Hart Publishing, pp. 265–282.

- Light, R. (2005), 'Disability and Human Rights: The Persistent Oxymoron', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, Oxford, Portland: Hart Publishing, pp. 9–20.
- Lord, J. E. and Stein, M. A. (2013), 'Prospects and practices for CRPD implementation in Africa', in *African Disability Rights Yearbook*, Pretoria: Pretoria University Law Press, pp. 97–114.
- Luoga, F. D. A. M. (1998), 'The Tanzanian Bill of Rights', in C. M. Peter and I. H. Juma (Eds.), *Fundamental Rights and Freedoms in Tanzania*, Dar Es Salaam: Mkuki na Nyota Publishers, pp. 37–46.
- Matsebula, S., *et al.*, 'Integrating Disability within Government: the Office on the Status of Disabled Persons', in B. Watermeyer, *et al.* (Eds.), *Disability and Social Change: A South African Agenda*, Cape Town: HSRC Press, pp. 85–98.
- Mueller, P. K., *et al.* (2010), 'Regarding Disability: Perceptions of Protection under the Americans with Disabilities Act', in S. N. Barnartt (Ed.), *Disability as a Fluid State: Research in Social Science and Disability*, Bingley: Emerald Group Publishing, pp. 159–182.
- Muyinda, H. and Whyte, S. R. (2011), 'Displacement, Mobility and Poverty in Northern Uganda', in A. H. Eide and B. Ingstad (Eds.), *Disability and Poverty: A Global Challenge*, Bristol: The Policy Press, pp. 119–136.
- Nchalla, B. M. (2013), 'Tanzania's Experience with Constitutionalism, Constitution-Making and Constitutional Reforms', in M. K. Mbondenyi and T. Ojenda (Eds.), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, Pretoria: Pretoria University Law Press, pp. 15–51.
- Nhlapo, C. M., *et al.*, 'Disability and Human Rights: The the South African Human Rights Commission', in B. Watermeyer, *et al.* (Eds.), *Disability and Social Change: A South African Agenda*, Cape Town: HSRC Press, pp. 99–107.
- Nickel, J. (2013), 'Human Rights', in E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/rights-human>, accessed: 13.9.2014.
- O'cinneide, C. (2005), 'A New Generation of Equality Legislation?: Positive Duties and Disability Rights', in A. Lawson and C. Gooding (Eds.), *Disability Rights in Europe: From Theory to Practice*, Oxford, Portland: Hart Publishing, pp. 219–248.
- O'cinneide, C. (2009), 'Extracting Protection for the Rights of Persons with Disabilities from Human Rights Framework: Established Limits and New Frameworks', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, Leiden: Martinus Nijhoff Publishers, pp. 165–200.
- Peter, C. M. (2009), 'Human Rights Commissions in Africa: Lessons and Challenges', in A. Bösl and J. Diescho (Eds.), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, Windhoek: Macmillan Education, pp. 348–374.
- Priestley, M. (2001), 'Introduction: the Global Context of Disability', in M. Priestley (Ed.), *Disability and the Life Course: Global Perspectives*, New York: Cambridge University Press, pp. 3–14.
- Quinn, G., 'Civil Society: Current use of the United Nations Human Rights and future Choices', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The*

*Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Geneva: OHCHR, pp. 151–167.

- Quinn, G., 'National Human Rights Institutions: Catalysts for Change', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Geneva: OHCHR, pp. 169–176.
- Quinn, G. and Degener, T., 'The Application of Moral Authority: The Shift to the Human Rights Perspective of Disability through United Nations 'Soft' Law', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Geneva: OHCHR, pp. 19–30.
- Quinn, G. and Degener, T., 'The Moral Authority for Change: Human Rights Values and Worldwide Process of Disability Reform', in G. Quinn and T. Degener (Eds.), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Geneva: OHCHR, pp. 9–18.
- Riedel, E. (2007), 'Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights', in G. P. Politakis (Ed.), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO.
- Rodgers, G. (2002), 'Decent Work as a Goal for the Global Economy', in G. Rodgers, et al. (Eds.), *Training, Productivity and Decent work*, Montevideo: ILO, pp. 11–26.
- Rutinwa, B. (2012), 'Historical Overview of Labour Legislation in Tanzania', in B. Rutinwa, et al. (Eds.), *The new Employment and Labour Relations law in Tanzania: An analysis of labour legislation in Tanzania*, Dar es Salaam, Rondebosch: University of Dar es Salaam School of Law, pp. 1–36.
- Schmidt, P. and Halliday, S. (2009), 'Beyond Methods: Law and Society in Action', in S. Halliday and P. Schmidt (Eds.), *Conducting Law and Society Research: Reflections on Methods and Practices*, New York, Melbourne, Cape Town, Singapore, Sao Paulo, New Delhi: Cambridge University Press, pp. 1–25.
- Shakespeare, T. (2006), 'The Social Model of Disability', in L. J. Davis (Ed.), *The Disability Studies Reader*, 2nd (edn), London, New York: Routledge, pp. 197–204.
- Shakespeare, T. and Watson, N. (2001), 'The Social Model of Disability: An Outdated Ideology?', in S. N. Barnartt and B. M. Altman (Eds.), *Exploring Theories and Expanding Methodologies: Where We are and Where We need to go. Research in Social Science and Disability*, Amsterdam, London: JAI, pp. 9–28.
- Sims, E. (2002), 'Employment Policy', in M. Humblet, et al. (Eds.), *International labour standards: A Global Approach*, 1st (edn), Geneva: International Labour Office, pp. 195–216.
- Stein, M. A. and Lord, J. E. (2009), 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, Leiden: Martinus Nijhoff Publishers, pp. 17 – 40.

- Traustadóttir, R. (2009), 'Disability Studies, the Social Model and Legal Developments', in O. M. Arnardóttir and G. Quinn (Eds.), *UN Convention on the Rights of Persons with Disabilities*, Leiden: Martinus Nijhoff Publishers, pp. 3–16.
- Turmusani, M. (2001), 'Work and Adulthood: Economic Survival in the Majority World', in M. Priestley (Ed.), *Disability and the Life Course: Global Perspectives*, New York: Cambridge University Press, pp. 192–205.
- van Klink, B. and Taekema, S., 'Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (Eds.), *Law and Method: Interdisciplinary Research into Law*, Tübingen: Mohr Siebeck, pp. 7–32.
- Waddington, L. and Diller, M. (2002), 'Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law', in M. L. Breslin and S. Yee (Eds.), *Disability Rights Law and Policy: International and National Perspectives*, New York: Transnational Publishers Inc, pp. 241–280.
- Wagner, C. C., *et al.* (2006), 'Evidence-Based Employment Practices in Vocational Rehabilitation', in K. J. Hagglund and A. W. Heinemann (Eds.), *Handbook of Applied Disability and Rehabilitation Research*, New York, NY: Springer, pp. 179–212.
- Wazakili, M., *et al.* (2011), 'Social inclusion of people with disabilities in poverty reduction policies and instruments: initial impressions from Malawi and Uganda: Initial Impressions from Malawi and Uganda', in A. H. Eide and B. Ingstad (Eds.), *Disability and Poverty: A Global Challenge*, Bristol: The Policy Press, pp. 15–29.
- Wiener, R. L. and Keller, S. N. (2011), 'Finding the Assumptions in the Law: Social Analytic Jurisprudence, Disability, and Aging Workers', in R. L. Wiener and S. L. Willborn (Eds.), *Disability and Aging Discrimination: Perspectives in Law and Psychology*, New York, London: Springer, pp. 1–36.
- Wilson, G. (2007), 'Comparative Legal Scholarship', in M. McConville and W. Hong Chui (Eds.), *Research Methods for Law*, Edinburgh: Edinburgh University Press, pp. 87–103.
- Young, C. (1994), 'In Search of Civil Society', in J. W. Harbeson, *et al.* (Eds.), *Civil society and the State in Africa*, Colorado, London: Lynner Rienner Publishers Inc, pp. 33–50.

## Journal Articles

- Ackson, T. (2008), 'Disability Benefits and Workers with HIV/AIDS: Coverage issues and challenges in the United Republic of Tanzania', *International Social Security Review*, Vol. 61, No. 4, pp. 74–94.
- Aldersey, H. (2012), 'Disability and Work: The United Republic of Tanzania's Workplace Policies in The Persons with Disabilities Act of 2010', *Disability Studies Quarterly*, Vol. 32, No. 3, <http://dsq-sds.org/Article/view/3279/3111>, accessed: 13.3.2012.
- Alston, P. and Quinn, G. (1987), 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9, No. 2, pp. 156–229.

- Ansah, S. K. and Ernest, K. (2013), 'Technical and Vocational Education and Training in Ghana: A Tool for Skill Acquisition and Industrial Development', *Journal of Education and Practice*, Vol. 4, No. 16, pp. 172–180.
- Areheart, B. A. (2008), 'When Disability Isn't 'Just Right': The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma', *Indiana Law Journal*, Vol. 83, No. 1, pp. 183–232.
- Bagandanshwa, E. T. T. (1999), 'Some Highlights in the Development of Educational Services for Visually Impaired and Blind People in Tanzania', *Huria: Journal of Open University of Tanzania*, Vol. 2, No. 2, pp. 44–55.
- Bagenstos, S. R. (2003), 'Comparative Disability Employment Law From an American Perspective', *Comparative Labour Law and Policy Journal*, Vol. 24, pp. 649–667.
- Bagenstos, S. R. (2004), 'The Future of Disability Law', *The Yale Law Journal*, Vol. 114, pp. 1–83.
- Beco, G. de (2011), 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: ? Another Role for the National Human Rights Institutions', *Netherlands Quarterly of Human Rights*, Vol. 29, No. 1, pp. 84–106.
- Berg, P. E. (2000), 'Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law', *Yale Law and Policy Review*, Vol. 18, pp. 1–50.
- Boardman, J., *et al.* (2003), 'Work and Employment for People with Psychiatric Disabilities', *British Journal of Psychiatry*, Vol. 182, pp. 467–468.
- Borg, J., *et al.* (2011), 'The Right to Assistive Technology: For Whom, for What, and by Whom?', *Disability & Society*, Vol. 26, No. 2, pp. 151–167.
- Bratton, M. (1989), 'Beyond the State: Civil Society and Associational Life in Africa', *World Politics*, Vol. 41, pp. 407–430.
- Cardenas, S. (2003), 'Emerging Global Actors: The United Nations and National Human Rights Institutions', *Global Governance*, Vol. 9, No. 1, pp. 23–42.
- Carver, R. (2010), 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law', *Human Rights Law Review*, Vol. 10, No. 1, pp. 1–32.
- Carver, R. (2011), 'One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights?: Lessons from the European Experience', *Journal of Human Rights Practice*, Vol. 3, No. 1, pp. 1–24.
- Chenwi, L. (2013), 'Unpacking “Progressive Realisation”, its Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for Assessing Compliance', *De Jure*, Vol. 46, No. 3, pp. 742–769.
- Cobbah, J. A. M. (1987), 'African Values and Human Rights Debate: An African Perspective', *Human Rights Quarterly*, Vol. 9, No. 3, pp. 309 – 331.
- Cook, J. A. (2006), 'Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President’s Commission', *Psychiatry Services*, Vol. 57, No. 10, pp. 1391–1405, <http://ps.psychiatryonline.org/data/Journals/PSS/3777/06ps1391.pdf>, accessed: 17.4.2014.

- Coomans, F., *et al.* (2010), 'Methods of Human Rights Research', *Human Rights Quarterly*, Vol. 32, No. 1, pp. 180–187.
- Degener, T. (2000), 'International Disability Law: A New Legal Subject on the Rise', *Berkeley Journal of International Law*, Vol. 18, pp. 180–195.
- Degener, T. (2006), 'The Definition of Disability in German and Foreign Discrimination Law', *Disability Studies Quarterly*, Vol. 26, No. 2, <http://dsq-sds.org/Article/view/696/873>, accessed: 10.1.2012.
- Del Vecchio, G. (1966), 'Equality and Inequality in Relation to Justice.', *Natural Law Forum*, pp. 36–47.
- Despouy, L. (1991), 'Human Rights and Disabled Persons', *Human Rights Studies Series*, No. 6, <http://www.un.org/esa/socdev/enable/dispaperdes0.htm>, accessed: 28.6.2013.
- Despouy, L. (1991), 'Human Rights and Disabled Persons', *Human Rights Studies Series*, Vol. 6, <http://www.un.org/esa/socdev/enable/dispaperdes0.htm>, accessed: 28.6.2013.
- De-Vos, P. (2003), 'So Much to Do. So Little Done: The Right of Access to Anti-Retroviral Drugs Post-Grootboom', *Law, Democracy and Development*, Vol. 7, No. 1, pp. 83 – 112.
- Donnelly, J. (1982), 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', *The American Political Science Review*, Vol. 76, No. 2, pp. 303–316.
- Donnelly, J. (1984), 'Cultural Relativism and Universal Human Rights', *Human Rights Quarterly*, Vol. 6, No. 4, pp. 400–419.
- Donnelly, J. (2007), 'The Relative Universality of Human Rights', *Human Rights Quarterly*, Vol. 29, No. 2, pp. 281–306.
- EI-Obaid, A. E. and Atua, A. K. (1996), 'Human Rights in Africa: A New Perspective on Linking the Past to the Present', *Mcgill Law Journal*, Vol. 41, No. 4, pp. 819–854.
- Ellis, K. (2005), 'Disability Rights in Practice: The Relationship between Human Rights and Social Rights in Contemporary Social Care', *Disability & Society*, Vol. 20, No. 7, pp. 691–704.
- Fatton, R. (1995), 'Africa in the Age of Democratization: The Civic Limitations of Civil Society', *African Studies Review*, Vol. 38, No. 2, pp. 67–99.
- Fineman, M. A. (2009), 'The Vulnerable Subject: Anchoring Equality in the Human Condition', *Yale Journal of Law and Feminism*, Vol. 20, pp. 1–23.
- Frank, B. (1972), 'The Tanzanian Permanent Commission of Inquiry: The Ombudsman', *Denver Journal of International Law and Policy*, Vol. 2, pp. 255–279.
- Fritz, D., *et al.* (2009), 'Making Poverty Reduction Inclusive: Experiences from Cambodia, Tanzania and Vietnam', *Journal of International Development*, pp. 673–684, <http://onlinelibrary.wiley.com/doi/10.1002/jid.1595/pdf>, accessed: 16.10.2014.
- Fukuyama, F. (2011), 'Dealing with Inequality', *Journal of Democracy*, Vol. 22, No. 3, pp. 79–89.
- Gatjens, L. F. A. (2011), 'Analysis of Article 33 of the UN Convention: The Critical Importance of National Implementation and Monitoring', *SUR - International Journal on Human Rights*, Vol. 8, No. 14, pp. 71–83.



- Geist, F., *et al.* (2003), 'Disability Law in Germany: The Historical Development of the Law of Handicapped Persons-from "War Victim Support" to the Ideal of Equal Social Participation', *Comparative Labour Law and Policy Journal*, Vol. 24, pp. 564–608.
- Ginsburg, R. B. and Merritt, D. J. (1999), 'Affirmative Action: An International Human Rights Dialogue', *Cardozo Law Review*, Vol. 21, pp. 253–282.
- Goss, D., *et al.* (2000), 'Disability and Employment: A Comparative Critique of UK Legislation', *International Journal of Human Resource Management*, Vol. 11, No. 4, pp. 807–821.
- Gräber, D. (2007), 'Menschenrechtsverletzungen und Behinderung: eine folgenschwere Verkettung', *Zeitschrift Behinderung und Dritte Welt*, No. 1, pp. 4–12.
- Grech, S. (2009), 'Disability, Poverty and Development: Critical Reflections on the Majority World Debate', *Disability & Society*, Vol. 24, No. 6, pp. 771–784.
- Green, R. J. (2011), 'An Introductory Theoretical and Methodological Framework for a Universal Mobility Index (UMI) to Quantify, Compare, and Longitudinally Track Equity of Access the Built Environment', *Journal of Disability Policy Studies*, Vol. 21, No. 4, pp. 219–229.
- Grönvik, L. (2007), 'The Fuzzy Buzz Word: Conceptualisations of Disability in Disability Research Classics', *Sociology of Health & Illness*, Vol. 29, No. 5, pp. 750–766.
- Hannett, S. (2003), 'Equality at the InterSections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *Oxford Journal of Legal Studies*, Vol. 23, No. 1, pp. 65–86.
- Hannum, H. (1996), 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, Vol. 25, pp. 287–397.
- Harper, P. (2012), 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities', *Disability & Society*, Vol. 27, No. 1, pp. 1–14.
- Hasegawa, T. (2007), 'Equality of Opportunity or Employment Quotas?: A Comparison of Japanese and American Employment Policies for the Disabled', *Social Science Japan Journal*, Vol. 10, No. 1, pp. 41–57.
- Haule, R. R. (2006), 'Torturing the Union?: An Examination of the Union of Tanzania and its Constitutionality', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 66, pp. 215–233.
- Hellsten, S. (2004), 'Human Rights in Africa: From Communitarian Values to Utilitarian Practice', *Human Rights Review*, Vol. 5, No. 2, pp. 61–85.
- Heyer, K. C. (2002), 'The ADA on the Road: Disability Rights in Germany', *Law and Social Inquiry*, Vol. 27, No. 4, pp. 723–762.
- Hurst, R. (2003), 'The International Disability Rights Movement and the ICF', *Disability and Rehabilitation*, Vol. 25, No. 11–12, pp. 572–576.
- Ito, N. (2010), 'Convention on the Rights of Persons with Disabilities and Perspectives of Development Assistance: A Case Study of Thai Disability Policy', *Asia Pacific Disability Rehabilitation Journal*, Vol. 21, No. 1, pp. 43–59.

- Kabudi, P. J. (2003), 'Legal Challenges of Bioprospecting in Tanzania', *Eastern Africa Law Review*, Vol. 28 – 30, pp. 96–117.
- Kabzems, V. and Chimedza, R. (2002), 'Development Assistance: Disability and Education in Southern Africa', *Disability & Society*, Vol. 17, No. 2, pp. 147–157.
- Kanter, A. S. (2007), 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities', *Syracuse Journal of International Law and Commerce*, Vol. 34, pp. 287–322.
- Kayess, R. and French, P. (2008), 'Out of Darkness into Light?: Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review*, Vol. 8, No. 1, pp. 1–34.
- Kearney, P. M. and Pryor, J. (2004), 'The International Classification of Functioning, Disability and Health (ICF) and Nursing', *Journal of Advanced Nursing*, Vol. 46, No. 2, pp. 162–170.
- King, R., *et al.* (2006), 'Enhancing Employment Services for People with Severe Mental Illness: The Challenge of the Australian Service Environment', *Australian and New Zealand Journal of Psychiatry*, Vol. 40, No. 5, pp. 471– 477., <http://anp.sagepub.com/content/40/5/471>, accessed: 17.4.2014.
- Klein, R. (1991), 'Risks and Benefits of Comparative Studies: Notes from Another Shore', *The Milbank Quarterly*, Vol. 69, No. 2, pp. 275–291.
- Koo, J. W. and Ramirez, F. O. (2009), 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004', *Social Forces*, Vol. 87, No. 3, pp. 1321 - 1353.
- Kumar, C. R. (2003), 'National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights', *American University International Law Review*, Vol. 19, No. 2, pp. 259–300.
- Leckie, S. (1998), 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 20, No. 1, pp. 81–124.
- Lehman, A. F. *et al.* (2002), 'Improving Employment Outcomes for Persons with Severe Mental Illnesses', *Archive of General Psychiatry*, Vol. 59, No. 2, pp. 165–172, accessed: 17.4.2014.
- Lord, J. E. and Stein, M. A. (2008), 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities', *Washington Law Review*, Vol. 83, pp. 449–479.
- Mackelprang, R. W. and Salsgiver, R. O. (1996), 'People with Disabilities and Social Work: Historical and Contemporary Issues', *Social Work*, Vol. 41, No. 1, pp. 7–14, <http://sw.oxfordjournals.org/content/41/1/7.full.pdf+html>, accessed: 11.2.2014.
- MacNaughton, G. and Frey, D. F. (2011), 'Decent Work for All: A Holistic Human Rights Approach', *American University International Law Review*, Vol. 26, No. 6, pp. 441–483.
- Makumbe, J. (2002), 'Is there a Civil Society in Africa?', *International Affairs*, Vol. 74, No. 2, pp. 305–317.

- Mapunda, B. T. (2003), 'Treaty Making and Incorporation in Tanzania', *Eastern Africa Law Review*, Vol. 28 – 30, pp. 156–170.
- Matzzie, C. G. (1994), 'Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act', *The Georgetown Law Journal*, Vol. 82, pp. 193–285.
- Mayerson, A. B. and Yee, S. (2001), 'The ADA and Models of Equality', *Ohio State Law Journal*, Vol. 62, pp. 535–554.
- Mboya, M. W. and Possi, M. K. (1996), 'The Special Child in Tanzania Primary School', *Papers in Education and Development*, pp. 52–64.
- McClain, C. V. (2002), 'Democracy and Disability in South Africa: Still Three Nations', *Disability World*, Vol. 14, [http://www.disabilityworld.org/06-08\\_02/gov/southafrica.shtml](http://www.disabilityworld.org/06-08_02/gov/southafrica.shtml), accessed: 10.2.2014.
- McDonald, A. S. (2012), 'Cultural Beliefs about Disability in Practice: Experiences at a Special School in Tanzania', *International Journal of Disability, Development and Education*, Vol. 59, No. 4, pp. 393–407.
- McKean, W. A. (1970), 'The Meaning of Discrimination in International and Municipal Law', *British Year Book of International Law*, Vol. 44, pp. 177–192.
- Mitchell, N. J. and McCormick, J. M. (1988), 'Economic and Political Explanations of Human Rights Violations', *World Politics*, Vol. 40, No. 4, pp. 476–498.
- Monk, J. and Wee, J. (2008), 'Factors Shaping Attitudes towards Physical Disability and Availability of Rehabilitative Support Systems for Disabled Persons in Rural Kenya', *Asia Pacific Disability Rehabilitation Journal*, Vol. 19, No. 1, pp. 93–113.
- Mwendwa, T. N., *et al.* (2009), 'Mainstreaming the Rights of Persons with Disabilities in National Development Frameworks', *Journal of International Development*, Vol. 21, No. 5, pp. 662–672.
- Myhill, W. N. and Blanck P. (2009), 'Disability and Aging: Historical and Contemporary Challenges', *Marquette Elder's Advisor*, Vol. 11, pp. 47–80.
- Nmehiell, V. O. (2004), 'Development of the African Human Rights System in the Last Decade', *Human Rights Brief*, Vol. 11, No. 3, pp. 6–11.
- Panikkar, R. (1982), 'Is the Notion of Human Rights a Western Concept?', *Diogenes*, Vol. 30, pp. 75–102.
- Parnes, P., *et al.* (2009), 'Disability in Low-Income Countries: Issues and implications', *Disability Rehabilitation*, Vol. 31, No. 14, pp. 1170–1180.
- Pegram, T. (2010), 'Diffusion Across Political Systems Human Rights Quarterly: The Global Spread of National Human Rights Institutions', *Human Rights Quarterly*, Vol. 32, No. 3, pp. 729–760.
- Perlin, M. L. (2009), 'A Change is Gonna Come: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law', *Northern Illinois Law Review*, Vol. 29, No. 3, pp. 483–498.
- Peter, C. M. (2007), 'Human Rights of Indigenous Minorities in Tanzania and the Courts of Law', *International Journal on Minority and Group Rights*, Vol. 14, pp. 455–487.

- Possi, M. K. (1994), 'Special Education in Tanzania International Journal of Special Education: A Critical Analysis of Special Education Services', *International Journal of Special Education*, Vol. 9, No. 1, pp. 41–52.
- Possi, M. K. (1995), 'Some Myths and Facts about Albinism: A Tanzanian Experience', *International Journal of Special Education*, Vol. 10, No. 1, pp. 82–89.
- Possi, M. K. (1996), 'Culture and Disability Superstitious behaviour towards People with Disabilities in Coastal Tanzania', *African Journal of Special Needs Education*, Vol. 1, No. 1, pp. 25–31.
- Possi, M. K. (1996), 'Gender and Education of People with Disabilities in Tanzania', *Utafiti (New Series): Journal of Faculty of Arts and Social Science, University of Dar es Salaam*, Vol. 3, No. 2, pp. 155–168.
- Possi, M. K. (1999), 'Perceived Causes of Visual Disability: Some Data from Preliminary Survey at the University of Dar es Salaam in Tanzania', *Journal of Adult Education*, Vol. 10, pp. 16–26.
- Quinn, G. (2010), 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability', *Texas Journal on Civil Liberties & Civil Rights*, Vol. 15, No. 1, pp. 33–52.
- Reif, L. C. (2000), 'Building Democratic Institutions: Protection: The Role of National Human Rights Institutions in Good Governance and Human Rights', *Harvard Human Rights Journal*, Vol. 13, pp. 1–69.
- Robertson, R. E. (1994), 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights', *Human Rights Quarterly*, Vol. 16, No. 4, pp. 693–714.
- Robertson, D. W. et al (2003), 'Interdisciplinary Research: Putting the Methods under the Microscope', *BMC Medical Research Methodology*, <http://www.biomedcentral.com/1471-2288/3/20>, accessed: 19.4.2012.
- Romany, C. and Chu, J. B. (2004), 'Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions', *Connecticut Law Review*, Vol. 36, pp. 831–870.
- Rovner, L. L. (2004), 'Disability, Equality, and Identity', *Alabama Law Review*, Vol. 55, No. 4, pp. 1043–1099.
- Schur, L. et al. (2005), 'Corporate Culture and the Employment of Persons with Disabilities', *Behavioral Sciences and the Law*, pp. 3–20, <http://onlinelibrary.wiley.com/doi/10.1002/bsl.624/pdf>, accessed: 17.4.2014.
- Sharma, R. N. (2006), 'Employment leads to Independent Living and Self-Advocacy: A Comparative Study of Employed and Unemployed Persons with Cognitive Disabilities', *Asia Pacific Disability Rehabilitation Journal*, Vol. 17, No. 1, pp. 50–60.
- Shepherd, G. (1989), 'The value of work in the 1980s', *Psychiatric Bulletin*, No. 13, pp. 231–233.
- Shivji, I. G. (1999), 'Constructing a New Rights Regime: Promises, Problems and Prospects.', *Social and Legal Studies*, Vol. 8, No. 2, pp. 253–276.

- Singhal, A. K. and Malik, I. (2012), 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits', *International Research Journal*, Vol. 2, No. 7, pp. 252–256.
- Smith, A. (2006), 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?', *Human Rights Quarterly*, Vol. 28, No. 4, pp. 904–946.
- Soldatic, K. (2013), 'The Transnational Sphere of Justice: Disability Praxis and the Politics of Impairment', *Disability & Society*, Vol. 28, No. 6, pp. 744–755.
- Starke, J. G. (1936), 'Monism and Dualism in the Theory of International Law', *British Year Book of International Law*, Vol. 17, pp. 66–81.
- Stein, M. A. (2004), 'The Law and Economics of Disability Accommodations', *Duke Law Journal*, Vol. 53, pp. 79–191.
- Stein, M. A. (2007), 'Disability Human Rights', *California Law Review*, Vol. 95, No. 1, pp. 75–121.
- Stein, M. A. and Stein, J. S. P. (2007), 'Beyond Disability Civil Rights', *Hastings Law Journal*, Vol. 58, pp. 1204–1240.
- Sturm, S. P. (1994), 'Sameness and Subordination: The Dangers of Universal Solution', *University of Pennsylvania Law Review*, Vol. 143, No. 1, pp. 201–219, <http://www.jstor.org/stable/3312520>, accessed: 14.2.2014.
- Tororei, S. K. (2009), 'The Right to Work: A Strategy for Addressing the Invisibility of Persons With Disability', *Disability Studies Quarterly*, Vol. 29, No. 4, <http://dsq-sds.org/Article/view/973/1174>, accessed: 12.2.2014.
- van Reenen, T. and Combrinck, H. (2011), 'The UN Convention on the Rights of Persons With Disabilities In Africa: Progress After 5 Years', *SUR - International Journal on Human Rights*, Vol. 8, No. 14, pp. 131–165.
- Waddington, L. (1996), 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws', *Comparative Labour Law Journal*, Vol. 18, pp. 62–101.
- Wambali, M. K. B. (2009), 'Reflections on the Main Features of the Bill of Rights Following Some Amendments to the Constitution of the United Republic of Tanzania', *Eastern Africa Law Review*, No. 35 – 40, pp. 67–102.
- Welch, F. (1976), 'Employment Quotas for Minorities', *Journal of Political Economy*, Vol. 84, No. 4, pp. S105 - S139.
- Westen, P. (1982), 'The Empty Idea of Equality', *Harvard Law Review*, Vol. 95, No. 3, pp. 537–596.
- Willborn, S. L. (1986), 'Theories of Employment Discrimination in the United Kingdom and the United States', *Boston College International and Comparative Law Review*, Vol. 9, No. 2, pp. 243–256.
- Yokoyama, A. (2012), 'A Comparative Analysis of Institutional Capacities for Implementing Disability Policies in East African Countries: Functions of National Councils for Disability', *Disability, CBR & Inclusive Development*, Vol. 23, No. 2, pp. 22–40, accessed: 19.2.2014.

- Young, K. G. (2008), 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *The Yale Journal of International Law*, Vol. 33, No. 1, pp. 113–175.
- Zola, I. K. (1989), 'Toward the Necessary Universalizing of a Disability Policy', *Milbank Quarterly*, Vol. 67, No. 2.
- Zola, I. K. (1993), 'Disability Statistics: What we Count and What It Tells Us', *Disability Policy Studies*, Vol. 4, No. 2, pp. 9–39.
- Zola, I. K. (1993), 'Self, Identity and the Naming Question: Reflections on the Language of Disability', *Social Science & Medicine*, Vol. 36, No. 2, pp. 167–173.

### **Theses**

- Alsaif, A. S. (2008) *The Rights of Disabled Persons and Discrimination A comparative study in British, American and Saudi Arabian Disability*, PhD Thesis, Newcastle University.
- Cameron, C. (2010) *Does Anybody Like Being Disabled? A Critical Exploration of Impairment, Identity, Media and Everyday Experience in a Disabling Society*, PhD Thesis, Margaret University.
- Doyle, B. J. (1993) *Disability, Discrimination and Equal Opportunities: A Comparative Study of Legal Models Addressing the Employment Rights of Disabled Persons, with Particular Reference to Britain and the United States*, PhD Thesis, University of Oxford.
- Ngweni, C. G. (2010) *Disabled People' and the Search for Equality in the Workplace: An Appraisal of Equality Models from a Comparative Perspective*, LL.D. Thesis, University of the Free State.

### **Conference Proceedings**

- Barry, M. (1992) *United Nations Decade of Disabled Persons Achievement, Shortcoming And Challenges*, Paper presented at the 17<sup>th</sup> World Congress of Rehabilitation International'.
- Bossman, A. (2007) *Promoting and Protecting Human Rights, Ensuring Administrative Justice and Fighting Corruption in Ghana*, Presentation of the Ghana Commission of Human Rights and Administrative Justice at the Commonwealth Conference of National Human Rights Institutions'.
- Kisanji, J. (1998) *Culture and Disability An Analysis of Inclusive Education Based on African Folklore*, Paper presented at the International Expert Meeting and Symposium on Local Concepts and Beliefs of Disability in Different Cultures, Bonn.

### **Unpublished Works**

- EAC Policy on Persons with Disability, 2012.*
- Allain, J. *Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities: Legal Report No. 2 issued on behalf of Disability Action's Centre on Human Rights for People with Disabilities, Queen's University: Belfast, 2009'.*

- Bruyère, S. M. and Flynn, B. G. (2001) *The Role of Disability Management Programs in ADA Compliance*, New York, <http://digitalcommons.ilr.cornell.edu/edicollect/31/>, accessed: 6.8.2013.
- CCBRT, et al. (2010) *Report on Employment of Persons with Disabilities in Dar es Salaam, Tanzania: An Assessment of the Proportion of Persons with Disabilities in the Workplace, Dar es Salaam*.
- CEPD (2013) *Report on The Campaign Launch, on Improving Attitudes Towards Persons with disability in Ghana*, <http://www.cepdghana.org/content/view/44/71/1/0/>, accessed: 10.5.2013.
- CHRAGG (2011) *Review of the United Republic of Tanzania: Individual Report of the Tanzania National Human Rights Institution Submission to the Human Rights Council Universal Periodic Review Mechanism*.
- DFID Uganda (2009) *Disability Scoping Study: Disability Scoping Study for DFID Uganda: Final Report*, Kampala, [http://www.ucl.ac.uk/lc-ccr/downloads/06052009\\_Disability\\_Scoping\\_Study\\_Uganda.pdf](http://www.ucl.ac.uk/lc-ccr/downloads/06052009_Disability_Scoping_Study_Uganda.pdf), accessed: 17.1.2014.
- Downing, A. (2011) *Power and Disability in the Global South: A Case Study of Ghana's Disability Rights Movement*, MA Dissertation'.
- Haapanen, T. (2007) *Civil Society in Tanzania: KEPA's working papers No. 19*, Helsinki.
- ILO (2004) *Kenya Country Profile: Employment of People with Disabilities - the Impact of Legislation*, The Study prepared by the ILO In-focus Programme on Skills, Knowledge and Employability in the Framework of a Project Funded by Development Cooperation Ireland (DCI), Geneva, [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_107837.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_107837.pdf), accessed: 17.1.2014.
- ILO (2004) *Uganda Country Profile: Employment of People with Disabilities - the Impact of Legislation*, The Study prepared by the ILO In-focus Programme on Skills, Knowledge and Employability in the Framework of a Project Funded by Development Cooperation Ireland (DCI), Geneva, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_107842.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_107842.pdf), accessed: 31.1.2014.
- ILO (2004) *United Republic of Tanzania Country Profile: Employment of People with Disabilities - the Impact of Legislation*, The Study prepared by the ILO In-focus Programme on Skills, Knowledge and Employability in the Framework of a Project Funded by Development Cooperation Ireland (DCI), Geneva, [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@ifp\\_skills/documents/publication/wcms\\_107844.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_107844.pdf), accessed: 22.1.2014.
- ILO (2007) *Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines*, Geneva.
- ILO (2008) *Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and Recommendation (No. 168)*, Geneva.
- Katsui, H. (2008) *Downside of the Human Rights-Based Approach to Disability in Development*, Working Paper No. 2, Institute of Development Studies, Helsinki

University, [http://www.tokyofoundation.org/sylff/wp-content/uploads/2008/12/downside\\_of\\_hrba\\_katsui\\_hisayo.pdf](http://www.tokyofoundation.org/sylff/wp-content/uploads/2008/12/downside_of_hrba_katsui_hisayo.pdf), accessed: 17.1.2014.

Kenya National Commission on Human Rights (2011) *Submission to the Committee on the Elimination of Racial Discrimination in Response to the Periodic Report of Kenya*, [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/KNCHR\\_Kenya\\_CERD79.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/KNCHR_Kenya_CERD79.pdf), accessed: 22.1.2014.

LHRC and ZLSC (2007) *Tanzania Human Rights Report 2006*, Dar Es Salaam, Zanzibar.

LHRC and ZLSC (2008) *Tanzania Human Rights Report 2007*, Dar Es Salaam, Zanzibar.

LHRC and ZLSC (2009) *Tanzania Human Rights Report 2008*, Dar Es Salaam, Zanzibar.

LHRC and ZLSC (2010) *Tanzania Human Rights Report 2009*, Dar Es Salaam, Zanzibar.

LHRC and ZLSC (2011) *Tanzania Human Rights Report 2010*, Dar Es Salaam, Zanzibar.

LHRC and ZLSC (2012) *Tanzania Human Rights Report 2011*, Dar Es Salaam, Zanzibar.

LHRC and ZLSC (2013) *Tanzania Human Rights Report 2012*, Dar Es Salaam, Zanzibar.

LRCT (2008) *Report on the Review of Legal Framework on the Rights of Persons with disability in Tanzania*, Dar Es Salaam.

National Assembly's Standing Committee (Tanzania) (2009) *The Opinion of the Standing Committee on Social Services on the Ratification of the United Nation Convention on the Rights of Persons with Disabilities, and the Optional Protocol*, Dodoma, <http://www.parliament.go.tz/docs/reports/1251912354.pdf>, accessed: 17.1.2014.

Nishith, P. *Improving the Labour Market Outcomes of Minorities: The Role of Employment Quota*, IZA Discussion Papers, No. 4386'.

Nzagi, I. (2009) *Securing the Rights of People with Albinism in Tanzania Mainland: The Fight Against Social Exclusion*, A Research Paper presented in partial fulfilment of the requirements for obtaining the degree of Masters Of Arts In Development Studies, International Institute of Social Studies, The Hague.

Office on the Status of Disabled Persons (South Africa) (1997) *White Paper on Integrated National Disability Strategy*.

OHCHR *Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva.

OHCHR (2005) *Economic, Social and Cultural Rights: A Handbook for National Human Rights Institutions*, Geneva.

OHCHR (2008) *A Review of the Ugandan Legal Framework Relevant to Persons With Disabilities: Comparative Analysis to the Convention on the Rights of Persons with Disabilities*, Working Paper, Geneva.

Oloka-Onyango, J. and Nassali, M. (2003) *Constitutionalism and Political Stability in Zanzibar: The Search for a New Vision*, Kampala.

O'Reilly, A. (2007) *The Right to Decent Work of Persons with Disabilities*, Geneva.

Republic of Uganda (2010) *Initial Status Report on the UN Convention on the Rights of Persons with Disabilities*.



- UHRC (2012) *The 15<sup>th</sup> Annual Report of the Uganda Human Rights Commission: The Report Submitted to Parliament of the Republic of Uganda*, Kampala, <http://www.uhrc.ug/?p=1873>, accessed: 17.1.2014.
- UN (2007) *From Exclusion to Equality: Realizing the Pights of Persons with Disabilities*, Handbook for Parliamentarians, Geneva, <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>, accessed: 17.1.2014.
- UN (2010) *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors*, New York, [http://www.ohchr.org/documents/Publications/disabilities\\_training\\_17en.pdf](http://www.ohchr.org/documents/Publications/disabilities_training_17en.pdf), accessed: 17.1.2014.
- United Republic of Tanzania (2010) *National Disability Mainstreaming Strategy 2010 – 2015*, Dar Es Salaam.
- WHO (1980) *International Classification of Impairments, Disabilities and Handicaps*, Geneva.
- Yao, R. (2001) *Chronic Poverty and Disability*, Frome, [http://www.chronicpoverty.org/uploads/publication\\_files/WP04\\_Yeo.pdf](http://www.chronicpoverty.org/uploads/publication_files/WP04_Yeo.pdf),
- Zambian Human Rights Commission (2007) *Statement Of Compliance With The Paris Principles*, Presentation of the Zambian Human Rights Commission at the Commonwealth Conference of National Human Rights Institutions, London, [http://secretariat.thecommonwealth.org/Shared\\_ASP\\_Files/UploadedFiles/EAD2B633-38F9-4317-9DE8-A1CD03F3663E\\_ZambiaHumanRightsCommissionPresentation.pdf](http://secretariat.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/EAD2B633-38F9-4317-9DE8-A1CD03F3663E_ZambiaHumanRightsCommissionPresentation.pdf), accessed: 20.1.2014.

### Internet Documents

- CESCR (1991) *Applicability of the Covenant within Domestic Law*,
- Disability Rights Promotion International (2013) *Overview of Disability Rights in Kenya*, <http://drpi.research.yorku.ca/Africa/resources/KenyaRep07/Section3>, accessed: 19.4.2013.
- Ghana Federation of the Disabled (2013) *History of GFD*, <http://www.gfdgh.org/history.html>, accessed: 10.5.2013.
- Giles, G. (2012) *Employment Equity, Targets and Quotas*, <http://www.gilesfiles.co.za/labour-law-amendments-2/employment-equity-amendments-and-targets-or-quotas-carol-paton-in-business-day/>, accessed: 5.8.2013.
- Hasselkus, A. (2012) *Habilitation*, <http://blog.asha.org/2012/01/04/habilitation-what-it-is-and-why-it-matters-to-you/>, accessed: 4.10.2010.
- Hoefmans, A. and Beco, G. de (2010) *Background Document prepared for the International Conference*, [http://www.socialsecurity.fgov.be/eu/docs/agenda/18-19\\_11\\_10\\_background\\_document.pdf](http://www.socialsecurity.fgov.be/eu/docs/agenda/18-19_11_10_background_document.pdf), accessed: 8.2013.
- Holman E. G. (2005) *Role-Taking vs. Cultural Identity*, [http://digitalcommons.iwu.edu/socanth\\_honproj/7](http://digitalcommons.iwu.edu/socanth_honproj/7), accessed: 5.12.2013.

- Kisanji, J. (1995) *Attitudes and Beliefs about Disability in Tanzania*, <http://tenmet.org/Droop/content/attitudes-and-beliefs-about-disability-tanzania>, accessed: 15.01.2014.
- Langtree, I. (2010) *Definitions of The Models of Disability*, <http://www.disabled-world.com/definitions/disability-models.php#ixzz1vxfsxp4y>, accessed: 26.5.2012.
- Morris-Wales, J. (2010) *Literature Review on Job Retention and Career Progression for Persons with disability in Canada and Internationally*, <http://disabilitystudies.ca/wp-content/uploads/2010/08/Job-Retention-and-Career-Progression-Among-People-with-Disabilities-Final-Report.htm>, accessed: 3.10.2012.
- Radar Development (2011) *About Radar Development*, <http://www.radardevelopment.com/about-us/>, accessed: 4.6.2014.
- Rains, S. (2010) *The Number of Persons with Disability Worldwide*, <http://www.rollinggrains.com/readings/2010/03/the-number-of-people-with-disabilities-worldwide.html>, accessed: 13.5.2012.
- SAFOD (2013) *Zambia Federation of the Disabled*, [http://www.safod.org/about%20safod/Countries/zambia\\_web.htm](http://www.safod.org/about%20safod/Countries/zambia_web.htm), accessed: 30.4.2013.
- UN Enable (2006) *UN Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/facts.shtml>, accessed: 1.7.2013.
- UN Enable (2007) *Overview of International Legal Frameworks for Disability Legislation*, accessed: 7.11.2011.
- UN Enable (2012) *History of United Nations and Persons with Disabilities*, <http://www.un.org/disabilities/default.asp?id=131>, accessed: 10.5.2012.
- UN Enable (2012) *Realizing the Rights of Persons with disability*, <http://www.un.org/disabilities/default.asp?id=215>, accessed: 5.1.2012.
- Wizara ya Kazi na Ajira (2013) *Historia*, <http://www.kazi.go.tz/historia.php>, accessed: 24.8.2014.

### **Newspaper Articles**

- Peter, C. M. (9.6.2013), 'Draft Constitution: A Sylent Revolution?', *This Day*, <http://www.ippmedia.com/frontend/?l=55690>, accessed: 17.1.2014.
- Serunkuma, P. (26.10.2009), 'Current Law on Disability and Empoyment Prone to Abuse <http://www.newvision.co.ug/D/8/459/699132>, accessed on', *New Vision*, accessed: 24.12.2013

### **National Constitutions (and related Acts)**

- The Draft Constitution of the United Republic of Tanzania, 2014* (3rd Draft).
- The Draft Constitution of Zambia, 2012.*
- The Interim Constitution of Tanzania, 1965* (repealed).
- The Constitution of Kenya, 2010.*
- The Constitution of the Republic of Ghana, 1992* (as amended).

*The Constitution of the Republic of Kenya, 1963* (repealed).

*The Constitution of the Republic of Uganda, 1995* (as amended).

*The Constitution of the State of Zanzibar, 1963* Legal Supplement (Part I) to the Official Gazette of the Zanzibar Government, Vol. 72, No. 4320 of 5th December 1963) (repealed).

*The Constitution of the United Republic of Tanzania, 1977* [Cap 2 R.E. 2002] (as amended).

*The Constitution of Zambia, 1991* (Chapter 1) (as amended).

*The Constitutional Amendment Act, 1984* (Act No. 15 of 1984) (Tanzania).

*The Constitutional Amendment Act, 2000* (Act No. 3 of 2000) (Tanzania).

*The Constitutional Government and the Rule of Law Decree, 1964* (Decree No. 5 of 1964) (Zanzibar, repealed).

## **Policies**

*Job Programme for Zanzibar, 2007.*

*Medium-Term National Development Policy Framework, 2010 - 2013* (Ghana Shared Growth And Development Agenda (GSGDA)).

*National Employment Policy, 1997* (Tanzania Mainland).

*National Employment Policy, 2008* (Tanzania Mainland).

*National Policy on Disability in Uganda, 2008.*

*National Policy on Disability, 2004* (Tanzania Mainland).

*The Arusha Declaration and TANU's Policy on Socialism and Self-Reliance, 1967* (Arusha Declaration). (United Republic of Tanzania)

*The Disability Rights Charter of South Africa, 1992.*

*The Technical Assistance Guidelines on the Employment of People with Disabilities* (South Africa), 2007.

*The Zanzibar Youth Employment Action Plan, 2007.*

*Zanzibar Employment Policy, 2009.*

## **National Legislation**

### *Ghana*

*The Human Rights and Administrative Justice Act, 1993* (Act No. 456 of 1993).

*The Labour Act, 2003* (Act No. 651 of 2003).

*The Persons with Disability Act, 2006* (Act No. 715 of 2006).

*The Technical and Vocational Education and Training Act, 2006* (Act 718 of 2006).

### *Kenya*

*The Employment Act, 2007* (Act No. 11 of 2007) (Kenya).

*The Labour Relations Act, 2007 (Act No. 14 of 2007).*

*The National Council for Law Reporting Act, 1994 (Act No. 11 of 1994).*

*The National Gender and Equality Commission Act, 2011 (Act No. 15 of 2011).*

*The Persons with Disabilities Act, 2003 Act No. 14 of 2003.*

*The Persons with Disability (Access to Employment, Services and Facilities) Regulations (L. N No. 62 of 2009).*

*The Technical and Vocational Education and Training Act, 2013 (Act No. 29 of 2013).*

#### **South Africa**

*The Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997).*

*The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (as amended).*

*The Employment Equity Act, 1998 (Act No. 55 of 1998) (as amended).*

*The Employment Equity Amendment Act, 2013 (Act No. 47 of 2013).*

*The Interim Constitution of South Africa, 1993 (Act No. 200 of 1993) (repealed).*

*The Labour Relations Act, 1995 (Act No. 66 of 1995).*

*The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000).*

*The Public Service Act, 1994 (Proclamation No. 103 of 1994).*

*The Skills Development Act, 1998 (Act No 97 of 1998).*

#### **Tanzania**

##### Legislation applicable in both sides of the Union:

*The Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2002]*

*The Commission for Human Rights and Good Governance Act [Cap 391 R.E. 2002]*

*The Interpretation of Laws Act [Cap 1. R.E. 2002].*

*The Permanent Commission of Inquiry Act, 1966 (Act No. 26 of 1966) (repealed).*

##### Legislation applicable in Tanzania Mainland only:

*The Disabled Persons (Care and Maintenance) Act [Cap 183 R.E. 2002] (repealed).*

*The Disabled Persons (Care and Maintenance) Regulations, 1985 (G.N. No. 465 of 1985) (repealed).*

*The Disabled Persons (Employment) Act [Cap 184 R.E. 2002] (repealed) .*

*The Disabled Persons (Employment) Regulations, 1985 (G.N. No. 464 of 1985) (repealed).*

*The Employment Act [Cap. 366 R.E. 2002] (repealed)*

*The Employment and Labour Relations (Code of Good Practice) Rules, 2007* GN No. 42 of 2007.

*The Employment and Labour Relations Act (Commencement Date Notice), 2007* (G.N. No. 1 of 5th January, 2007).

*The Employment and Labour Relations Act, 2004* (Act No. 6 of 2004).

*The Employment Ordinance, 1956* (Ordinance No. 35 of 1956) (repealed).

*The Executive Agencies Act* [Cap 245 R.E. 2002].

*The Labour Institutions Act (Commencement Date), 2005* (G.N. No. 24 of November, 2005).

*The Labour Institutions Act, 2004* (Act No. 7 of 2004).

*The Law of the Child Act, 2009* (Act No. 21 of 2009).

*The Mental Diseases Act* [Cap 98 R.E. 2002].

*The National Employment Promotion Service Act* [Cap 243 R.E. 2002].

*The Occupational Health and Safety Act, 2003* (Act No. 5 of 2003).

*The Persons with Disabilities Act, 2010* (Act No. 9 of 2010).

*The Persons with Disability (General) Regulations, 2012* (GN No. 152 of 2012).

*The Trade Unions Act* [Cap 244 R.E. 2002] (repealed).

*The Vocational Education and Training Act, 1994* [Cap 82 R.E. 2002].

*The Workers' Compensation Act* [Cap. 263 R.E. 2002].

#### Legislation applicable in Tanzania Zanzibar only:

*The Constitutional Amendment Act* (Act No. 9 of 2010).

*The Constitutional Government and the Rule of Law Decree, 1964* (Decree No. 5 of 1964) (repealed).

*The Employment Act, 2005* (Act No. 11 of 2005).

*The Employment of Children, Young Person and Adolescents Decree, 1952* (Decree No 8 of 1952) (repealed).

*The Employment of Women (Restriction) Decree, 1952* (Decree No. 9 of 1952) (repealed).

*The Equality, Reconciliation and Unity of Zanzibar Peoples Decree, 1964* (Presidential Decree No. 7 of 1964) (repealed).

*The Existing Laws Decree, 1964* (Decree No.1 of 1964) (repealed).

*The Forced or Compulsory Labour Decree, 1932* (Decree No. 8 of 1932) (repealed)

*The Labour Act, 1997* (Act No. 3 of 1997) (repealed).

*The Labour Decree, 1946* (Decree No. 11 of 1946) (repealed).

*The Labour Relations Act, 2005* (Act No. 1 of 2005) (Zanzibar).

*The Minimum Wages Decree, 1935* Decree No. of 1935) (Zanzibar, repealed) .

*The Occupational Safety and Health Act, 2003* (Act No. 14 of 2003).  
*The Persons with Disabilities (Rights and Privileges) Act, 2006* (Act No.9 of 2006).  
*The Vocational Training Act, 2006* (Act No. 8 of 2006).

#### *Uganda*

*The Business, Technical, Vocational Education Act, 2008* (Act No. 12 of 2008).  
*The Employment Act, 2006* (Act No. 6 of 2006 (Act No. 6 of 2006)).  
*The Equal Opportunities Commission Act, 2007*.  
*The National Council for Disability Act, 2003*.  
*The Persons with Disabilities Act, 2006*.

#### *Zambia*

*Industrial and Labour Relations Act* Cap 169.  
*The Citizens Economic Empowerment Act, 2006* (Act No. 9 of 2006).  
*The Employment Act* Cap. 268.  
*The Human Rights Commission Act* (Cap 48).  
*The Persons with Disabilities Act, 2012* (Act No. 6 of 2012).

#### **OAU/AU Treaties and Declarations**

*African Youth Charter*, Adopted by the Seventh Ordinary Session of the Assembly, held in Banjul, The Gambia, 2nd July 2006, 2006 (AYC).  
*Grand Bay (Mauritius) Declaration and Plan of Action*, Adopted by the 1st OAU Ministerial Conference on Human Rights, Grand Bay, Mauritius, 16 April, 1999 (Grand Bay Declaration).  
*The African Charter on Democracy, Elections and Governance*, Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30th January 2007 (ACDEG).  
*The African Charter on Human and Peoples' Rights*, Organisation of African State Document CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 1981 (Banjul Charter).  
*The African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), 1990 (ACRWC).  
*The Agreement for the Establishment of the African Rehabilitation Institute (ARI)*.  
*The AU's Continental Plan of Action for the African Decade of Persons with disability 1999 – 2009*.  
*The AU's Continental Plan of Action for the Extended African Decade of Persons with disability (2010 – 2019)*, Adopted by the 22nd Ordinary Session of the Executive Council and 20th Ordinary Session of Assembly of the African Union, Adis Ababa, 23 - 28 January 2013.

*The Constitutive Act of the African Union*, Adopted in at the Lome Summit (Togo).

*The Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 U.N.T.S. 45, 1969.

*The Declaration of the African Decade of Disabled Persons (1999-2009)*, Adopted by the 23rd Session of the Labour and Social Affairs Commission in Algiers.

*The Kigali Declaration*, Adopted by the 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting in Kigali, Rwanda, 8 May 2003.

*The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, CAB/LEG/66.6, 2003 (Maputo Protocol).

*The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), 1998.

*The Resolution on the Renewal of the Mandate of the Working Group on the Rights of Older Persons and People with Disabilities in Africa*, Adopted in the 54th Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia, 5 November 2013.

*The Resolution on Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on The Rights of Older Persons and People with Disabilities in Africa*, Adopted in the 45th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 27 May 2009.

*The Windhoek Declaration on Social Development*, Adopted by 1st AU Ministerial Conference of Ministers in Charge of Social Development Development, Windhoek, Namibia, 31 October 2008 (Windhoek Declaration).

### **UN Conventions, Soft Law and General Comments**

*General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* E/1991/23, 01 Jan 1991 .

*General Comment No. 5: Persons with Disabilities* E/1995/22, 1.1.1995 .

*General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights (Right to Work)* E/C.12/GC/18, 6.2.2006 .

*The Convention on the Elimination of All Forms of Discrimination against Women*, General Assembly Resolution 34/180, 1979 (CEDAW).

*The Convention on the Elimination of All Forms of Racial Discrimination*, General Assembly Resolution 2106 (XX), 1965 (CERD).

*The Convention on the Rights of Persons with Disabilities*, General Assembly Resolution 61/106, 2006 (CRPD).

*The Convention on the Rights of the Child*, General Assembly Resolution 44/25, 1989 (CRC).

*The Declaration on the Rights of Disabled Persons*, General Assembly Resolution 3447 (XXX) of 9 December 1975 (DRDP).

*The Declaration on the Rights of Mentally Retarded Persons*, General Assembly Resolution 2856 (XXVI) of 20 December 1971 (DRMRP).

*The International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), 1966 (ICCPR).

*The International Covenant on Economic, Social and Cultural Rights*, General Assembly Resolution 2200A (XXI), 1966 (ICESCR).

*The United Nations Decade of Disabled Persons*, General Assembly Resolution 39/26, 1984 .

*The Universal Declaration of Human Rights*, General Assembly Resolution 217 A (III) of 10 December 1948 (UDHR).

*The World Programme of Action concerning Disabled Persons*, General Assembly Resolution A/RES/37/ 52, 1982 (World Program of Action).

*Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Document E/CN.4/1987/17, 8 January, 1997 (Limburg Principles).

*Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, 60 L.N.T.S. 253, 25 September 1926 .

*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI), 30 April 1956 .

*Implementation of the World Programme of Action concerning Disabled Persons*, General Assembly Resolution A/RES/37/53, 3 December 1982 .

*Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, General Assembly Resolution A/RES/48/96, 20 December 1993 (Standard Rules).

*Vienna Declaration and Programme of Action*, World Conference on Human Rights in Vienna, 25th June 1993.

*Principles relating to the Status of National Institutions*, General Assembly resolution 48/134 of 20 December 1993 (Paris Principles).

## **ILO Conventions and Recommendations**

*The Abolition of Forced Labour Convention*, ILO Convention No. 105 of 1957.

*The Convention Concerning Forced or Compulsory Labour*, ILO Convention No. 29 of 1930

*The Convention concerning Freedom of Association and Protection of the Right to Organise*, ILO Convention No. 87

*The Declaration on Fundamental Principles and Rights at Work*, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010). .

*The Discrimination (Employment and Occupation) Convention*, ILO Convention No. 111 of 1958

*The Discrimination (Employment and Occupation) Recommendation*, ILO Recommendation No. 111 of 1958 .

*The Equal Remuneration Convention*, ILO Convention No. 100 of 1951.



*The Minimum Age Convention*, ILO Convention No. 138 of 1973.

*The Right to Organise and Collective Bargaining Convention*, ILO Convention No. 98 of 1949 .

*The Vocational Rehabilitation (Disabled) Recommendation*, ILO Recommendation No. 99 of 1955.

*The Vocational Rehabilitation and Employment (Disabled Persons) Convention*, ILO Convention No. 159 of 1983.

*The Vocational Rehabilitation and Employment (Disabled Persons) Recommendation*, ILO Recommendation No. 168 of 1983.

*The Worst Forms of Child Labour Convention*, ILO Convention No. 182 of 1999.

## **Judicial Decisions**

### *Kenya*

*Abel Odhiambo Onyango and Hope Disability Foundation v Cabinet Secretary Ministry of Health and Two Others*, High Court of Kenya at Nairobi, Petition No 13 of 2014.

*Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme*, Industrial Court of Kenya, Cause No. 665 of 2011.

*Duncan Otieno Waga v Attorney General*, High Court of Kenya at Nairobi, Petition 94 of 2011.

*Duncan Otieno Waga v The Hon. Attorney General*, Industrial Court of Kenya, at Mombasa, Cause No. 89 of 2013.

*Federation of Women Lawyers Kenya and 5 others v Attorney General and Judicial Service Commission*, High Court of Kenya at Nairobi, Constitutional Petition No. 102 of 2011.

*Fredrick Gitau Kimani v Attorney General & 2 Others*, High Court Kenya at Nairobi, Petition 157 of 2011.

*Joram Jotham Waluseshe v Mumias Sugar Co. LTD*, High Court of Kenya at Bungoma, Civil Suit 83 of 2005.

*Kenya Society for the Mentally Handicapped (KSMH) v the Attorney General and 7 Others*, High Court of Kenya at Nairobi, Petition 155A of 2011.

*Mary Wangui Gakunju v City Council of Nairobi*, Industrial Court of Kenya at Nairobi, Cause No. 27 of 2012.

*Paul Pkiach Anupa & Another v Attorney General & Another*, High Court of Kenya at Nairobi, Petition 93 of 2011.

*Silas Rukungu Karanja v Teachers Service Commission*, Industrial Court of Kenya, Cause No. 567 of 2012.

### *South Africa*

*IMATU v City of Cape Town*, [2005] 11 BLLR 1084 (LC).

*Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*, (2008) 4 BCLR 356 (LC).

*Du Plessis and Others v De Klerk and Another*, (CCT 8/95) [1996] ZACC pp. 10.

*Purohit and Moore v Gambia* (2003) AHLR pp. 96.

#### *Tanzania*

*Abubakar Haji Yakubu. v Air Tanzania Co. Ltd.*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 162 of 2011.

*Anthony Francis Munyigo v Total Tanzania L.T.D and Others*, High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Complaint No. 30 of 2009.

*Bernado Ephraim v. Holaria Pastory*, High Court of Tanzania at Mwanza, Civil Appeal No. 70 of 1989 [1990] LRC pp. 757.

*Director of Public Prosecution v Daudi Pete* [1983] TLR pp. 22.

*Director of Public Prosecution v. Ally Haji Ahmed and Others*, Court of Appeal of Tanzania, Criminal Appeal Case Nos. 44 and 45 of 1985.

*General Manager, Mufindi Paper Mills Ltd v Masoya Magoti and Cosmas fimbo Msigwa*, High Court (Labour Division) at Dar es Salaam, Revision No. 7 of 2007.

*J. W. Ladwa (1977) Ltd v Peter Kimote*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 52 of 2008.

*Job Mwakang'ata v Director, Kinondoni Municipal Council*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 66 of 2009.

*Julius Ishengoma Francis Ndyanabo v The Attorney General Civil*, Court of Appeal of Tanzania at Dar es Salaam, Appeal No. 61 of 2001.

*Legal and Human Rights Centre and Others v Attorney General*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Case No 77 of 2005.

*Macmillan Aidan Ltd. v Blandina Lucas Mohamed*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 273 of 2008.

*Martin Oyier. v Geita Gold Mine Ltd*, High Court of Tanzania (Labour Division) at Mwanza, Revision No. 226 of 2008.

*Ndewawiosia Ndeamtzo v. Imanuel Malasi* [1968] H. C. D. pp. No. 127.

*Transport Equipment Ltd. and Reginald John Nolan v. Devran P. Valambhia*, Court of Appeal of Tanzania, at Dar es Salaam, Civil Application No. 19 of 1993.

*Vodacom Tanzania. v Zawadi Bahenge and 6 others*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 12 of 2012.

*Wazalendo Secondary School v Zainul Koshuma*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 89 of 2009.

*Zayurnba Abeid versus Tanzania Ports Authority*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 155 of 2008.

## *Zambia*

*Sela Brotherton (suing as secretary of the Zambia Federation of Disability Organisations) v Electoral Commission of Zambia*, High Court for Zambia, at Lusaka, 2011/HP/0818.

### **Other Documents**

Hansard, 13 April 2010 (1<sup>st</sup> session), (Parliament of the United Republic of Tanzania)

Hansard, 13 April 2010(2<sup>nd</sup> Sessionn), (Parliament of the United Republic of Tanzania)

Statute of Incorporation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights , 15<sup>th</sup> April 2000 (as amended).

### **Interviewed Persons**

Muhanza, T. R. (2.2.2014) Interview (E-Mail).

Muhammed, R. A. (15.5.2014) Interview (E-Mail).

Ackson, T. (20.5.2014) Interview (E-Mail).

Anastaz, A. (24.5.2014) Telephone .

Lyengi, J. (24.5.2014) Interview (Telephone).

Rukwago, N. (4.6.2014) (E-Mail).

Mtulya, F. (5.6.2014) Interview (E-Mail).

Abdallah, R. A. (10.6.2014) Interview (E-Mail).

Khalfan, H. K. (17.11.2008) (Print).

## **DECLARATION**

I hereby certify that I have written this thesis independently and without unauthorized assistance.

I have used no other than the listed sources and resources. This applies to printed texts as well as texts from the Internet.

The work has never been presented in any other institute (either at FAU or at another university) in the present or in a modified form.

I understand that any breach of this declaration would lead to this work being assigned with the grade "Fail".

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the left.

Abdallah Possi

Erlangen, 20.11.2014

## **ERKLÄRUNG**

Hiermit versichere ich, dass ich die vorliegende Arbeit selbständig und ohne unerlaubte Hilfe verfasst habe.

Ich habe keine anderen als die angegebenen Quellen und Hilfsmittel benutzt und alle wörtlich oder dem Sinn nach aus anderen Texten entnommenen Stellen als solche kenntlich gemacht. Das gilt für gedruckte Texte ebenso wie für Texte aus dem Internet.

Die Arbeit wurde in keiner anderen Lehrveranstaltung (weder an der FAU noch an einer anderen Hochschule) in der vorliegenden oder in einer modifizierten Form vorgelegt.

Mir ist bewusst, dass jeder Verstoß gegen diese Erklärung zu einer Benotung der Arbeit mit „nicht ausreichend“ führt.

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the left.

Abdallah Possi

Erlangen, 20.11.2014