

**EMPLOYMENT OF PERSONS WITH DISABILITIES: A CRITICAL ANALYSIS OF
THE PERSONS WITH DISABILITIES ACT 2003**

BY

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G62/71995/08

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LLM) OF
UNIVERSITY OF NAIROBI, SCHOOL OF LAW**

25th NOVEMBER 2010

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ACKNOWLEDGEMENT

There are so many people whose guidance, support and love has made it possible for me to complete this work. I express my gratitude to my family and friends for bearing with my long absences and the non-stop chatter about 'my dissertation'! I would like to appreciate Nairobi Pentecostal Church - Valley Roads' Challengers Ministry for teaching me everything I know about living fully despite impairments. I would also like to express my profound gratitude to my supervisor, Mr. Eric Ogwang', without whom the idea behind this work would never have been born. To Monica Kirya and Edwin Mokaya, I say thank you! While I cannot name everyone who has specially impacted on this work, I would like to single out my mother Jane Ngima Kamundia, my sister Shiro (and her forthcoming baby!), my late brother Anthony Wachira and my friends Peter Wainaina, and Malika Maneno – my appreciation and love for you knows no bounds. I thank the Late Noah Muthui Wathituni (9th June 1972 – 4th October 2010) for teaching me all about devotion and enthusiasm. And to humanity at large, I say -
Treasure Life...

DECLARATION

I, **ELIZABETH WARUGURU KAMUNDIA** do declare that this research project/ dissertation is my original work and has not been submitted and is not currently being submitted for a degree in any other institution.

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LEGAL INSTRUMENTS

Local Instruments

The Constitution of Kenya

The Employment Act (No. 11 of 2007)

The Persons with Disabilities Act, (No. 14 of 2003)

International Instruments

The Universal Declaration of Human Rights

The International Covenant on Civil and Political Rights

The International Covenant on Economic, Social and Cultural Rights

The UN Convention on the Rights of Persons with Disabilities

LIST OF ABBREVIATIONS

ADA - American Disability Act

CPI - Corruption Perceptions Index

CRPD - The United Nations Convention on the Rights of Persons with Disabilities

DDA - Disability Discrimination Act

DPI - Disabled People's International

DPOs – Disabled Persons Organisations

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural rights

ICIDH - World Health Organisation's International Classification of Impairments, Disabilities and Handicaps

LPHU - Lebanese Physical Handicapped Union

NCPWD - National Council of Persons with Disabilities

NGO - Non-Governmental Organisation

UPIAS - Union of Physically Impaired Against Segregation

UDHR - Universal Declaration of Human Rights

WHO - World Health Organization

CHAPTER 1

1. BACKGROUND TO THE STUDY AND REVIEW OF LITERATURE

1.1 Introduction

There are persons with disabilities the world over, and their rights have been recognized and guaranteed in various national as well as international laws. In 2003, Kenya enacted the Persons with Disabilities Act (hereinafter called "the Act") to provide for the rights and rehabilitation of persons with disabilities as well as to achieve equalization of opportunities for persons with disabilities.¹

This study looks at the Persons with Disabilities Act 2003, and analyses its impact on employment rights of persons with disabilities in Kenya.

1.2 Background

The current global economic recession, portends great challenges to employment and job security, especially in developing countries. In the context of actualization of human rights and due to the centrality of employment in modern human development, concerns over employment continue to increase. This is reflected in the ever growing research and work in this field by international organizations, governments, non-governmental organizations and academics.

This problem is understandably more acute in relation to persons with disabilities. Around 10 per cent of the world's population, or 650 million people, live with disabilities. Eighty per cent of persons with disabilities – more than 400 million people – live in poor countries. Statistics on employment for persons with disabilities are staggering. In developing countries, 80 per cent to 90 per cent of persons with disabilities of working age are unemployed and in industrialized countries it is estimated to be between 50 per cent and 70 per cent. Yet approximately 470 million of the 650 million people are of working age.²

¹ The preamble to the Persons with Disabilities Act

² United Nations Enable <http://www.un.org/disabilities/default.asp?navid=22&pid=109> (last accessed on 8th January 2009)

The 2009 census results revealed that persons with disabilities constitute 3.5%³ of the Kenyan population, which are 647,689 males and 682,623 females totalling to 1,330,312.⁴ Using the estimate above (an estimate of 80 to 90 percent of persons with disabilities of working age in developing countries are unemployed)⁵ in the case of Kenya therefore, this means that about one million persons with disabilities of working age are without employment!

Generally, the demography of disability is difficult. Counting persons with disabilities is challenging because disability is not just a status condition, entirely contained within the individual. Rather, it is an interaction between medical status and the environment. Further, there are varying approaches taken to defining disability.⁶

Persons with disabilities have the potential to make a valuable contribution in the workforce, as employees, entrepreneurs and employers of others. However, this is often not the case for many reasons. For instance, employers assume that people with disabilities are unable to work and are unwilling to give them the opportunity. Often people with disabilities have not had access to education or training in employable skills. Further the support services they require, for instance, buildings and transportation, are not accessible to them. These and other obstacles stand in the way of persons with disabilities finding a job which will enable them to earn their own living, support their families and contribute to the national economy. The resulting loss is felt at every level, not only by persons with disabilities themselves and their families, but also by employers and the wider society.

1.3 Problem Statement

Massive unemployment is one of the most serious problems facing Kenya as a country today. This problem is more compounded when it comes to persons with disabilities. In 2003, the Government of Kenya passed the Persons with Disabilities Act that is hoped to result in improved quality of life for persons with disabilities. There is need for Kenya to look into the

³ This would appear to be a significant underestimate, given that the United Nations Enable puts the number at 10% (<http://www.un.org/disabilities/default.asp?navid=22&pid=109>) as does the World Health Organisation (<http://www.who.int/disabilities/media/events/idpdinfo031209/en/> last accessed on 18th October 2010). The Kenya National Survey for Persons with Disabilities done by the National coordinating Agency for Population and development and the Kenya National Bureau of Statistics preliminary report of March 2008 puts the estimate at 4.6%.

⁴ <http://gusii.com/2010/08/kenyas-population-census-2010.html> (last accessed 17th September 2010)

⁵ <http://www.un.org/disabilities/default.asp?navid=22&pid=109> (last accessed on 8th January 2009).

⁶ <http://www.ilo.org/public/english/employment/skills/disability> (last accessed on 1st January 2009)

relationship between disability and unemployment. The concerns, needs and experiences of persons with disabilities must be made an integral part of the design and implementation of policies and programs in the political, economic and social spheres of life so that persons with disabilities benefit equally. This study addresses the potential and limitations of the Persons with Disabilities Act 2003 and suggests a multi-dimensional package of solutions to the legal and extra-legal handicaps to putting employment rights of persons with disabilities in motion and actualizing them in Kenya.

1.4 Research Significance

This research has an overall significance in expanding the existing body of knowledge in contemporary disability law and its implementation in Kenya. The study refocuses attention to persons with disabilities by bringing to bear the employment challenges faced by persons with disabilities in developing countries, like Kenya.

This research draws attention to the prevailing conditions with regard to unemployment and disability. More importantly, it discusses and suggests a multi-dimensional package of solutions to the legal and extra-legal handicaps to putting employment rights for persons with disabilities in motion and actualizing them in Kenya.

This may prove useful to a host of actors in the society including the government and its relevant agencies, non-governmental organizations, the persons with disabilities; to most importantly galvanize them into synergetic- action.

1.5 Conceptual Framework

Defining disability is a complicated and controversial matter. It is important to consider the preferences of persons with disabilities themselves, and to bear in mind that acceptable terminology changes over time, and from one culture to another.

The Persons with Disabilities Act defines disability as *'a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts*

on social, economic or environmental participation'.⁷ The American Disability Act defines disability as 'a physical or mental impairment that substantially limits one or more major life activities of such individual'.⁸ The US House of Representatives has defined "major life activities" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working and participating in community activities".⁹ The UN Convention on the Rights of Persons with Disabilities (CRPD)¹⁰ defines persons with disabilities as to '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'. Disability has also been defined as a lack of ability relative to a personal or group standard or norm.¹¹

Two key terms – 'impairment' and 'disability' – are often used synonymously. However their meanings are different and it is important to make a distinction between them. Impairment has been defined as 'lacking all or part of a limb; having a defective limb, organ or mechanism of the body'.¹² Some persons with disabilities campaigners question the use of this term, because of its negative implications; they prefer the more neutral term 'condition'. A condition may or may not be perceived as impairment and may or may not restrict one's ability to function. In contrast, the term disability as used by organizations of persons with disabilities (DPOs), emphasizes society's denial of the human rights of the person with the impairment.¹³ In the words of Disabled Peoples International: 'Disability is the disadvantage or restriction of activity caused by contemporary social organization, which takes little or no account of people who have impairments, and thus excludes them from the mainstream of social activities'.¹⁴

⁷ *Supra* note 1, Section 2

⁸ Laplante, M.P (1991). The Demographics of Disability, *The Milbank Quarterly*, 69, 55-77

⁹ *Ibid.*

¹⁰ *Convention on the Rights of Persons with Disabilities* (A/RES/61/106).

¹¹ <http://en.wikipedia.org/wiki/Disability> (last accessed on 30th April 2009)

¹² Davis, K. (1986). Re-defining the Disabled underclass, Union of the Physically Impaired Against Segregation available at http://www.dcedd.nl/data/1076334869630_VSO%20Disability%20Position%20Paper%202001.pdf (last accessed 7th October 2010)

¹³ Harris, A. & Enfield, S. (2003), *Disability, Equality and Human Rights*, 'A Training Manual for Development and Humanitarian Organisations', Oxford: Oxfarm GB in association with Action on Disability and Development .

¹⁴ Disabled People's International (DPI) website available at www.dpi.org (last accessed 21st September 2010)

The distinction between the two terms is neatly summarized in a discussion paper issued by the UK Government's Department for International Development: *'Disabled people have long term impairments that lead to social and economic disadvantages, denial of rights, and limited opportunities to play an equal part in the life of the community.'*¹⁵

According to the World Health Organization (WHO), disability is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is defined as a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations.¹⁶ From this definition, disability is seen as a complex phenomenon, reflecting an interaction between features of a person's body and features of the society in which he or she lives.

This study adopts the definition of disability provided in the UN Convention on the Rights of Persons with Disabilities. This is because this definition was adopted with great input from persons with disabilities movements, it has the widest international consensus and fits in with the theoretical model of disability taken by this study – the renewed social model.

Employment is the hiring of a person for compensation.¹⁷ According to the Employment Act Chapter 11, Laws of Kenya, an employee means a person employed for wages or a salary and includes an apprentice and indentured learner while an employer means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. This is the definition of employment that is adopted in this study as it is the more comprehensive one.

There exists a vicious cycle that links unemployment and disability. Persons with disabilities are likely to face barriers to their inclusion in society, to educational opportunities, to access to health care and ultimately, their access to employment. The need to care for a family member with disabilities makes demands upon other members and reduces the time available to them for economic activity and skills development, or even for education. Discrimination against persons with disabilities is compounded if they belong to an ethnic minority or other

¹⁵ DFID Issues Paper, (2000). Disability, Poverty and Development, London available at handicap-international.fr/bibliographie-handicap/.../DFID_disability.pdf (last accessed 20th November 2010)

¹⁶ <http://www.who.int/topics/disabilities/en/disabilities> (last accessed 28th January 2009)

¹⁷ <http://legal-dictionary.thefreedictionary.com/employment> (last accessed 28th January 2009)

marginalised group. But irrespective of their social class, or their religious or ethnic identity, persons with disabilities around the world are more likely to be unemployed than their counterparts without disabilities.

1.6 Theoretical Framework

A major contribution made by persons with disabilities to an understanding of disability has been the description and development of ‘the three models of disability’: the medical model, the religious or charitable model and the social model. Models of disability provide a framework for understanding the way in which people with impairments experience disability. They also provide a reference for society as laws, regulations and structures are developed that impact on the lives of persons with disabilities.¹⁸

1.6.1 The Medical Model of Disability

The medical model tends to view persons with disabilities first and foremost as having physiological problems to be cured.

Until as recently as 2007, the World Health Organisation's International Classification of Impairments, Disabilities and Handicaps (ICIDH), utilized the medical model of disability and hence had the following definitions:

Impairment: Any loss or abnormality of psychological, physiological, or anatomical structure or function;

Disability: Any restriction or lack (resulting from impairment) of ability to perform an activity in the manner or within the range considered normal for a human being;

Handicap: A disadvantage for a given individual, resulting from an impairment or disability that limits or prevents fulfilment of a role that is normal, depending on age, sex, social or cultural factors' (WHO, 1980).¹⁹

¹⁸ <http://www.open.ac.uk/inclusive-teaching/pages/understanding-and-awareness/models-of-disability.php> (last accessed 27th January 2010)

¹⁹ WHO has since then updated its definitions, as is discussed under the social model of disability

Within this framework, a person's functional limitations (impairments) are the root cause of any disadvantages experienced and these disadvantages can, therefore, only be rectified by treatment or cure.²⁰

In the medical model, disability is seen as resulting directly from individuals, in which case the focus is typically on aspects of those individuals and how they could function better. The medical model is presented as viewing disability as a problem of the person, directly caused by disease, trauma, or other health condition which, therefore, requires sustained medical care provided in the form of individual treatment by professionals. In the medical model, management of the disability is aimed at "cure", or the individual's adjustment and behavioural change that would lead to an "almost-cure" or effective cure. The quest for a cure is often protracted, painful and unnecessary; it means that the rest of life is put on hold while professionals strive to return the body to a more 'normal' level of functioning.

The medical model is sometimes known as the 'individual model' because it promotes the notion that it is the individual person with disability who must adapt to the way in which society is constructed and organized. The medical model is vigorously rejected by organizations of persons with disabilities, but it still pervades many attitudes towards persons with disabilities.²¹

There are clear cases where relatively simple levels of medical intervention can reduce the impacts of impairment substantively; examples would be a surgical operation to correct a cataract or club foot. Persons with disabilities do not reject medical intervention, but they stress that the impact of disability on the individual is much greater than its medical implications, and that it is misleading to focus on the search for a cure, rather than helping individuals to manage their lives.²²

In this model, medical care is viewed as the main issue, and at the policy level, the principal response is that of modifying or reforming healthcare policy.

²⁰ Crow, L., (1996). Including all of our lives: renewing the social model of disability. In Colin Barnes & Geof Mercer (Eds), *Exploring the divide*, (pp. 55-72) Leeds: The Disability Press (Accessed at <http://www.leeds.ac.uk/disability-studies/archiveuk/Crow/exploring%20the%20divide%20ch4.pdf>)

²¹ <http://www.open.ac.uk/inclusive-teaching/pages/understanding-and-awareness/models-of-disability.php> (last accessed 27th January 2010)

²² Supra Note 14

Critique of the medical model of disability

The key problem with the medical model of disability is that it perceives disability as a problem located in the person with disabilities, and assumes that working on the individual can solve it (or not, as the case may be, in which case the person concerned might as well give up all hope of a full and satisfying life). The person with disability becomes defined solely in terms of his or her diagnosis, as a patient with medical needs and no longer as a person with a whole range of needs.

The medical model of disability relegates the person with disability to the passive role of patient, with medical personnel and care professionals making many decisions even about issues unrelated to impairment, such as how the individual should dress or what she or he may eat. This, in essence, makes the person with disability passive and inactive, and leaves them feeling helpless and patronised. It denies persons with disabilities the freedom to take risks and responsibility and to learn from mistakes – in essence, the freedom to grow up.

Further, should the impairment be one that cannot be fixed, the person with disability is regarded as being beyond hope: his or her life is seen as worthless. Such a negative assessment may well become internalised by the person concerned causing him or her to despair, and in extreme cases, suicide may seem the only way out.

1.6.2 The Religious or Charitable Model of Disability

The religious or charitable model tends to view persons with disabilities as victims of impairment, and as the beneficiaries of charity, alms, and services – for which they should be grateful. Persons with disabilities are viewed as tragic or suffering people to be pitied and cared for. At the same time, persons with disabilities may find that they have few choices, no means of accessing relevant advice, and no powers to decide how they could best be assisted. Services are designed for them and delivered to them, perhaps with the best of intentions but with inefficient consultation.

Because persons with disabilities are considered to be different from the norm, a range of different or special services to meet their needs has usually been provided for them – special transport; special buildings; special schools (where the courses are very often less challenging and academic than in mainstream schools, making it hard or impossible for persons with

disabilities to enter high education and employment); special sports and recreational facilities and sheltered employment workshops. Extra resources are necessary in order to provide such special services, and in resource-poor economies, the inability to provide adequate levels of service to the whole population is frequently used as a justification for doing very little to provide special services for persons with disabilities.

It cannot be claimed that either the medical or the religious/charitable approach has had much success in improving the lives of persons with disabilities – as demonstrated by the high levels of poverty, abuse, marginalisation and discrimination that persons with disabilities still face world wide; yet for centuries, these two models have determined the experience of persons with disabilities.²³

Critique of the religious or charitable Model

The greatest critique against the religious or the charitable model is that it accepts the status quo. The problems that are faced by persons with disabilities cannot be solved by accepting society as it is structured – treating the symptoms rather than the causes. What is needed, among other solutions, is social justice. Social justice tries to look at the system (political, economic, social, cultural, religious and mythical) within which we live so as to name and change those structural things that account for the fact that some of us are unduly penalized even as others are unduly privileged. Thus, social justice differs from private charity: charity is about giving a hungry person some bread, while justice is about trying to change the system so that nobody has excess bread while some have none. Social justice has to do with changing the way the world is organised so as to make a level playing field for everyone. It is about trying to organise the economic, political, and social structure of the world in such a way that it values equally each individual. Accomplishing this will take more than private charity.²⁴

Another criticism is that in the religious or charitable model, carers may become unacceptably powerful, making decisions about what is best for those in their care. An extreme example of this is the enforced sterilisation without consultation or consent, of women with disabilities.

²³ Ibid (pg 16)

²⁴ Rolheiser R.,(1999), *The Holy Longing, the search for a Christian Spirituality*, New York: Double day

Further, under this model, charity is provided at the discretion of the giver, often on the basis of 'worthiness'. If the person providing charity or care decides that the person with disabilities is unworthy, bitter or 'negative', help may be withdrawn on a whim.²⁵

1.6.3 The Social Model of Disability

The social model has been developed by persons with disabilities in response to the medical model and the impact it has had on their lives.²⁶ The social model of disability recognises the close connection between the limitation experienced by individuals with disabilities, the design and the structure of their environment and the attitudes of the general population²⁷. Here, the focus is on the role of society in labelling some people as having a disability relative to others, while causing or maintaining disability in those people through attitudes and standards of accessibility that favour the majority. In this model, disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment. Hence, in this model, the management of the problem requires social action, and thus, it is the collective responsibility of society at large to make the environmental modifications necessary for the full participation of people with disabilities in all areas of social life. The issue is both cultural and ideological, requiring individual, community, and large-scale social change. Viewed from this perspective equal access for people with impairment/disability is a human rights issue of major concern. Therefore, this view is also called the human rights model of disability.²⁸ To understand this view fully, it is important first, to discuss human rights generally, so as to clarify how the social model fits into the wider human rights debate, and why the issue of employment among persons with disabilities is so critical.

Human rights are principles that are recognized as applying universally to all human beings without exception. A human right is a claim each person has, by virtue of being human, to those conditions and resources that are fundamental to life and dignity. They do not need to be specifically granted, nor can they be taken away. Human rights are universal and

²⁵ Supra Note 14 (pg 16)

²⁶ <http://www.open.ac.uk/inclusive-teaching/pages/understanding-and-awareness/models-of-disability.php> (last accessed 27 January 2010)

²⁷ Ibid

²⁸ <http://en.wikipedia.org/wiki/disability> (last accessed 28th January 2009)

inalienable; indivisible; interdependent and interrelated. They apply to all equally, and all have the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards. Human Rights are contained in a trio of documents that consist of the Universal Declaration of Human Rights (UDHR)²⁹, the International Covenant on Civil and Political Rights (ICCPR)³⁰ and the International Covenant on Economic, Social and Cultural rights (ICESCR).³¹ Together, these express the core principles of human rights law.

Human rights are *universal* and *inalienable* in that all people everywhere in the world are entitled to them. The universality of human rights is encompassed in the words of Article 1 of the *Universal Declaration of Human Rights*: “All human beings are born free and equal in dignity and rights.” This makes no distinction between persons with and without disabilities.

Human rights are *indivisible* in that whether they relate to civil, cultural, economic, political or social issues, human rights are inherent in the dignity of every human person. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights. Thus, the right of everyone to an adequate standard of living cannot be compromised at the expense of other rights, such as the right to health or the right to education.

Human rights are *interdependent* and *interrelated* in that each one contributes to the realization of a person’s human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs. The fulfillment of one right often depends, wholly or in part, upon the fulfillment of others. For instance, fulfillment of the right to health may depend, in certain circumstances, on fulfillment of the right to development, to education or to information. The right to equal opportunities in employment is in turn impacted upon by among other, the rights to education and to health.

Human rights encapsulate the principle of *equality and non-discrimination*. All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender,

²⁹ *Universal Declaration of Human Rights* (A/RES/3/217 A)

³⁰ *International Covenant on Civil and Political Rights* General Assembly Res. 2200A (XXI), 993 U.N.T.S. 3, entered into force Jan 3, 1976

³¹ *International Covenant on Economic, Social and Cultural rights* General Assembly Res. 2200A (XXI), 993 U.N.T.S. 3, entered into force Jan 3, 1976

age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.³²

The human rights of persons with disabilities have further been enshrined in the UN Convention on the Rights of Persons with Disabilities. The Convention establishes eight principles that are the foundational pillars of the protection and promotion of the rights of persons with disabilities. These are listed in Article 3 as:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Persons with disabilities in Kenya comprise a vulnerable group that is often subject to human rights violations through neglect and non-inclusion in various aspects of civil, political, socio-cultural and economic life. The society has knowingly or unknowingly imposed discriminatory barriers that exclude, restrict or deter persons with disabilities from the enjoyment of their rights.³³ This goes against upholding the human rights of persons with disabilities. In no other sector are the effects of this exclusion felt as much as in employment. The social model requires that the society at large makes the environmental modifications necessary for the full participation of people with disabilities in all areas of social life. This, in turn, would ensure that the human rights of persons with disabilities are upheld.

³² <http://www.unfpa.org/rights/principles.htm> (last accessed 28th January 2009)

³³ Mumma, C. (2009). International Human Rights Instruments and Disability with a focus on the UN Convention on the rights of Persons with Disabilities. In Mwaura M. I. (Ed) *Human Rights Disability and Development in Kenya, A Discourse*, (pp.) Nairobi: Konrad Adenauer Stiftung

Having fitted the social model into the wider human rights debate, it is critical to look into the worldwide move towards adopting the social model of disability. A case in point in this regard, is the World Health Organization (WHO), which has moved toward a new international classification system, the International Classification of Functioning, Disability and Health (ICF 2001). It emphasizes functional status over diagnoses. The new system is not just about people with traditionally acknowledged disabilities diagnostically categorized but about all people. For the first time, the ICF also calls for the elimination of distinctions, explicitly or implicitly, between health conditions that are 'mental' or 'physical.'

The new ICF focuses on analyzing the relationship between capacity and performance. If capacity is greater than performance then that gap should be addressed through both removing barriers and identifying facilitators. It specifically references Universal Design as a central concept that can serve to identify facilitators that can benefit all people.

The new World Health Organisation's definition defines disability as a contextual variable, dynamic over time and in relation to circumstances. One is more or less disabled based on the interaction between the person and the individual, institutional and social environments. The ICF also acknowledges that the prevalence of disability corresponds to social and economic status. The 2001 ICF provides a platform that supports Universal Design as an international priority for reducing the experience of disability and enhancing everyone's experience and performance.³⁴ This definition is within the social model of disability.

The social model identifies three major barriers that confront persons with disabilities who have impairments: physical (exclusion from the built environment³⁵), institutional (systematic exclusion or neglect in social, legal, educational, religious and political institutions), and attitudinal (negative valuations of persons with disabilities by non disabled people). Removing these barriers is possible and has a hugely beneficial impact on the lives of persons with disabilities and the whole community.

³⁴ <http://www.rollingrains.com/2007/10/the-world-health-organizations-new-definition-of-disability.html> (last accessed 18th October 2010)

³⁵ A simple example is that of a wheelchair user who has a mobility impairment. He is not actually disabled in an environment where he can use public transport and gain full access to buildings and their facilities in the same way that someone without his impairment would do.

The social model stands on the premise that it is the society's response to the impairment or the disability that matters. Jones has tried to make this point by defining and bringing out the differences between impairment, disability and handicap.³⁶ He says that while impairment has a medical aspect to it and may or may not necessarily require treatment and sometimes treatment may be detrimental, disability on the other hand can cause disadvantage of which can be minimised by modifying the environment in which the person lives.³⁷ According to him, a disability becomes a handicap when society responds to the disability through prejudice and is unable to overcome its prejudices so that the disadvantage resulting from impairment or disability is magnified.³⁸ So, according to Jones, society's response to those with impairment or disability such as rejection by family or community or lack of education is the main source of handicap.³⁹

Haber has lamented about the fact that the social dimension of disability has been underestimated.⁴⁰ He says that the effect of disability as a social problem is underestimated.⁴¹ According to him, the focus on medical aspects of disability emphasises too much on diagnosis and treatment of the impairment rather than on the behavioural processes of adaptation and normalisation. Even in rehabilitation, he says that much of the emphasis is on the psychosocial functioning and motivation of the individual through adjusting the people to the circumstances surrounding them, rather than on the adaptation of the environment to fit the person with disability.⁴² Haber, therefore, suggests that society should respond to disability as a human resource rather than a medical problem.⁴³ In so doing, industrial relations between employers and workers with disabilities will have alternatives such as union-management contracts, hiring and retention contracts, reassignment of jobs, allocation and restructuring, informal social accommodation and pension planning.⁴⁴

Adopting the social model of disability does not mean rejecting any form of medical services, rehabilitation, or assistance from others, but it does change the way in which services and

³⁶ Jones, R.B (2001). Impairment, Disability and Handicap: Old Fashioned Concepts? *Journal of Medical Ethics* 27, 337-339.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Haber, L.D (1973). Some Parameters of Social Disability: A Cross-National Comparison, *The Milbank Memorial Fund Quarterly*, 51

⁴¹ Ibid

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

assistance should be given, placing them in the wider context of the lives of persons with disabilities.. The social model has allowed many persons with disabilities to regain control of their own lives, becoming the experts in their own experience and changing their outlook in fundamental ways.⁴⁵

The social model relates to economics in that it proposes that people can be disabled by a lack of resources to meet their needs. It addresses issues such as the under-estimation of the potential of people to contribute to society and add economic value to society, if given equal rights and equally suitable facilities and opportunities as others.

The social model of disability has fundamentally changed the way in which disability is regarded and has had a major impact on anti-discriminatory legislation. However, some persons with disabilities and academics are involved in a re-evaluation of the social model and they argue that the time has come to move beyond this basic position.⁴⁶

Critique of the social model of disability

The social model tends to centre on disability as 'all'. This focus may sometimes be so absolute that persons with disabilities are in danger of assuming that impairment has no part at all in determining their experiences. Instead of tackling the contradictions and complexities of the experiences of the person with disabilities head on, the social model presents impairment as irrelevant, neutral and, sometimes, positive, but never, ever as the quandary it really is.

In arguing that the experience of impairment is not always irrelevant, neutral or positive, Liz Crow poses the question: How can it be (irrelevant, neutral or positive) when it is the very reason used to justify the oppression that persons with disabilities are battling against? She argues that persons with disability align themselves with other civil rights movements and have learnt much from those campaigns. But, persons with disabilities have one fundamental difference from other movements, which they cannot afford to ignore. There is nothing inherently unpleasant or difficult about other groups' embodiment: sexuality, sex and skin colour are neutral facts. In contrast, impairment means that the persons with disabilities' experiences of their bodies can be unpleasant or difficult. This does not mean that their

⁴⁵ Supra Note 14

⁴⁶ <http://www.open.ac.uk/inclusive-teaching/pages/understanding-and-awareness/models-of-disability.php> (last accessed on 27th January 2010)

campaigns against disability are any less vital than those against heterosexism, sexism or racism; it does mean that for many persons with disabilities, personal struggle related to impairment will remain even when disabling barriers no longer exist.⁴⁷

She argues that many people find that it is their experience of their bodies - and not only disabling barriers such as inaccessible public transport - which make political involvement difficult. For example, an individual's capacity to attend meetings and events might be restricted because of limited energy. If these circumstances remain unacknowledged, then alternative ways of contributing are unlikely to be sought, thus excluding many persons with disabilities. This would also mean that the understanding of disability is partial.

She proposes three related approaches to impairment: First, there is the objective concept of impairment. This was agreed in 1976 by the Union of Physically Impaired Against Segregation (UPIAS, 1976) and has since been developed by Disabled People's International (DPI) to include people with a range of non-physical impairments: 'Impairment: lacking all or part of a limb, or having a defective limb, organism or mechanism of the body' (UPIAS, 1976).

Second, there is the individual interpretation of the subjective experience of impairment in which an individual binds their own meanings to the definition of impairment to convey their personal circumstances. Finally, there is the impact of the wider social context upon impairment, in which misrepresentation, social exclusion and discrimination combine to disable people with impairments. It is this third aspect to impairment which is not inevitable and its removal is the primary focus of the movement of persons with disabilities. However, all three layers are currently essential to an understanding of the personal and social experiences of persons with disabilities.

She proposes a renewed social model of disability. This model would operate on two levels: a more complete understanding of disability and impairment as social concepts; and recognition of an individual's experiences of their body over time and in variable circumstances.⁴⁸

⁴⁷ *Supra* Note 22

⁴⁸ *Ibid*

This study adopts the renewed social model of disability. This is because this model is a means to encapsulating the lived reality of persons with disabilities.

1.7 Research Objectives

The main objective of this research was to analyse the impact of the Persons with Disabilities Act 2003 on the employment of persons with disabilities in Kenya.

The specific objectives were:-

1. To establish the major constraints to accessing employment among persons with disabilities in Kenya;
2. To evaluate the effectiveness of the Persons with Disabilities Act in guaranteeing the rights of persons with disabilities;

1.8 Research Questions

1. Why are the majority of persons with disabilities in Kenya unemployed?
2. In what ways does the Persons with Disabilities Act hinder or promote the employment of Persons with Disabilities?

1.9 Hypothesis

The hypotheses in this study were as follows:

1. The majority of the persons with disabilities in Kenya are unemployed because of extralegal factors such as lack of education, attitudes of society and corruption.
2. The Persons with Disabilities Act is not sufficient to guarantee the employment of persons with disabilities in Kenya.

1.9.1 Literature Review

With regard to literature review, most literature in this area of study has been devoted to employment generally, or to disability generally. However, there are some works which are

devoted to disability and employment as a distinct area of study. This study is therefore, for the most part, guided by the general literature on employment law and on disability to establish a relationship between disability and unemployment in light of the Persons with Disabilities Act 2003.

Kabue (2009) points out that there are many sheltered workshops employing thousands of persons with intellectual disabilities which were established as a result of parent advocacy groups. He asserts that establishment of more sheltered employment would go far in ensuring that such persons are gainfully engaged, thus relieving parents of the burden of caring for them all their lives. He also asserts that vocational rehabilitation centres have assisted many persons with disabilities to secure either wage or self employment at a time when these trades were on demand in the country immediately after independence. However, these centres failed to keep pace with demand for new and more relevant skills as the country progressed, leading to production of trainees with courses that were no longer marketable. As a result, graduates could no longer get employed or become self employed.⁴⁹ Kabue's work focuses on the history of how Kenya has tried to address the issues of persons with disabilities, mainly through institutionalisation. This study takes a different perspective – that of focusing on the Persons with Disabilities Act 2003 and the reasons for its subdued effect in employment.

Mwaura (2009) in writing on the implementation of the Persons with Disabilities Act 2003 points out that it would be very hard to quantify the work done by the National Council for Persons with Disabilities (NCPWD) with regard to equalization of opportunities in employment. He asserts that there has been a challenge towards the realization of affirmative action on employment as enshrined in the substantive Article 13 which seeks to ensure the reservation of 5% of all casual and contractual employment to persons with disabilities. While the Council has been collecting Curriculum Vitae for various individual Persons with Disabilities and even writing recommendation letters to various employers, Kenya is still way behind the achievement of this goal. One of the reasons for this is lack of awareness among both the employers and persons with disabilities.

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Kabue, N, (2009). Chronological aspects of disability, human rights and development; A Kenyan Perspective, In Mwaura M. I. (Ed) *Human Rights Disability and Development in Kenya, A Discourse*, (pp.) Nairobi: Konrad-Adenauer-Stiftung

Mwaura asserts that not all persons with disabilities can work within the formal work environment, not because of a shrinking labour market that is experiencing a high influx of new graduates, but due to inaccessibility of the workplace environment. This situation requires funding through the operationalization of the National Disability Fund.⁵⁰ While Mwaura's work is a thorough exposition of the Act, he does not focus on any one aspect of it, and nor does he offer concrete solutions to the problem of unemployment, as is the case with this study.

Ochich (2008) asserts that employment is of great significance in a person's life as it facilitates the realization of one's potential, and is a source of livelihood. Of relevance to this study is his discussion on the right to employment as provided for in the Act. His position is that the Act embraces provisions that in many ways seek to enhance the employment, relative job comfort and job security of persons with disabilities. He also points out the claw back clauses in the Act that may be susceptible to abuse by employers. Ochich's work is an assessment of the entire Act, and as such he does not lay emphasis on any particular aspect of it.

Wasike (2003) points out that the Kenya Constitution does not prohibit discrimination on the ground of disability, and that the enactment of the Persons with Disabilities Act cannot cure this gap because the Act is inferior to the Constitution. His thesis is that Kenyan laws and policies are not up to date with its international legal obligations. He concentrates on discrimination in the labour market. This study looks beyond discrimination in seeking to understand the high unemployment rates among persons with disabilities. More importantly, this study was undertaken after the passing of a new constitution which does recognise disability as a ground of discrimination in Article 27(4).

Harris (2003) suggests that there is lack of employment for persons with disabilities because employers do not want to hire persons with disabilities because of the poor quality of education available for persons with disabilities and because the state encourages persons with disabilities to take a pension instead of working. She asserts that unemployment can lead to dependence on others (the state and the family) and thus to poverty, low status in society, lack of friendship and communication, isolation, low self-esteem, depression, loss of interest

⁵⁰ Mwaura M., (2009). Implementation of the Persons with Disabilities Act No. 14 of 2003: Emerging issues, Concerns and Future paradigms. In Mwaura M. I. (Ed), *Human Rights Disability and Development in Kenya, A Discourse*, (pp.88-109) Nairobi: Konrad Adenauer Stiftung

and involvement in life, inactivity and prejudices against persons with disabilities, thus perpetuating the vicious cycle. Harris' book is a manual to help practitioners in development and humanitarian organisations to understand the issues confronting children and adults with disabilities and ways in which these organisations can break down the barriers to include people with disability in their work. Hence, its main focus is the various aspects of disability training. This study concentrates on linking unemployment with disability and critiquing the Persons with Disabilities Act.

Blaxter (1976) asserts that there is a connection between sickness and disability on the one hand, and unemployment, under-employment and downward mobility on the other. Further, she point out that every survey of the unemployed shows that health problems are prominent, and every study of the impaired shows that a high proportion are unemployed, or lacking in training and skills when compared to the general population. She states that the historical emphasis on the moral value of employment to the individual as well as its economic value to society ensured that some of the first services specifically for persons with disabilities should be in the field of employment.⁵¹ This work was done before the social model of disability was articulated. Thus for instance, it states that to be disabled is to be presented with problems: to be less able or to be at a disadvantage in earning one's living or in the ordinary activities of daily life. The approach to disability taken in this study is the social model of disability.

1.9.2 Methodology

This study employed qualitative methodology. I have used library research drawing from primary sources of information such as relevant domestic laws, policy papers, and relevant international instruments. I have also used secondary sources such as books, articles from journals, newspapers and magazines.

This study would have benefited greatly from data collection methods such as interviews and observational methods. However, due time and financial constraints, I was not able to undertake the same.

⁵¹ Blaxter, M. (1976), *The meaning of Disability: A sociological study of impairment*, London: Heinemann Educational Publishers

1.9.3 Chapter Breakdown

Chapter 1 has discussed the background to the study, the problem statement, the significance of the research and the conceptual and theoretical frameworks to the study. It has also dealt with the research objectives and questions, the hypothesis, literature review and methodology.

Chapter 2 discusses the major constraints to accessing employment among persons with disabilities. These are societal attitudes towards persons with disabilities, personal reasons which include personal attitudes and limitations associated with disability, lack of education, corruption, problems of environment, the limited nature of the antidiscrimination paradigm and poor national health insurance.

Chapter 3 assesses the Persons with Disabilities Act. It is a part by part expose of the act in terms of how the Act both hinders and promotes the employment of persons with disabilities.

Chapter 4 looks into the measures which, beyond the reform of the Persons with Disabilities Act, need to be put into place to guarantee the employment rights of persons with disabilities in Kenya.

The conclusion sums up the entire study, and reveals whether the hypothesis have been proved or disproved.

CHAPTER 2

2. BARRIERS TO ACCESSING EMPLOYMENT AMONG PERSONS WITH DISABILITIES

2.1 Introduction

Throughout the twentieth Century, policy makers assumed people with disabilities were unfit for employment on the open labour market alongside everyone else. A very carefully organized form of disability apartheid functioned, which separated and segregated people with disabilities into separate schools, separate training programmes, institutions, residential centres and a few segregated employment outlets. The approach was widely endorsed or endured by public bodies, voluntary education and social services providers, professionals and many families. It had the appearance of being natural and normal.⁵² Increasingly, this approach came under attack, and continues to be dismantled all over the world, in some parts of the world more successfully than others.

This Chapter examines why persons with disabilities continue to experience systematic marginalisation in the labour market despite the efforts made to counter this. This research suggests that persons with disabilities are more likely than their able-bodied counterparts to be unemployed, in low status occupations, earn less or be out of the labour market altogether. Consequently, persons with disabilities are more likely to live in poverty or experience social isolation and poor mental health. I argue that the social status of persons with disabilities effectively shapes their work patterns through (mis)conceptions that associate ‘disability’ with ‘inability’ to work and to be employable.⁵³ Further, I argue that there are other barriers to accessing employment among persons with disabilities that exist that subdue the effect of the Persons with Disabilities Act, 2003. The barriers include:

- a. The societal attitudes towards persons with disabilities;
- b. Personal reasons which include personal attitudes and limitations associated with disability;
- c. Lack of education;
- d. Corruption;

⁵²Quin, S. & Bairbre, R. (2003), *Disability and social policy in Ireland*, Dublin: University College Dublin Press

⁵³Gartrell, A. (2010). A frog in a well: The exclusion of disabled people from work in Cambodia, *Disability & Society*, 25: 3, 289-301

- e. Problems of environment;
- f. The limited nature of the antidiscrimination paradigm;
- g. Poor national health insurance.

This chapter explores these barriers.

2.2 Societal Attitudes towards Persons with Disabilities

In this part, I discuss how societal attitudes towards persons with disabilities affect their employment. It includes attitudes of employers, of the families of persons with disabilities⁵⁴ and of the general society.⁵⁵

Past research into disability and employment has outlined a range of organizational and attitudinal barriers that persons with disabilities face in seeking and maintaining employment and in advancing their careers. Persons with disabilities, without regard to the specific disability are often believed by others to have impaired brain and nervous function, to be emotionally erratic and unaware of the social norms of behaviour. They are seen as lesser people – the embodiment of poor character. At its worst, this line of thinking extends to labelling persons with disabilities as useless, untrustworthy and without value.⁵⁶

Different religions have different views, mostly negative about disability. Writing in the context of Cambodia, Gartrell, (2010) notes that Buddhism and *karma* (being dominant ideologies in Cambodia) link inhibited bodily status and well-being in this life with bad actions and poor character in past lives. *Karma* guarantees retribution in the current life for unwholesome actions and thoughts in previous incarnations. From this perspective, disability is a form of repayment – the embodiment of demeritous deeds performed in past lives. These beliefs naturalize disability with poverty and suffering, which in turn structures social expectations of capacity and access to educational, work and social opportunities. For

⁵⁴ Negative family attitudes include overprotection that impedes access to work

⁵⁵ Negative attitudes of the general society includes fear of people with disabilities ‘disability as contagion’, as discussed in Wehbi, Samantha and El-Lahib, Y.(2007). The employment situation of people with disabilities in Lebanon: Challenges and opportunities, *Disability & Society*, 22, (4), 371-382

⁵⁶ Supra note 55 (Pg 289 — 301)

example, the general population believes that disabled people are only capable of begging and must rely on the pity and goodwill of their kin and others for their well-being.⁵⁷

In Christianity, there are ancient prohibitions, for instance, against people with disabilities becoming priests. ‘And the Lord said to Moses’, it says in Leviticus:

‘None of your descendants throughout their generations who has a blemish shall draw near, a man blind or lame, or one who has a mutilated face or a limb too long, or a man who has an injured foot or an injured hand, or a hunchback, or a dwarf, or man with a defect in his sight, or an itching disease, or scabs or crushed testicles...He may eat the bread of his God, both of the most holy and of the holy things, but he shall not come near the veil or approach the alter, because he has a blemish, that he may not profane my sanctuary’.⁵⁸

These cultural discourses shape the attitudes of parents, members of extended family networks, villagers, teachers and employers, each of whom is vital in ensuring, or depriving, access to opportunities, such as school and work.⁵⁹

The Kenya National Survey for Persons with Disabilities Preliminary Report⁶⁰ indicates that attitudes displayed by the people around persons with disabilities can be a bigger problem for persons with disabilities than the medical condition they must cope with: People living and interacting with persons with disabilities tend to treat them differently in relation to their disabilities. This view is confirmed by William Odhiambo Ogutu, a person living with a physical impairment. Lamenting about how hard it is for him to get internship as a student of accounting with impairment, he says:

“I have been looking for attachment but many employers think that my disability is inability... Many employers are biased against disabled people...The public is not any better. Many people have urged me to abandon accounting and seek a shoe making course...”⁶¹

Research in other jurisdictions has outlined a range of organizational and attitudinal barriers that persons with disabilities face in seeking and maintaining employment and in advancing their careers. For instance, employers in both the private and public sectors in the UK have been shown to have inadequate knowledge about disability, which can, in part, explain their

⁵⁷ Ibid

⁵⁸ Pg 75-76

⁵⁹ Supra Note 55

⁶⁰ Published by the National Coordinating Agency for Population and Development and available at www.african.org/.../KNSPWD%20Prelim%20Report%20-%20Revised.pdf (last accessed 16October 2010)

⁶¹ Munala T., (2005, October 27) Student’s Unshakeable Resolve. *The Standard*

resistance to hiring workers with disabilities. Employers often make assumptions about low productivity from, and quality of output of, such workers. Employers are more likely to question the work ethic of disabled workers and their aspirations for career advancement relative to other employees, while believing they are more prone to absenteeism, less committed to their work and less capable of getting along with others on the job.⁶²

Research done in Lebanon corroborates this view. The practice-based knowledge of the Lebanese Physical Handicapped Union (LPHU) and its partner organizations has highlighted several important obstacles to employment for persons with disabilities, including: societal misconceptions of people with disabilities as being incapable of working; internalization of these misconceptions by some people with disabilities; fear of people with disabilities ('disability as contagion'); family fear for the safety of people with disabilities; segregation of people with disabilities in sheltered workshops; lack of accessibility of the workplace; exploitation by employers, discrimination, health/disability issues, lack of opportunities, competition and lack of personal connections. Other less cited difficulties include family pressure to not be employed, transportation difficulties and inadequate education or vocational training.⁶³

Stevens (2002) showed that employers think that disabled workers cost more to employ. This can be a reflection of:

- a. the perceived costs involved in providing a working environment that caters to their specific needs and requirements;
- b. the assumption that there is a greater possibility of disabled employees hurting themselves (leading to insurance claims);
- c. the belief that related discipline and dismissal procedures are especially problematical.

Together, these assumptions lead employers to believe that there is a greater risk in hiring and promoting workers with disabilities as opposed to non-disabled workers.⁶⁴ Yet nothing could be further from the truth. Workers with sensory impairments, such as hearing or sight, often need only the slightest adjustment in work practice or computer software to function with a

⁶² Wilson-Kovacs, Dana , Ryan, Michelle K. , Haslam, S. Alexander and Rabinovich, Anna(2008). Just because you can get a wheelchair in the building doesn't necessarily mean that you can still participate: Barriers to the career advancement of disabled professionals, *Disability & Society*, 23 (7), 705-717

⁶³ Supra Note 57

⁶⁴ Stevens 2002

competence equal to any in any modern workplace.⁶⁵ Further, there is ample evidence from professionals and from those employers who have engaged seriously in economic integration that workers with disabilities can offer exceptionally high motivation and reliability.⁶⁶

Asked to comment on two deaf employees under his supervision, Aziz Abdulkadir, the restaurant manager of Summit Resort, Nakuru, had this to say:

... "I have no complaints about them whatsoever. They are hard working and have not been subjected to disciplinary action since their employment..."

He further urged other employers not to discriminate against the disabled people, saying that their work was as good as that of other people, if not better.⁶⁷

Martin Luther King said that, 'Judicial decrees may not change the heart, but they can restrain the heartless' (cited in Law Society, 1992). In so saying, he acknowledged that behaviour towards people who are discriminated against can be modified, but the attitude towards such people may still remain prejudiced.⁶⁸

Ajzen⁶⁹ argued that attitudes, be they positive or negative, towards an attitude object, can be inferred from verbal or non-verbal responses towards the said object. These responses can be categorized as cognition (expressions of belief about the attitude object or perceptual reactions to the attitude object), affect (expressions of feelings toward the attitude object or physiological reactions to the attitude object) and conation (expressions of behavioural intentions or overt behaviour with respect to the attitude object).⁷⁰

Prejudice can also be conceived as having these three components (cognition, affect and conation), with prejudice being defined as an unfair negative attitude toward a social group or a person perceived to be a member of that group. Writing in the context of the United Kingdom, Mark Deal notes that whilst the unemployment rate for disabled people in UK is

⁶⁵ Quin, S. & Bairbre, R. (2003), *Disability and social policy in Ireland*, Dublin: University College Dublin Press

⁶⁶ Daunt, P. (1991), *Meeting disability – a European Response*, London: Cassell educational limited

⁶⁷ Ngige, F. (2005, May 16) Deaf and dumb waiters but as good as any other. *The Standard*, p. 3

⁶⁸ Mark, D. (2007). Aversive disablism: Subtle prejudice toward disabled people. *Disability & Society*, 22, 93–107

⁶⁹ Ajzen, I. (1988), *Theory of planned behavior*, Amherst: University of Massachusetts

⁷⁰ Supra Note 70.

slowly improving⁷¹, this does not mean that those in employment are treated on a par with their non-disabled colleagues. Hence, blatant forms of direct discrimination in the context of refusing to employ a person with disabilities as a consequence of their impairment and, therefore, breaching UK law under the Disability Discrimination Act (DDA) (1995), may be declining (albeit very slowly), but subtle forms of prejudice still persist. Where persons with disabilities are in employment, they are likely to receive lower pay and have poorer career prospects and less support. Of those persons with disabilities who obtain employment, one-third lose that job by the following year, as compared with one-fifth of the non-disabled population who enter the labour market. Grewal *et al.* (2002) found that 17% of disabled respondents (to a survey of 2064 people in Britain, of which 47% were disabled) said they had experienced actual discrimination in the workplace, with a further 37% saying they had experienced some form of prejudice or unfair treatment when prompted.⁷²

Whilst any employer will argue that the recruitment of staff must be based on a sound business case, this does not explain the discriminatory practice experienced in the workplace by persons with disabilities. Structural factors can lead to inequality, such as fewer opportunities for training and development for persons with disabilities in the workplace. Such factors will inevitably lead to lower skill and knowledge levels than their non-disabled counterparts, which in turn will lead to fewer opportunities for promotion and a greater risk of redundancy. According to Mark Deal aversive disablism recognize disablism is bad but do not recognize that they themselves are prejudiced. Aversive disablism may have an influence whereby an employer, through good intentions, could decide not to put an employee with disabilities under additional pressure by exposing them to a new function or requiring them to attend a stressful training event, but doing so inadvertently limits career development and thus places the employee in a more vulnerable position with respect to his or her career.⁷³

2.2.1 Family attitudes

In a study conducted in Lebanon⁷⁴, participants who had never been employed consisted of those whose parents felt they were unemployable and those who felt that their impairments prevented them from finding employment. The first group (those whose parents felt that they

⁷¹ UK National Statistics online, 2005 available at <http://www.statistics.gov.uk/hub/index.html> (last accessed 22th November 2010)

⁷² Supra Note 70.

⁷³ Ibid

⁷⁴ Supra Note 57

were unemployable) included people, mostly with intellectual disabilities, whose parents had prevented from seeking employment because they believed them incapable of working or of staying safe. However, many of these participants were judged by their parents to be capable of doing housework or other simple tasks. This apparent lack of awareness of the potential and capacities of this group creates a major obstacle for them in ever seeking employment. Of note in the study is the particular situation of several female participants and participants with intellectual disabilities. For these participants, the difficulty in finding employment started with their families and not in the labour market. Family members were very reluctant to see them leave the village or house to work because of their disability, thereby preventing them from seeking employment.⁷⁵

While talking about societal attitudes, it is important to note that women with disabilities face double prejudice. Women and girls with disabilities have even less access to education and formal employment than males and face a complexity of discrimination based on the intersection of disability and gender. In the same Lebanese study, women's unpaid labour as homemakers or as caregivers to their family members remained invisible. For example, while parents saw their daughters as incapable of doing any work, they still noted their ability to do housework. In addition, women's work alongside their relatives in a family business was not considered to be employment by the participants themselves. In several examples women indicated that they were unemployed, but when asked more about their family situation, they indicated that they worked with their male kin in running the family business. More specifically, parents were often reluctant to send female family members to work, as employment is still seen by many in this rural region as an unsuitable choice for women.⁷⁶

2.3 Personal Reasons

The elements of a personal nature that affect persons with disabilities in their attempts to find work include negative self-perception⁷⁷, ignorance of their own abilities, educational deficiencies and limitations associated with disability.⁷⁸

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ This includes internalization of the societal misconceptions of people with disabilities as incapable of working by some persons with disabilities.

⁷⁸ González, M.L (2009). Getting to know reality and breaking stereotypes: The experience of two generations of working disabled women, *Disability & Society*, 24 447-459

2.3.1 Personal attitudes

In the Lebanese study cited above, some of the participants who had never been employed felt that their physical condition did not permit them to work. Interestingly, not all those who felt they could not work had what can be classified as complex needs. Indeed, some of those employed had far more complex needs. This finding leads to the question of the necessary supports to encourage people with disabilities to explore and expand their own employment capacities and potential.⁷⁹

2.3.2 Limitations associated with disability

In the first place, there can be additional costs for employees with specific impairments in taking or holding a job. Taking a cab or taxi to work arises in the absence of accessible public transport. Replacement of shoes or wheelchair tyres is an example of essential recurring expenses for some employees. These are known as 'the costs of disability'. Working can cost more to a taxpaying worker with a disability compared to a worker without a disability.

Secondly, disability is often accompanied by increased isolation and decreased social capital. Isolation sometimes reflects a lack of financial resources: it is often expensive to obtain home and vehicle modifications that make it easier to participate in outside activities. The isolation suffered by persons with disabilities is made worse by physical barriers to accessing shops, pubs, restaurants, theatres, cinemas, sports stadia, town halls, law courts, churches, polling stations and other such places where people engage in community events. Clearly, the lower employment rates noted above contribute to increased isolation. The depreciation of social capital is likely to lead into a self-perpetuating downward spiral as individuals are increasingly alienated from community affairs.

Thirdly, the option most often taken by persons with disabilities is self employment. However, establishing small businesses requires capital resources which many often lack. Moneylenders do not trust the capacity of persons with disabilities to repay loans, making access to financial credit extremely difficult. For the majority of persons with disabilities, this blocks their means of earning a livelihood.

⁷⁹ Supra Note 57

Finally, Kenya's economy in both rural and urban areas is structured in such a way that physical strength is key. In such an economy where physical strength is the basic currency, impairment precludes persons with disabilities from the most readily available forms of employment. With few economic and physical resources to access employment opportunities, persons with disabilities are trapped by their impairments, dominant social and cultural attitudes and by the physical space itself. Together, these factors fix persons with disabilities in their place of low status and help to confine them to their homes, setting in train a vicious cycle of impoverishment.⁸⁰

2.4 Lack of Education

Not surprisingly, given historical patterns of segregation and isolation, people with disabilities tend to have lower levels of education relative to non-disabled individuals.⁸¹ An important group of difficulties concern vocational training. The overall picture of the training of persons with disabilities is one of basic inadequacy often combined with limited resources for adaptation, so that there is an increasing mismatch between the skills persons with disabilities have to offer and the few vacancies available, and an over-provision of low-level training which does not equip persons with disabilities for available jobs.⁸² For a long time in Kenya, education, even basic education, was neither free nor compulsory. The result of this has been increased levels of illiteracy in the general population. The situation is worse for persons with disabilities.

Recent decades have witnessed enormous growth across all sectors of education in Kenya. For instance, while enrolment in primary school (6-13 years) totalled 7.2 million in 2003, the secondary school enrolment totalled only 847,287 (GoK, 2007a). Thus, every child completing primary school had less than a 50 percent chance of transiting to secondary school. During the same period (2002-2003), enrolment in public universities stood at an estimated 63,941. Considering that both the secondary school and university courses last an average of four years, it implies that only 7.5% of the students in secondary schools could secure a place in a public university. The gross transition from secondary to university (both public and private) reached only 12% in 2004 (GoK, 2005). These statistics paint a grim

⁸⁰ Supra Note 55

⁸¹ Supra Note 84

⁸² Supra Note 68

picture of the education sector in Kenya. The situation is even more deplorable in the special education sub-sector. According to a commission of enquiry into education, in 1999 (GoK, 2001) of the three million people with disabilities, 25% were children of school going age, of which only about 90,000 had been identified and assessed. The report estimated that more than 90% remained excluded from the education system. The situation, though still dire has improved since the introduction of free primary education.⁸³

The Kenya National Disability Caucus has however noted that it is not possible for free education policy to work without a clear monitoring system. Further, it noted that most, if not all, schools in Kenya are inaccessible to persons with disabilities. According to the Caucus, parents of children with disabilities do not take their children to nearby ordinary schools because:

- a. Of the negative attitude of the fellow pupils, teachers and other parents;
- b. Some children with disabilities will require transport or accommodation;
- c. The education system is too competitive for teachers to bother about slow learners;
- d. Teachers cannot use more than one form of communication methods as inclusive education may require;
- e. The teaching techniques used in basic schools are not suitable for children with disabilities;
- f. Classrooms are inaccessible to children with disabilities especially those with physiological disabilities.⁸⁴

In Kenya, most persons with disabilities have limited options when it comes to choosing fields of study. Majority end up as teachers or pursue non-marketable courses that hardly generate adequate income or guarantee upward career mobility. These courses include weaving, cobbling, shoe shining, knitting, tailoring and small scale farming⁸⁵.

Other jurisdictions are not much different from Kenya. In a study done in Northern Ireland, some 62% of persons with a moderate disability and of an age to work did not complete second level education. They have no certificates, skills or qualifications, no Leaving

⁸³ Mugo, J.K., Oranga, J. & Singal, N. Testing youth transitions in Kenya: Are young people with disabilities falling through the cracks?, Research Consortium on Educational Outcomes and poverty, WP34/2010

⁸⁴ Maina, P. (2003). The National Disability Caucus, Report of the meeting held on 22nd January 2003 at Wheel Power International Office

⁸⁵ Supra Note 52

certificate, no Junior Certificate. The consequences are stark. While 95% of people with a disability living in Irish households have an income, it is not an earned income; that is, it does not come from employment. It originates in social welfare payments⁸⁶, or family money. A further consequence of the education system for weakened labour market access has been the difficulties for many people with disabilities in obtaining high level vocational training. Those forms of vocational training which are based on completion of secondary education are out of reach of the majority of people with disabilities. Between 1973 and 1994, the European Union invested 615 million Euros in vocational training for people with disabilities in Ireland. Most of the training was outside work places or work sites, was at the most elementary skill level and was provided by social rather than employment oriented agencies.⁸⁷ The investment failed to structurally connect people with disabilities with the open labour market.⁸⁸

In the Lebanese study mentioned above, it is noted that persons with disabilities are marginalized from the mainstream educational sector. The majority of the study's participants (54%) had not reached intermediate school; only 7% had attained a vocational certificate and only 6% had university degrees. In terms of rates of illiteracy, findings indicate a rate of 50%; 26% of participants indicated that they were illiterate; another 24% indicated that while they had some schooling and were counted in the figure of 54% above, they could not read or write or could barely do so. Many of these had spent years in specialized institutions or in public schools.⁸⁹

The Cambodian study conducted by Gartrell, (2010) reveals that some parents do not even think of sending a child with disabilities to school and instead keep their children hidden at home.⁹⁰ Parents believe their children are unable to remember what they learn; investing in their education is seen as a waste. Informants with disability since childhood describe their struggle to attend school, crawling along the road, being carried by siblings or convincing parents to take them. Others, unable to attend school, learnt what they could from siblings. Children with disabilities had to convince parents and siblings of their right to attend school and, even when they did, mobility entailed direct and indirect costs. Whilst parents and siblings could and did take them to school, not all families had the means to do so; some had

⁸⁶ Kenya is not a welfare state and therefore its persons with disabilities do not have this buffer

⁸⁷ European social Fund, 1996

⁸⁸ Supra Note 54

⁸⁹ Supra Note 57

⁹⁰ Parallels can be drawn between Cambodia and Kenya in this regard.

neither bicycles nor motorbikes or the money to pay for transport. Furthermore, it was time taken away from other livelihood activities, both paid and unpaid. In the context of poverty, children with disabilities were often the first to be taken out of school. Additionally, at the village level, there were few employment opportunities requiring education, and those that did, such as office work with the government or an NGO in nearby towns, had barriers to entry.⁹¹

This is more or less the situation of children with disabilities in Kenya with regard to education. Having been ill equipped with the skills required by the labour market, it is not surprising then that persons with disabilities have such high rates of unemployment. The situation of education amongst persons with disabilities is not much different.

2.5 Corruption

Corruption is one of the biggest problems facing Kenya today. According to the annual Corruption Perceptions Index (CPI), Kenya has some of the most corrupt government and public officials. Since its first CPI ranking, Kenya's record has deteriorated steadily. 1996 - 3rd from the bottom of all countries surveyed with only Pakistan and Nigeria performing worse; 1998 - 73rd out of 85 countries surveyed in an expanded index; 1999 - 90th of the 99 countries surveyed; 2000 - 82nd out of 90 countries surveyed; 2001 - 84th out of 91 countries surveyed with only Indonesia, Uganda, Nigeria and Bangladesh ranking lower on the list.⁹²

Corruption is rampant in both the public and private sectors.

At first sight, the link between corruption and the unemployment of persons with disabilities is not very clear. However, when one takes into account the fact that third world countries have high rates of unemployment generally, and labour markets that rely heavily on 'connections' the link becomes clearer.⁹³

Gartrell (2010) conducted a study on the exclusion of persons with disabilities from work in Cambodia. It is a study from which parallels with Kenya can be drawn. He notes that in Cambodia, employment that is highly valued, referred to as 'big work', is appropriate for

⁹¹ Supra Note 55

⁹² Transparency International website available at <http://www.tikenya.org/faqs.asp#faq7> (last accessed 7th October 2010)

⁹³ Supra Note 57

people with economic resources and social networks. 'Small work', on the other hand, is undesirable and performed by those who cannot access 'big work'. The defining characteristic of 'small work' is low income. 'Big work' is done by 'big people', generally men. It is a relative concept and what is considered 'big work' varies with context, but always implies a distinction from the working lives of 'the poor'. 'Small work', on the other hand, refers to a range of jobs in the informal sector, where capital requirements are minimal and returns are low. Examples include selling small goods like cakes, sweets or fish, repairing fishing nets and growing small amounts of fruit and vegetables for sale.

Social networks – relatives working in the government, military, local authorities, police or customs, for example – are critical to securing employment in the lucrative sectors that comprise 'big work'. Money is needed to pay bribes that essentially buy positions. A school-leaving certificate is critical to employment in the civil service, but even successful examination results can be purchased. Corrupt employment practices and nepotism extend to gaining work in the non-governmental organisation (NGO) sector.⁹⁴

'Big work' is the most lucrative, prestigious and desirable form of employment and often the least physically demanding. However, persons with disabilities typically lack the resources and networks necessary to secure this type of work. Furthermore, employers lack trust in the ability of persons with disabilities to perform the tasks required and are often unwilling to take the risk of employing them. Disability largely precludes employment in the most readily accessible work – agricultural work – and as a result persons with disabilities tend to work in lowly paid 'small work' or unpaid home-based work, perpetuating a cycle of poverty.⁹⁵

The case in Kenya is not much different. The unemployment rate as at 2009 was at 40%.⁹⁶ A nation-wide opinion poll published in October 2001 by the International Republican Institute found that 24% of respondents consider corruption as the single most important issue facing Kenya now followed by poverty (22%) and unemployment (15%).⁹⁷

⁹⁴ Supra Note 55

⁹⁵ Ibid

⁹⁶ <http://www.indexmundi.com/g/g.aspx?v=74&c=ke&l=en> (last accessed 7th October 2010)

⁹⁷ Mati, M. & Githongo, J. (2001). Judicial decisions and the fight against corruption in Kenya, Rule of Law Report of the International Commission of Jurists Kenya Section and available at www.ealawsociety.org/issue2/.../Ojienda2007SADCkeynotespeech.pdf (last accessed 22 November 2010)

There is widespread corruption involved in securing a job in Kenya. Persons with disabilities are adversely affected by this state of affairs. Further, corruption also infiltrates projects that are meant to benefit persons with disabilities. The Kenya National Disability Caucus 'noted with concern that several plots meant for projects to benefit the persons with disabilities have been grabbed and appealed to the National Rainbow Coalition (NARC) government to take action about this matter'⁹⁸.

2.6 Problems of Environment

This subtopic looks at both the issues of access and that of lack of assistive devices. According to National Council of Persons with Disabilities (NCPWD) Director Phoebe Nyagudi, the lack of access to public buildings, transportation, and other facilities and services by persons with disabilities in Kenya limits their movement and prevents them from actively participating in socio-economic activities. The hostile physical environment also puts persons with disabilities at risk when accessing buildings or crossing the road.⁹⁹ They also do not get equal employment opportunities because most work places are inaccessible to them.¹⁰⁰

The Kenya National Disability Caucus has noted that most persons with disabilities are unable to further their studies beyond primary school as a result of inaccessibility of most institutions. In 2009, the Ministry of Education disbursed KES 10,000 to all public primary schools as part of modification of the environment for learners with disabilities. Unfortunately, most of the allocation was poorly utilized or misappropriated due to lack of guidelines. Most headteachers planted trees and flowers instead¹⁰¹.

In one article, the Standard tells the story of William Odhiambo Ogutu in the following words:

... 'He has crawled to class for more than two decades, chasing a dream to become an accountant...were it not for well wishers who this year gave him a wheel chair, he would still be crawling to class... before he got the wheelchair, the trainee accountant

⁹⁸ Supra Note 89

⁹⁹ National Council for persons with disabilities website, available at <http://ncpwd.go.ke/2010/04/09/ndfpwd/> (last accessed 21st September 2010) & <http://ncpwd.go.ke/2009/05/18/council-participates-in-kenyas-first-ever-accessibility-conference/> (last accessed 7th October 2010)

¹⁰⁰ Supra Note 89

¹⁰¹ Supra Note 52

discloses that he would leave the house three hours early to be in time for class. He has in the past been caned 18 strokes at Mahola Primary school in Siaya for being only five minutes late. This for a school that was two kilometres away from his home...¹⁰²,

Progress in creating the physical conditions – in terms of usable transport, accessible built environment and adapted housing – needed to support a positive employment policy has been generally too slow and too sporadic. This can entail insuperable limitations to the employment opportunities readily available and virtually nullify the operation of a quota system (for example) in the public sector. It should be noted that many of the most promising opportunities for persons with physical disabilities at present are in the tertiary and specifically the office sector, and that this trend is likely to continue. Yet many modern office blocks have no offices on the ground floor, and there may well be serious problems not only in entering the building but also in being able to leave it quickly in an emergency.¹⁰³

2.7 The Limited Nature of the Antidiscrimination Paradigm

The preamble to the Persons with Disabilities Act of 2003 states that it is an Act of Parliament to provide for the rights and rehabilitation of persons with disabilities and to achieve equalization of opportunities for persons with disabilities amongst other purposes. Part III of the Act is the most prominent part, and provides for the rights and privileges of persons with disabilities¹⁰⁴. Section 12 provides that no person shall deny a person with a disability access to opportunities for suitable employment. Section 15 prohibits discrimination by employers and provides a remedy in the event of such discrimination. In these and other matters, the Act leans heavily on anti discrimination provisions.

It has been argued that antidiscrimination requirements are inherently limited in their nature.¹⁰⁵ Writing in the context of America, Bagenstos (2004) notes that antidiscrimination requirements can prohibit employers from discriminating against qualified people with

¹⁰² Munala T., (2005, October 27) Student's Unshakeable Resolve. *The Standard*

¹⁰³ Supra Note 68

¹⁰⁴ The Act is divided into eight main parts. Part I is titled, 'preliminary' and has two sections. Part II is titled, 'National Council for persons with disabilities' and has eight sections. Part III is titled, 'rights and privileges of persons with disabilities' and has eighteen parts. Part IV is titled, 'civic rights' and has three sections. Part V is titled, 'National Development Fund for Persons with Disabilities' and has three sections. Part VI is titled, 'relief and incentives' and has three sections. Part VII is titled, 'Miscellaneous' and has seven sections. Part VIII is titled, 'offences and penalties' and has five parts.

¹⁰⁵ Bagenstos, S. (2004). The Future of Disability Law, *The Yale Law Journal*, 114, 1-83

disabilities who apply for jobs, but they cannot put people with disabilities in a position to apply and be qualified for jobs in the first place.¹⁰⁶ For a large number of people with disabilities, it is not the discriminatory acts of particular employers but instead deep-rooted structural barriers such as the lack of personal-assistance services, accessible assistive technology, home modifications and accessible transportation and, above all, the current setup of the health insurance system that keep them out of the workforce.¹⁰⁷ Antidiscrimination laws like the American Disability Act (ADA) - and in Kenya, the Persons with Disabilities Act of 2003 - are a singularly ineffective means of eliminating such structural barriers.

Generally, although discrimination is plainly a major problem for people with disabilities, many individuals with disabilities face significant barriers to employment that operate well before they are ever in a position to be discriminated against by an employer. Many people with disabilities need personal-assistance services attendants who assist with personal hygiene and other activities of daily living to help them get out of bed and get to work. Many others need assistive technology to perform work-related (and other) tasks, as well as structural modifications to their homes to enable them to leave for work in the morning. And the lack of accessible transportation remains a crucial issue for people with disabilities.¹⁰⁸

Continuing to critique the American context, Bagenstos notes that the ADA might, at first glance, appear to be a more promising vehicle for eliminating deep structural barriers to employment than other antidiscrimination statutes. The ADA's innovation, after all, was that it placed the requirement of "reasonable accommodation" front and center.¹⁰⁹ Because the existing physical and social environment is structured in a way that often excludes people with disabilities simply by failing to take them into account, the ADA's - and the Persons with Disabilities Act of Kenya - drafters insisted that any disability discrimination law must include a requirement that employers make changes to (physical and social) structures that were designed without people with disabilities in mind. The accommodation requirement might in principle serve as a means of attacking the deep-rooted structural obstacles to employment for people with disabilities.

¹⁰⁶ Ibid at 23

¹⁰⁷ Ibid at 23-27

¹⁰⁸ Ibid.

¹⁰⁹ -Section 15(5) of Kenya's Persons with Disabilities Act is to the same effect. It states that an employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the work place as may reasonably be required to accommodate persons with disabilities-.

However, Bagenstos notes that it has not worked out that way in America. By deploying two doctrines the "job-related" rule, and the access/content distinction - courts have drained the accommodation requirement of significant power to eliminate those deep-rooted barriers. These doctrines categorically exclude certain classes of accommodation from the purview of the ADA even if the requested accommodations could be provided reasonably and without undue hardship. Unfortunately, the types of accommodation excluded by these doctrines are precisely those that are necessary to eliminate broad structural barriers to employment for people with disabilities.

The employer in America will never be required to provide "an adjustment or modification [that] assists the individual throughout his or her daily activities, on and off the job." The "job-related" rule plainly rules out a number of accommodations that could be provided at reasonable cost and without undue hardship and that, while necessary to enable many individuals to work, also provide off-the-job benefits. For example, the rule excuses employers from any obligation to provide assistive technology that people with disabilities need to get to work at least if that technology also helps them outside of the workplace. Nor need employers provide medical treatment or rehabilitation that would make an individual with a disability able to work, paid leave to attend training for a new service animal that would enable an individual with a disability to come to work, or training that would enable an individual to perform a new job when she has become unable to perform her old job because of a disability. In all of these cases, the accommodation might enable an individual with a disability to work, and it might be provided at "reasonable" cost and without "undue hardship." But because the accommodation would also provide benefits that extend beyond the individual's relationship with her particular employer, the "job-related" rule excludes it from the ADA's requirements. By similar logic, the statute does not require employers to provide the home-based personal assistance that many individuals with disabilities need to get out of bed and ready for work, because such assistance also enhances those individuals' independence more generally.

The access/content distinction is to the effect that persons with disabilities have access to the same benefits as individuals without disabilities, though the content of the benefit is not altered to meet the needs of the persons with disabilities. The ADA espouses formal equality which in practice translates into persons with disabilities being treated as those without.

In the case of disability, adherence to a formal equality approach is untenable. Part of the difficulties faced by a person with disabilities is the result of stereotyping by the able-bodied. In this sense, prohibition of direct discrimination against a person with disabilities will be effective in promoting equality. But, much of the difficulty faced by persons with disabilities relates to their denial of access to a world shaped for the able bodied. Without the imposition of a duty to accommodate the needs of persons with disabilities, any formal guarantee of equality would be a cynical exercise¹¹⁰.

There has not yet been, before a court in Kenya, a case on the accommodation provisions of the Persons with Disabilities Act, 2003. However, it is not farfetched to foresee that Kenyan courts would be hard pressed to place upon employers the duty of providing the types of accommodation that are necessary to eliminate broad structural barriers to employment for people with disabilities.

2.8 Poor National Health Insurance

One of the most significant barriers to employment for people with disabilities is the current structure of our health insurance system.¹¹¹ For two major reasons, health insurance is a matter of special importance for those who have disabilities. First, because society's response to disability has historically been so heavily medicalized, many of the services people with disabilities need for independence and labor force participation personal assistance and assistive technology being the most obvious are "medical" services for which the health insurance system should be responsible. Second, even without considering those services (which might more appropriately be provided in a nonmedical context), it is nonetheless true that people with disabilities, on average, have greater health needs than do those without disabilities.¹¹² Further, one of the greatest impediment to the right to health is poverty, which is closely related to disability and perpetuates its occurrence. Persons with disabilities are usually the poorest of the poor and marginalized to the extreme¹¹³.

In its current form, our health insurance system affirmatively disserves the interest of people with disabilities in moving into the workforce. The problem is that the public insurer National

¹¹⁰ Supra Note 111

¹¹¹ Kenya theoretically offers free basic health care and medicine, but the practice on the ground is quite different

¹¹² Supra Note 111

¹¹³ Supra Note 52

Hospital Insurance Fund (NHIF), on which the average worker in Kenya relies for their health needs, fails to cover the services people with disabilities most need for independence and health. As for private insurance, most Kenyans are not financially capable of procuring it. The situation is even more dire for persons with disabilities, most of whom live in poverty.

In summary therefore, the constraints to employment among persons with disabilities are the societal attitudes towards persons with disabilities, personal reasons which include personal attitudes and limitations associated with disability, lack of education, corruption, problems of environment, the limited nature of the antidiscrimination paradigm and poor national health insurance. These, together with weaknesses of the Act, impact negatively on the employment of persons with disabilities. The next Chapter is a comprehensive analysis of the Act and looks into how the Act addresses or fails to address the above constraints.

CHAPTER 3

3. CRITIQUING THE PERSONS WITH DISABILITIES ACT, 2003

3.1 Introduction

Persons with disabilities often are excluded from the mainstream of the society and denied their human rights. Discrimination against persons with disabilities takes various forms, ranging from invidious discrimination, such as the denial of educational opportunities, to more subtle forms of discrimination, such as segregation and isolation because of the imposition of physical and social barriers. Effects of disability-based discrimination have been particularly severe in fields such as education, employment, housing, transport, cultural life and access to public places and services. This may result from distinction, exclusion, restriction or preference, or denial of reasonable accommodation on the basis of disablement, which effectively nullifies or impairs the recognition, enjoyment or exercise of the rights of persons with disabilities.¹¹⁴

In an attempt to deal with these issues, Kenya enacted the Persons with Disabilities Act in 2003. The Persons with Disabilities Act has quite a long history. In part, it was inspired by various international legal instruments such as the 1975 UN Declaration on the Rights of Disabled Persons, the UN Standard Rules on Equalization of Opportunities For Persons With Disabilities and the 2006 UN International Convention on the Rights of Persons with Disabilities. All these instruments demand comprehensive legislative and institutional reforms so as to effectively address issues of discrimination or differential treatment.

Following the 1975 UN Declaration on the Rights of Disabled Persons, the government of Kenya declared 1980 the National Year for Persons with Disabilities ahead of the 1981 United Nations International Year of the Disabled Persons. Aggressive awareness campaigns on disabilities and need for collaborative efforts were launched during that year. These efforts continued during the United Nations International Year of the Disabled Persons, 1981.

In 1993 the Attorney General appointed a Task Force to review laws relating to persons with disabilities. The Task Force collected views from the public at large and persons with disabilities. It completed its assignment and presented a report. A draft Bill was drawn and forwarded to the Attorney General in 1997. The Persons with Disabilities Act was assented to

¹¹⁴ <http://www.un.org/esa/socdev/enable/disovlf.htm> (last accessed 15 September 2010)

on the 31st December, 2003 and came into force, other than sections 22, 23, 24, 35(1), 35(2), 39 and 40 on 16th June, 2004 through Legal Notice No. 64 of 2004. The excluded sections make provision for adjustment of public buildings and public service vehicles, the issuing of adjustment orders to facilitate access, exemption from income tax, adjustment for access to communication by television programmes and telephone services respectively.

Kenya has also been undergoing constitutional reforms since the 1990s. These reforms bore fruit when a new constitution was finally passed on the 4th of August 2010. The new constitution has elaborate provisions on persons with disabilities.

Article 7 is on national, official and other languages. Article 7(3)b states that the state shall promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities. If implemented, this will go a long way in granting persons with disabilities the right to information. This will in turn reduce the sense of isolation suffered by persons with sensory disabilities.

Article 21(3) is on implementation of rights and fundamental freedoms. It states that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including persons with disabilities *inter alia*.

Article 27(4) states that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Under the old Constitution, disability was not recognized as a ground for discrimination.

Article 54 states that 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 disabilities 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.

Articles 54(2), 81, 97(1)c, 100 and 177(1)c are affirmative action measures that impact upon the political participation of persons with disabilities. Article 54(2) states that 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 disabilities. Article 81 is on general principles for the electoral system. Principle 81(c) is on the fair representation of persons with disabilities. Article 82(2)(c)(i) states that legislation on elections should ensure that voting at every election takes into account the special needs of persons with disabilities. Article 97(1)c states that the National Assembly consists of among others, twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers. Article 98(1)d states that the senate consists of among others, two members, being one man and one woman, representing persons with disabilities. Article 100 requires parliament to enact legislation to promote representation in parliament of, among others, persons with disabilities. Article 177 (1)c states that a county assembly consists of the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament. Persons with disabilities must join, and participate actively in, political parties for these provisions to bear fruit.

Article 232 (1) (i) (iii) states that the values and principles of public service include affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of, among others, persons with disabilities. If implemented, this provision would have a directly positive effect on the employment of persons with disabilities.

Article 260 defines disability to include any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities. The Persons with Disabilities Act defines disability as 'a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts on social, economic or environmental participation'. The constitutional provision prevails over that under the Act, and therefore the Act must be amended accordingly.

This Chapter examines and critiques the Persons with Disabilities Act. Its key focus is on the provisions of the Act that touch on employment.

3.2 Overview of issues addressed in the Act

The Act addresses a wide range of issues:

- a. the creation of an institutional framework, namely, the National Council for Persons with Disabilities, that is charged with formulating and developing measures and policies designed to enhance the welfare of persons with disabilities;¹¹⁵
- b. the creation of the National Development Fund for Persons with Disabilities to provide monetary assistance to organizations and persons with disabilities;
- c. stipulates the rights and privileges of persons with disabilities;
- d. the provision of free legal services in certain circumstances, tax-related exemptions and deductions, encouraging the extending of credit facilities to persons with disabilities and the use of Braille and sign language on communication facilities, education documents and media productions;
- e. the imposition of duties upon the state and the ordinary citizens to create a barrier free environment by adapting buildings, public vehicles, roads and other social amenities to the needs of the persons with disability; and
- f. the creation of criminal and civil offences and penalties for discrimination or mistreatment directed at persons with disabilities and for breach of the provisions of the Act.

3.3 Arrangement

The Act is divided into eight main parts.

Part I – Preliminary

Part II - National Council for Persons with Disabilities

Part III - Rights and Privileges of Persons with Disabilities

Part IV - Civic Rights

¹¹⁵ The Persons With Disabilities Act, Section 7(1)b

Part V - National Development Fund for Persons with Disabilities

Part VI - Relief and Incentives

Part VII – Miscellaneous

Part VIII - Offences and Penalties

The preamble is to the effect that the primary object of the Act is to provide a legal framework for the rights and rehabilitation of persons with disabilities, to achieve equalization of opportunities for persons with disabilities, to establish the National Council for Persons with Disabilities and for connected purposes.¹¹⁶ The opportunities envisaged in the preamble include employment opportunities.

3.4 Provisions relating to employment in the Act

It is critical to note that the Act does give employment a central place in its provisions, both directly and by implication. The right to equal opportunities in employment as prescribed by the Act may be deemed as absolute and capable of immediate enforcement, as it does not require any direct financial input, and is otherwise accorded other persons not categorized as having disabilities.

3.5 Part I: Preliminary

Part I contains the short title and interpretation of key terms in the Act. The interpretation section of the Act¹¹⁷ also has a great bearing on the employment aspect of persons with disabilities. To start with, the word "disability" is defined to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation. This definition leans heavily on the medical model of disability in that it locates the problem of disability solely on the person with disability, regarding disability solely as an individual impairment without making any reference to the impact of the environment on and social attitudes towards persons with disabilities. Further, the definition of "disability" should not only encompass all

¹¹⁶ Preamble, The Persons With Disabilities Act

¹¹⁷ The Persons With Disabilities Act, Section 2

forms of disability but also make reference to the fact that such disabilities are recognized under the Act “whether arising from natural or artificial causes.” This fact is not expressed and the definition needs to be widened to make this clear.¹¹⁸

Secondly, it is remarkable that the Act defines “disability” rather than “persons with disabilities”. One weakness of this approach is the consequent impossibility of introducing the “on an equal basis with others” standard which would easily apply if legislation defined the person rather than the state of being. Second, no universal normative standard applies in the definition of disability in Kenya¹¹⁹. Of note is the fact that Article 260 of the Constitution overrides this definition, defining disability to include any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities. The constitutional definition is also amenable to criticism as it raises legal difficulties with regard to proof. It also poses problems for people whose condition has disabling effects only intermittently rather than continuously, or whose condition is controlled by medication, for instance epilepsy. Further, it is questionable whether a person seeking the assistance of anti-discrimination law in asserting their ability and entitlement to participate equally may paradoxically find it necessary to argue that their ability to participate fully is in fact limited by their impairment in order to qualify for the protection of the law (MCColgan 2006).

Another word that is defined that touches on employment is "aged person", which is defined to include a person with a disability who has been forced into retirement from employment due to his disability. This definition is ambiguous, as it does not specifically refer to “aged persons with disabilities”. As it is, it can cause confusion in cases where aged persons generally may seek to invoke the provisions of the Act to their advantage in the absence of a functioning social welfare scheme for aged persons generally.¹²⁰

¹¹⁸ Nyegenye, J., (2006) Drafter’s report on proposals for the amendment of the persons with disabilities act, Prepared for the Kenya Law Reform Commission and handed in on 11th November 2006

¹¹⁹ Mute, L., (2006). Domesticating the International Convention on the Rights of Persons with Disabilities: Key Considerations For Kenya & available at www.knchr.org/dmdocuments/DOMESTICATING.pdf (last accessed 22nd November 2010)

¹²⁰ Ibid

Another definition that touches on employment in the Act is that of "assistive devices and services", which means implements, tools and specialized 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. This definition leaves out sighted guides for visually impaired persons.¹²¹

3.6 Part II: National Council for Persons with Disabilities

Section 3 establishes the National Council for Persons with Disabilities, to consist of not more than 27 members¹²². The Act provides that not more than 8 members are to be drawn from organisations representing persons with various categories of disabilities, 3 are to be drawn from organisations for persons with disabilities, 8 are to represent various ministries¹²³, one is to be a representative of the Attorney General, one from an organisation representing interests of employers and one from an organisation representing interests of workers. The first Council started its operations on 1st November 2004.

The council is clearly too bloated. Its membership should be revised downward to, say, a minimum of nine and a maximum of thirteen members drawn from key ministries and organisations for and of persons with disabilities. A smaller Council is much more efficient and nothing bars it from being assisted by various technical committees whose membership may be drawn from various other ministries and organisations for and of various categories of persons with disabilities.¹²⁴ Further, the Act gives the Minister too much leeway in selection of members. The Act should provide for rigorous screening for quality and proportionate representation. There is also a need to safeguard the use of briefcase organisations of and for persons with disabilities for purposes of appointment to the Council.¹²⁵

The Minister is further given powers to appoint a chairman and a vice chairman of the board. This provision creates room for political interference in the affairs of the Council. The

¹²¹ *Supra* Note 127

¹²² Currently, the Council has 22 members.

¹²³ The Ministries to be represented are: culture and social services, local government, health, education, economic planning, housing, transport and labour.

¹²⁴ *Supra* Note 127

¹²⁵ *Supra* Note 52

Council should elect both its chair and vice. This way, the chair will be directly liable to the board and ensure internal checks and balances¹²⁶.

Section 7 stipulates the functions of the Council. These include, among others, to formulate and develop measures and policies designed to achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible, that they obtain certain opportunities, including employment. The Council is also charged with putting into operation schemes and projects for self-employment or regular or sheltered employment for the generation of income by persons with disabilities. It is also required to encourage and secure the establishment of vocational rehabilitation centres and other institutions and services for the welfare, rehabilitation and employment of persons with disabilities.

The question that arises with regard to the functions allocated to the Council is; is it equipped, financially to accomplish these functions? It is not clear that the Government has committed to providing funds for these functions, and this has the effect of making these rights mere paper rights. It sounds onerous for the Council to be reasonably expected to provide assistive devices, appliances and other equipment for persons with disabilities. Further, the Council is required to make provision for assistance to students with disabilities in the form of scholarships, loan programmes, fee subsidies and other similar forms of assistance in both public and private institutions. The responsibility for job placement imposed on the Council by Section 13 should be shifted to the government's Ministry of Labour, Directorate of Personnel Management, and the Public Service Commission, among other government departments and agencies best placed to enforce this obligation.¹²⁷ The government must ensure availability of funds for such programmes, and express provision should be made to reflect the government's commitment to this end.

Section 17 requires that the Council establish and maintain a record of persons with disabilities who are in possession of various levels of skills and training and update such records regularly for the purposes of job placement. To accomplish its functions, the Council should have a well equipped secretariat and be funded accordingly.

¹²⁶ Ibid

¹²⁷ Supra Note 127

3.7 Part III - Rights and privileges of persons with disabilities

Section 11 requires the government to take to the maximum extent of its available resources steps to ensure the full realization of the Act.

3.7.1 The right to access to equal opportunities in employment

Section 12 stipulates that no person shall deny a person with a disability access to opportunities for suitable employment. Further, a qualified employee with a disability shall be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees. In addition, Section 12 (c) stipulates that an employee with a disability shall be entitled to exemption from tax on all income accruing from his or her employment. Section 35 is to the effect that all persons with disabilities who are in receipt of an income may apply to the Minister responsible for finance for exemption from income tax and any other levies on such income.

In critiquing Sections 12 (c) and 35, it is contended that persons with disabilities should be exempted from tax on personal income regardless of whether such income is derived from employment or self-employment. This does not come out clearly from a reading of these sections. Further, whereas the Act stipulates that "an employee with a disability shall be entitled to exemption from tax on all income accruing from his employment," this privilege is taken away when the Minister in charge of Finance is given authority to determine who is exempted from tax and the terms of the exemption. The clause on exemption of persons with disabilities from taxation enables persons with disabilities to service their equipment needs. It was operationalized in December 2009 - six years after the Act was gazetted¹²⁸.

The Act also provides for reservation of employment. However, it does not unequivocally reserve any minimum employment opportunities for persons with disabilities.¹²⁹ Section 13 provides that the National Council for Persons with Disabilities 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 disabilities. This provision is somewhat

¹²⁸ Supra Note 104

¹²⁹ Otieno, G, (2008). Bold and Generous or Timid and Faint-Hearted? A panoramic Assessment of Kenya's Persons with Disabilities Act, 2003 and available at www.lawafrica.com/documents/Catalogue%202010_28Oct09.pdf (last accessed 7th October 2010)

watered down by the use of the word 'endeavour' which does not actually show a definite intention to unequivocally reserve five percent of all vacancies to persons with disabilities. Many countries have some type of employment quota for persons with disabilities, at least for positions in the public sector. These quotas range between 2 and 7 per cent, but compliance rates are generally low, between 50 and 70 per cent. Quotas normally apply to medium to large firms and noncompliant enterprises are usually fined. While such fines have not improved compliance rates, they do provide additional funds that are often spent on employment-related programmes for persons with disabilities.¹³⁰ This is not the case in Kenya.

The Act also recognizes apprenticeship and stipulates at Section 14 that subject to the provisions of the Employment Act, persons with disabilities shall be eligible for engagement as apprentices or learners where their disability is not such as to impede their performance in particular occupations for periods for which they are hired.

Section 15(5) provides that an employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities. So far, this has remained a paper right, and more remains to be done to actualize it.

Section 15(6) stipulates that the minimum retirement age for persons with a disability *shall* be sixty years. It is meant to give persons with disability a longer working life than their counterparts without disabilities. However, the philosophy of this subsection is unsound. Why do people, whether with disability or otherwise, retire? Is retirement a bad or unnecessary thing that is forced on employees and that should be avoided as long as possible? Is setting a higher minimum retirement age for persons with disability really a blessing or a curse? I would think the latter. Retirement allows a person who has been slaving away for donkey years and is now tiring to slow down and rest and enjoy a pension. It acknowledges the law of diminishing returns and accepts that productivity begins to decline at some age. If persons without disability require this break, is the case any different for persons with disabilities? Is it fair to them to *force* (as the Act has done) them to remain at work and deprive them of the opportunity to retire at the same age as other persons and enjoy their

¹³⁰ United Nations Enable <http://www.un.org/disabilities/default.asp?navid=22&pid=109> (last accessed on 8th January 2009)&<http://www.un.org/esa/socdev/enable/disovlf.htm> (last accessed 15th September 2010)

pension? To make matters worse, the language of the Act, does not allow persons with disability the option (which everyone else has!) to retire earlier. If anything, one would expect that the minimum age of retirement (the age at which one can legally retire with full benefits) should be (optionally) lower, *not higher*, for persons with disabilities¹³¹.

It is important to note that the right to accessible public buildings and public service vehicles¹³² is one of the facilitative rights to the right to equal opportunities in employment. When persons with disabilities are not integrated into policies and planning related to transport, physical infrastructure and education systems, they are often excluded from employment. Even if jobs are available to persons with disabilities, those individuals might find that there are other obstacles to employment: they might not have received the required education; they might not have access to job listings in appropriate formats, and there might be no accessible transport to and from work. All of these factors could dissuade qualified persons with disabilities from seeking employment.¹³³ Under the Act, the right to accessible public buildings and public service vehicles is among the rights that require progressive realization and can be derogated from on grounds of insufficient resources.

Finally, the Act also does not make provision for the rights of self employed persons with disabilities. For many persons with disabilities in developing countries, self-employment or micro-business may be the first, and perhaps only, option.¹³⁴ The Act should, at the very least, legally obligate the government to promote such opportunities.

3.7.2 Prohibition of discrimination by employers

Section 15(1) provides that no employer shall discriminate against a person with a disability. It sets out specific areas in relation to which discrimination must not occur. These are:

- (a) the advertisement of employment;
- (b) the recruitment for employment;
- (c) the creation, classification or abolition of posts;

¹³¹ Supra Note 127

¹³² The Persons With Disabilities Act, Section 22 and 23

¹³³ From Exclusion to equality, Realizing the rights of Persons with Disabilities, handbook for parliamentarians on the convention on the rights of persons with disabilities and its optional protocol, No. 14, 2007 and available at www.ohchr.org/Documents/Publications/training14en.pdf (last accessed 22 November 2010)

¹³⁴ Ibid Pg 89

- (d) the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits;
- (e) the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment;
- (f) the provision of facilities related to or connected with employment; or
- (g) any other matter related to employment.

Section 15(2) provides for occasions in which an employer shall be deemed not to have discriminated against a person with a disability, that is, if -

- (a) the act or omission alleged to constitute the discrimination was not wholly or mainly attributable to the disability of the said person;
- (b) the disability in question was a relevant consideration in relation to the particular requirements of the type of employment concerned; or
- (c) special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.

The exceptions under Section 15(2) have the capacity to act as a claw back clauses as they allow an employer who does not want to incur the expenses of modifying his premises to reasonably accommodate a person with disabilities to merely claim that he cannot reasonably provide the special facilities or modifications. The exception under Section 15(2)b can also create 'indirect discrimination', which denotes situations where the employer applies a rule, criterion or procedure that seems neutral, but entails particular disadvantages for a person with a disability.¹³⁵ Section 15(2) is thus susceptible to abuse by employers.

3.7.3 Penalties for discrimination in employment

Section 15(3) states that a complaint by a person with a disability that his employer has discriminated against him in a way which is contrary to the Act may be presented to the Industrial Court through the appropriate trade union.

¹³⁵ Steinmeyer, H-D., (2003). Legislation to counter discrimination against persons with disabilities, 2nd edn, Council of Europe available at www.coe.int/t/dg3/disability/.../Discrimination%20E%20in%20color.pdf (last accessed 20th November 2010)

Section 26 provides that a person is guilty of an offence if he or she contravenes section 12(1)¹³⁶ or discriminates against a person contrary to section 12; or if he discriminates against a person contrary to section 15(1).¹³⁷ It also provides that a person who is convicted of such offence is liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment. A person found guilty of an offence under this section may in addition to the penalty imposed by the Court be ordered to pay the person injured by the offence such sums of money in compensation as the Court may deem appropriate. The fine of Kshs. 20,000/- is too little in light of the grave effects of discrimination by an employer on the life of a person with disabilities.

Section 49 provides for legal action by the Attorney General, through a request made by the Council if the Council believes that a person or group of persons is engaged in a practice which is discriminatory under the Act and that the discrimination is a significant and substantial infringement of the rights of persons with disabilities and raises issues of public interest.¹³⁸

The Attorney General is by law also charged with the role of supporting and facilitating the implementation of the Government's policy interventions to revitalize the economy and encourage reform and development in the various sectors, such as agriculture, transport, infrastructure, education, energy, health, commercial, industrial and financial sectors, through the provision of legal advisory services, participation in policy formulation and legislative drafting processes, negotiation and vetting of treaties and agreements, as well as handling civil litigation and arbitration matters. It is also charged with providing prosecution services and advise to the government on all criminal matters.¹³⁹

In light of the wide mandate of the Attorney General's office, it is clear to see that public interest litigation may not necessarily rank highly on its priorities. Leaving the litigation of the rights of persons with disabilities to the Attorney General in Kenya is thus ill advised. It

¹³⁶ No person shall deny a person with a disability access to opportunities for suitable employment.

¹³⁷ Prohibits discrimination by employers and specifies the grounds of prohibition

¹³⁸ Any person or group of persons aggrieved by an order made in a legal action commenced pursuant to a request under subsection 49 (1) may within sixty days after the making of such order apply in the prescribed form to the High Court for the review of such order.

¹³⁹ The State Law Office Service Charter available at www.mouseplan.com/statelaw/index.php?option=com (last accessed 20th October 2010).

fails to take into account the fact that the Attorney General's office is swamped with other issues. It may also not have sufficient machinery to represent persons with disabilities, who in any case may find it hard to overcome the barriers in place in following up the case.¹⁴⁰

3.7.4 Protection of persons with disabilities in contractual matters

Section 15(4) states that any contract for employment or for provision of goods, facilities or services, or any other agreement, is void insofar as it purports to deny any person any rights or privileges conferred under the Act or in any other way to limit the operation of the Act. This provision is a good provision with regard to undertakings in which the parties have in place formal contracts. However, a large number of persons with disabilities in Kenya work in the informal sector which consists of small-scale, self-employed activities (with or without hired workers), typically at a low level of organization and technology, with the primary objective of generating employment and incomes. The activities are usually conducted without proper recognition from the authorities, and escape the attention of the administrative machinery responsible for enforcing laws and regulations.¹⁴¹ Thus, Section 15(4), to a large extent fails to avoid the mischief that it was meant to address.

Section 16 of the Act is to the effect that a private employer who engages a person with a disability with the required skills or qualifications either as a regular employee, apprentice or learner shall be entitled to apply for a deduction from his taxable income the equivalent of twenty five percent of the total amount paid as salary and wages to such employee. There are, however, conditions attached to this. These are that:

(i) such an employer shall present proof certified by the Ministry responsible for labour that the persons with disabilities in respect of whom he claims the deduction are under his employ; and

(ii) the persons with disabilities so employed are accredited with the Council as to their disabilities, skills and qualifications.

Further, a private employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities shall

¹⁴⁰ Currently, the state law office is not disability friendly. It does not, for instance have sign language interpreters to aid those members of the public who may have hearing impairments.

¹⁴¹ International Labour Organisation Website available at <http://www.ilo.org/public/english/employment/skills/disability> (last accessed 1st January 2009) and http://www.ilo.org/public/english/region/asro/bangkok/feature/inf_sect.htm (last accessed 21st September 2010)

be 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, though in force, has not been utilized by employers due to low awareness among them and the non-gazettement of the rules and regulations of the Act¹⁴². This section does not make provision for the procedure for tax relief, which would be desirable.¹⁴³ Such procedure should not be unnecessarily bureaucratic so as to encourage employers to accord equal employment opportunities or even to encourage them to apply affirmative action measures in favour of persons with disabilities. However, such procedure must also guard against abuse by unscrupulous employers who may make bogus claims to evade tax.

3.8 Part IV - Civic Rights

This part of the Act does not impact directly on the right to employment for persons with disabilities.

3.9 Part V- The National Development Fund for Persons with Disabilities

Section 32 establishes the National Development Fund for Persons with Disabilities. Section 34 establishes a Board of Trustees to manage the fund. Section 32(2) provides that the fund shall be established as a permanent fund and the income therefrom shall be used for the benefit of persons with disabilities in Kenya. Section 33(2) provides that the Board of Trustees may, out of the Fund, pay allowances to persons with disabilities who have no other source of income. Such persons are identified as including persons with severe disabilities and who are therefore not trainable in any skills, aged persons with disabilities and single parents with children with disabilities and who cannot, therefore, seek employment.

The Government has set aside Kenya shilling 200 million in the 2009/2010 financial year for the Fund. This is not a lot of money given that the estimated population of persons with disabilities at 10 percent of the entire population would amount to approximately 3.8 million people.¹⁴⁴

¹⁴² Supra Note 130

¹⁴³ Supra Note 127

¹⁴⁴ Supra Note 104

3.9.1 Part VI - Reliefs and Incentives

Section 35 is to the effect that all persons with disabilities who are in receipt of an income may apply to the Minister responsible for finance for exemption from income tax and any other levies on such income. According to a circular issued by the State Law Office concerning the implementation of the Act, Section 35 is independent of Section 12. Section 35 became operational in December 2009, six years after the passing of the Act. Further, the tax exemption does not apply in any shape or form to self employed persons with disabilities.

3.9.2 Part VII - Miscellaneous

This part contains sections on the legal system,¹⁴⁵ television programmes, postal charge exemption, exemptions and deductions – general requirements, inspectorate units and Council Inspectors as well as regulations. This part, therefore, does not impact directly on the employment rights of persons with disabilities.

3.9.3 Part VIII- Offences and penalties

This part contains sections on concealment of persons with disabilities, negligence by doctor, giving false information to get registered, general penalty and request for legal action by Attorney General. This part, therefore, does not impact directly on the employment rights of persons with disabilities.

3.9.4 Poor implementation of the Act

Another aspect of note is the fact that the implementation of the Act has been sluggish and half-hearted.

The provisions that did not come into force as at June 2004 are sections 22, 23, 24, 35(2), 39, and 40. Section 22(1) requires the proprietor of a public building to adapt it to suit persons with disabilities. Section 22(2) requires the proprietors to comply with subsection 1 within five years of the provision coming into operation. This provision came into operation in

¹⁴⁵ Discussed above under ‘penalties for discrimination’.

December 2009. Hence, proprietors have until December 2014 to comply with the requirement for access to public buildings. This is an inordinately long delay, impacting negatively on the lived realities of persons with disabilities.

Section 23(1) requires that operators of public service vehicles adapt them to suit persons with disabilities. Section 23(2) requires the operators to comply with subsection 1 within two years of the provision coming into operation. This provision came into operation in December 2009. Hence, proprietors have until December 2011 to comply with the requirement for access to public service vehicles. It remains to be seen whether this requirement will be met, and whether the government will move to enforce it.

Section 24 gives the Council the power to serve adjustment orders on any premises, services or amenities that are inaccessible to persons with disabilities by reason of structural, physical or administrative impediments. This provision came into operation in December 2009. So far, the Council has not served an adjustment order under this provision.

Section 35(2) is on tax exemptions and came into operation in December 2009. It is currently being implemented, although the delay has been decried by the Council as being too long.¹⁴⁶ The downside of this provision is that it is centralized, and as such requires persons with disabilities from all over the country to travel to the Council's offices in Nairobi's Waiyaki Way to process the exemptions.

Section 39 requires television stations to provide a sign language inset or sub-titles in all newscasts and educational programmes, and in all programmes covering events of national significance. Section 40 requires providers of public telephone services to install and maintain telephone devices or units for persons with hearing disabilities and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system with regard to section 39. The government has been providing sign language interpretation services on national television during national celebrations¹⁴⁷. However, section 40 has not come into operation at all.

¹⁴⁶ Supra Note 104

¹⁴⁷ Supra Note 52

Further evidence of the half hearted implementation of the Act is in the staffing of the Council. At its inception, the Council was given staff on secondment from the persons with disabilities division in the department of social services. Majority of the staff were recalled to the mainstream civil service after two years. The move depleted the Council's institutional memory and weakened its workforce. In addition, inadequate funding from the exchequer has made it difficult for the Council to recruit the requisite workforce¹⁴⁸.

Further, the government has so far not been keen on funding the requisite awareness campaigns towards issues of persons with disabilities. Very few employers are aware of the various incentives that are provided to them in the Act. In addition, few people, including persons with disabilities are aware of the provisions of the Act¹⁴⁹.

Of note is that little has been done to coordinate rehabilitation services for persons with disabilities in Kenya¹⁵⁰.

While it is true that there are many competing interests that seek government attention, it is also evident that within the first six years of the Act coming into force, little effort has gone into provision of adequate resources for its implementation. In its first year of operation, the Council received KES 6.7 million, an amount hardly enough to hire office space, staff and pay sitting allowances to its board. Indeed most of the funding that has been channelled to the Council has gone into catering for administrative costs. This practice has precipitated a skeletal administrative structure, ill fitted to support massive programmatic interventions requisite for the full implementation of the Act¹⁵¹.

In summary, the main strengths of the Act are that:

- a. It specifically outlaws discriminative acts against persons with disability and provides for avenues for the redress of discrimination;
- b. It creates a wider scope of rights, duties and obligations owed to persons with disabilities and identifies the actors in society who are expected to uphold these rights and create conducive environment for persons with disabilities to enjoy a full life;

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid

- c. It creates institutional frameworks and mechanisms to cater for persons with disabilities;
- d. It provides for penalties and remedies for discriminative acts against persons with disabilities;
- e. It mandates inclusiveness by requiring all television stations to provide a sign language inset or sub-titles in all newscasts and educational programmes, and in all programmes covering events of national significance.

The main weaknesses of the Act are that:

- a. It does not make provision for the rights of self employed persons with disabilities, which is significant because for many persons with disabilities in developing countries, self-employment or micro-business may be the first, and perhaps only, option of earning a livelihood;
- b. It gives the Minister in charge of Finance too much leeway in appointing council members as well as in determining who is exempted from tax and the terms of the exemption;
- c. The employment quota in the Act is somewhat watered down by the use of the word 'endeavour' which does not actually show a definite intention to unequivocally reserve five percent of all vacancies to persons with disabilities;
- d. The National Council for Persons with Disabilities consisting of not more than 27 members is too bloated;
- e. The National Council for Persons with Disabilities is charged with numerous functions, without being sufficiently financed to conduct such functions, which include providing assistive devices, appliances and other equipment for persons with disabilities and making provision for assistance to students with disabilities in the form of scholarships, loan programmes, fee subsidies and other similar forms of assistance in both public and private institutions.

CHAPTER 4

4. RECOMMENDATIONS

4.1 Introduction

The approach adopted by the Kenyan government in dealing with issues of persons with disabilities is a legal centralist one. The solution preferred in Kenya is to entrench the rights and entitlements of persons with disabilities in state laws, namely through enacting a specific law on persons with disabilities and the Constitution. The obvious challenge is that there has not been much change regarding challenges faced by persons with disabilities in employment and other issues since the enactment of the Act. Why is this the case? Why has the Persons with Disabilities Act failed to deliver the elaborate promises it has made?

Some authors have located the general answer to these questions through a critique of the legal centralist approach itself. They have criticised this approach for assuming that problems in society, particularly those touching on equality, can be solved through legal reform. Unfortunately, there are extralegal factors such as those discussed in Chapter 2 that cannot simply be solved through legal enactment or reform, particularly those involving the attitude of the population concerned regarding the problem.¹⁵² This Chapter therefore looks into the measures that need to be put in place to secure greater employment for persons with disabilities. The measures proposed are two-pronged – proposals for the amendment/review of the Act and measures beyond the review of the Act/extralegal measures. Both types of measures are meant to address the barriers raised in Chapter 2. In conclusion, it is important to note that poor implementation and enforcement of the Act has also contributed significantly to the Act's subdued effect on the employment of persons with disabilities.

4.2 Proposals for the Amendment of the Act

This section's main proposal as far as amendment of the Act is concerned is towards ensuring that Kenya makes its laws compliant with the UN Convention on the Rights of Persons with

¹⁵² For instance, Ambreena Manji and Fareeda Banda, who tackle the issue of gender inequality in postcolonial African societies, have asserted that legal reform should take into account extralegal factors and plural normative frameworks that inform peoples' attitudes and practices in postcolonial societies. See Manji, A. (1999) "Imagining Women's Legal World: Towards a Feminist Theory of Legal Pluralism", 8 Social & Legal Studies 435-455 and Banda, F. (2003) "Global Standards, Local Values", 17 International Journal of Law, Policy and the Family 1-26.

Disabilities¹⁵³ (The CRPD). There are some critical ways in which the Act departs from the CRPD. For instance, unlike the Act, the CRPD recognises that there are different types of disability – and that different forms of disabilities may require different forms of interventions. The definition of persons with disability should include salient aspects of the definition in article 1(2) of the convention. Article 1(2) is to the effect 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. The CRPD, unlike the Act also recognises that there are persons with disabilities who are often subjected to multiple discrimination such as girls and women.¹⁵⁴

Article 9 defines access in reference to the physical environment and transportation *inter alia* and requires state parties to develop, promulgate and monitor the implementation of minimum standards for the accessibility of facilities and services. Article 20 is about personal mobility. State parties are expected to take effective measures to ensure personal mobility with the greatest independence for persons with disabilities. The Persons with Disabilities Act adopts the principle of progressive realisation of economic, social and cultural rights along with the qualifier subjecting such realisation to the maximum available resources. This is used so ambiguously in the Persons with Disabilities Act that the Government could use absence of resources as a justification even for stagnating or retrogressing on the rights of persons with disabilities. In fact, the Act is silent on the principle of progressive realisation altogether, Section 11 merely providing that:

‘The government shall take steps to the maximum of its available resources with a view to achieving the full realisation of the rights of persons with disabilities set out in this part.’

At the same time, Section 42(1)(c) of the Persons with Disabilities Act provides that ‘an exemption or deduction may be refused on the basis that it has not been provided for in the allocation of public resources’. This provision amounts to an effective claw back on tax exemptions (Section 12), employers’ incentives (Section 16), tax exemptions on import duty and others (Section 35), tax exemptions for donors and others (Section 36(1) and provision of telephone services (Section 40).

¹⁵³ Kenya was among the 81 countries which signed the Convention when it was opened for signature on 30th March 2006.

¹⁵⁴ Article 6 recognises the special status of women and girls with disabilities.

In this regard, the CRPD provides language which should form the basis for reviewing the Persons with Disabilities Act, to the following effect:

‘With regard to economic, social and cultural rights, the Council shall ensure that measures are taken, to the maximum of available resources, and with a view to achieving progressively the full realization of these rights, without prejudice to those obligations that are immediately applicable according to international law’.¹⁵⁵

The CRPD includes a number of rights and freedoms that are not in the Act. These include protection from being subjected without free consent to medical or scientific experimentation, the right to independent living and inclusion in the community, protection from arbitrary or unlawful interference with communication as well as the right to marry and found a family. Article 30 recognises the right to equal participation in cultural life, including access to entertainment. The state is also expected to take appropriate measures to enable persons with disabilities to develop and utilize their creative, artistic and intellectual potential. The right to education and health are provided for with an elaborate description of the expected implementation role for state parties. Kenya has so far not met these obligations.

To facilitate effective implementation and monitoring progress, state parties are required to undertake certain actions at Article 8, 31, 32, 33 and 35. Article 8 requires them to undertake immediate, effective and appropriate measures to raise awareness at all levels of society, including the family level, regarding persons with disabilities, and to foster respect for their rights, to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; and to promote awareness of the capabilities and contributions of persons with disabilities. Article 32 calls for international cooperation in research and access to scientific and technical knowledge. Awareness raising should be an ongoing process, which the government has been quite lax about. The government should put into place the mechanisms set out in the CRPD.

4.3 The right to equal opportunities in employment

Sections 12(c) and 35, should be amended to make it so that persons with disabilities are exempted from tax on personal income regardless of whether such income is derived from

¹⁵⁵ Supra Note 128

employment or self-employment. The Minister in charge of Finance should not have the sole authority to determine who is exempted from tax and the terms of the exemption.

The language of section 13 should be amended in such a way as to show a definite intention to unequivocally reserve five percent of all vacancies to persons with disabilities. The use of the word "endeavour" leaves the issue of quotas as an aspiration.

Section 15(6) stipulates that the minimum retirement age for persons with a disability shall be sixty years. The language of the Act should be such as to allow persons with disability the option (which everyone else has) to retire earlier.

Finally, the Act also does not make provision for the rights of self employed persons with disabilities. For many persons with disabilities in developing countries, self-employment or micro-business may be the first, and perhaps only, option.¹⁵⁶ The Act should at the very least legally obligate the government to promote such opportunities.

4.4 Definition

The definition of "assistive devices and services", should be amended to include sighted guides for visually impaired persons.¹⁵⁷

4.5 The National Council for Persons with Disabilities

Section 3 establishes National Council for Persons with Disabilities, to consist of not more than 27 members. Its membership should be revised downward to, say, a minimum of nine and a maximum of thirteen members drawn from key ministries and organisations for and of persons with disabilities to reduce the financial burden of the Council. It is also important to consider including grassroots structures. The Council should be re-structured to allow it to establish many committees even if they are not composed of members.

Section 7(1)(d)(i) should be revised. It sounds onerous for the Council to be reasonably expected to provide assistive devices, appliances and other equipment for persons with

¹⁵⁶ From Exclusion to equality, Realizing the rights of Persons with Disabilities, handbook for parliamentarians on the convention on the rights of persons with disabilities and its optional protocol, No. 14, 2007 and available at www.ohchr.org/Documents/Publications/training14en.pdf(last accessed 22 November 2010)

¹⁵⁷ Supra Note 127

disabilities. The phrase “maximum extent possible” in the provision is indefinite and of no legal force.

Section 7(1)(f) requires the Council to make provision for assistance to students with disabilities in the form of scholarships among others.. The Act should be amended to reflect a firm government’s will to provide funds for such programmes.

4.6 Penalties for discrimination in employment

Section 15(3) states that a complaint by a person with a disability that his or her employer has discriminated against him or her in a way which is contrary to the Act may be presented to the Industrial Court through the appropriate trade union. This may disadvantage persons with disabilities who work in sectors where there are no trade unions. It would be better to leave leeway for presentation of grievances by individuals.

Section 26 provides that a person is guilty of an offence if he contravenes section 12(1)¹⁵⁸ or discriminates against a person contrary to section 12; or section 15(1).¹⁵⁹ The fine of Kshs. 20,000/- that is provided by the Act is too little in light of the grave effects of discrimination by an employer on the life of a person with disabilities. Further, a fine of KES 20,000 is preferable to the expense of obeying an adjustment order, which would surely cost more.

4.7 Accessibility of buildings

Reference in Sections 22 and 24 to “the owner” or “proprietor” of premises should clearly make a distinction as to whether this excludes an occupier, such as a tenant or agent of the proprietor. These are duties which should properly belong to the owner or proprietor of premises. Tenants and occupiers should not be required to substantially modify or adapt premises that belong to someone else, unless they will do so at the owner’s cost, which is the same thing as putting the duty on the owner of the premises.

The Act should make further provision for appropriate action in cases where a person or corporation wilfully refuses to comply with adjustment orders. The court should be given explicit power to condemn such a building until the appropriate adjustments have been made.

¹⁵⁸ ‘No person shall deny a person with a disability access to opportunities for suitable employment.’

¹⁵⁹ Prohibits discrimination by employers and specifies the grounds of prohibition

The economic consequences of such an order would be sufficient incentive to any prudent proprietor of premises to comply.

4.8 Reliefs and Incentives

Section 16 of the Act is to the effect that a private employer who improves or modifies his physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities shall be 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 does not make provision for the procedure for tax relief, which would be desirable.¹⁶⁰ Such procedure should not be unnecessarily bureaucratic.

4.9 Measures beyond Review of the Act

The main proposal in this chapter is that the enactment of the Persons with Disabilities Act is not enough to guarantee the employment of persons with disabilities. It has to be accompanied by concrete diverse and coherent policy measures for the core areas that the Act has sought to address. Therefore, I propose that there is need for concrete policy measures and other concrete steps in the following areas:

- a. Awareness raising
- b. Policy and funding
- c. Access to public facilities;
- d. Public transportation;
- e. Education;
- f. Research
- g. Employment of persons with disabilities.

4.9.1 Awareness Raising

Chapter 1 outlined how under the social model, society's attitude towards persons with disabilities is what is held to handicap them from performing tasks that they should otherwise be able to. Chapter 2 demonstrated how the attitudes of employers, of persons with

¹⁶⁰ Supra Note 127

disabilities', of their families and of the general society act as barriers to the employment of persons with disabilities. It is, therefore, clear that any attempt to remedy the employment situation of persons with disabilities has to start at awareness raising.

Article 8 of the CRPD requires States Parties to adopt immediate, effective and appropriate measures:

- a. To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- b. To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- c. To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

- a. Initiating and maintaining effective public awareness campaigns designed:
 - i. To nurture receptiveness to the rights of persons with disabilities;
 - ii. To promote positive perceptions and greater social awareness towards persons with disabilities;
 - iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
- b. Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
- c. Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
- d. Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

In reality, awareness raising has to begin with persons with disabilities. This is because a substantial number of persons with disabilities have already internalised the misconceptions of society about their inability to work or limit on their productivity.¹⁶¹ Persons with disabilities need to understand that they have a right to join and take part in the mainstream labour market. ¹⁶² Persons with disabilities that are employed need to be provided with information and support on their rights as employees so that they are better equipped to argue on their own behalf if need be.¹⁶³

¹⁶¹ Supra Note 57

¹⁶² Ibid.

¹⁶³ Ibid.

Parents and families of persons with disabilities also hold very crucial positions as far as their relatives with disabilities are concerned. There is, therefore, a need to develop and implement awareness raising activities for parents and conduct follow up visits to ensure that families understand and support the right of their relatives with disabilities to employment.¹⁶⁴

Finally, there is need for awareness raising for employers of persons with disabilities, both existing and prospective ones. They need to be supported with information on how best to adapt their work environment or job description for their employees with disabilities.¹⁶⁵ This is because there is generally a lack of knowledge and willingness on the part of employers to understand the needs of persons with disabilities and the need to accommodate them. There is widespread unwillingness on the part of human resource departments, immediate line managers and colleagues to understand, acknowledge and accommodate the needs of employees with disabilities, hence the need for formal disability knowledge and skills.¹⁶⁶ Andrea Hunt, a 45 year old person with disability working with Microsoft, lamented about the lack of knowledge of employers as far as the needs of persons with disabilities are concerned:

“Employers don’t understand reasonable judgement, they don’t understand the pressure, the different types of moves and changes because all injuries or disabilities we’ve got, no two people are the same.”¹⁶⁷

The Council needs to roll out mainstreaming programmes in order to build capacities of employers on the needs of persons with disabilities. The Council should also publicise the public and private entities that mainstream disability. The government needs to demonstrate its goodwill towards disability issues by availing funds for these and other programmes.

4.9.2 Policy and Funding

There is need for coherent policies on employment and on inclusion generally. This is because lack of coherent employment policies for persons with disabilities creates uncertainty among employers as to whether, when and how they should adapt their workplaces to

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Wilson-Kovacs, Dana , Ryan, Michelle K. , Haslam, S. Alexander and Rabinovich, Anna(2008). Just because you can get a wheelchair in the building doesn't necessarily mean that you can still participate: Barriers to the career advancement of disabled professionals, *Disability & Society*, 23 (7), 705-717.

¹⁶⁷ Ibid

accommodate persons with disabilities.¹⁶⁸ There is a need for a centralised technical resource centre for employers so that they can obtain technical information on accommodation, modifications and procedures to be put in place so that the workplace is accessible and equitable to all.¹⁶⁹

As far as funding is concerned, the Act should be applauded for creating the national Development Fund for Persons with Disabilities.¹⁷⁰ All the measures and actions required under the Act for persons with disabilities to enjoy employment and other rights equitably with other members of the society will require the commitment of huge annual sums of money. It, therefore, becomes imperative not only that the scope of the Fund is enlarged, but also that there will be innovative ways of raising money. One method that has been utilised by Belgium is the payment of a certain percentage of premium into the National Fund for the Social Resettlement of Disabled People from motor insurance, on the premise that if citizens can afford to pay motor insurance, then they should afford to part with a few coins to top up on their motor insurance for persons with disabilities.¹⁷¹

A method that may be used in Kenya is transferring most of the funds that run programmes of exclusion such as sheltered workshops to vocational training programmes that enhance employability, and to funding loans for business start-up for persons with disabilities wishing to become self employed.

4.9.3 Access to Public Facilities

This area is very important for policy as it is stipulated in the Act that employers shall provide special facilities or modifications, whether administrative, physical or otherwise to accommodate persons with disabilities.¹⁷² This is the principle of reasonable accommodation. Article 2 of the Convention on the Rights of Persons with disability defines reasonable accommodation to mean necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

¹⁶⁸ Conroy, P. (2003). Employment Policy, In Quin, S. & Redmond, B. (Eds), *Disability and Social Policy in Ireland* (pp.) Dublin: Bairbre Redmond University College Dublin Press

¹⁶⁹ Ibid at 55.

¹⁷⁰ At Section 32.

¹⁷¹ Supra Note 68

¹⁷² Section 15(2)(c).

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Reasonable accommodation is important as a matter of principle since persons with disabilities need to access public buildings in order to find their way to offices.

It is, therefore, highly important that this provision of the Act be implemented. In terms of the enforcement of this provision, guidelines should be set in place for contractors of new buildings so that they are disability friendly. The same should apply to the renovation of new buildings. This is consistent with the American policy as well.¹⁷³

4.9.4 Public Transportation

The provisions of the Act on public transport vehicles are also among those that have not yet become operational. The urgency of accessible transportation cannot be gainsaid. This study acknowledges the financial and economic implications of operationalizing this provision especially for a third world country like Kenya. Nonetheless, it is an initiative that must eventually be tackled head on as part of mainstreaming disability issues by the Ministry of Transport. Perhaps a starting point would be the holding by the American Department on Transportation that local transport systems should provide 'special efforts' to serve persons with disabilities.¹⁷⁴ This was in response to the challenge of the position of full accessibility for persons with disabilities of public transport in the case of *American Public Transit Association v Lewis*.¹⁷⁵

4.9.5 Education

The challenge about the education of children with disabilities is the debate surrounding segregated education. It is argued that educating children with special needs in special schools does not help them to integrate fully into society. Moreover, the training received in

¹⁷³ Conroy, P. (2003). Employment Policy, In Quin, S. & Redmond, B. (Eds), *Disability and Social Policy in Ireland* (pp.) Dublin; Bairbre Redmond University College Dublin Press

¹⁷⁴ Ibid at 94.

¹⁷⁵ American Public Transit Association, et al., Appellants V Andrew L. Lewis, J., Secretary, United States Department of Transportation, et al., No. 80 – 1497 Available at (<http://openjurist.org/655/f2d/1272/american-public-transit-association-v-l-lewis>) (Last accessed on 19th October 2010)

segregated or special schools does not give them competitive training to join and integrate in the mainstream labour market. Considered non-productive members of society, **persons with disabilities** are often locked up in institutions, deprived of everything that the rest of us take for granted – freedom, a normal social life, work, and education. Disability policy has been based on concepts of welfare and charity not with the intention of allowing **persons with disabilities** the status that they deserve in society.¹⁷⁶

There is, therefore, a move towards inclusive education.¹⁷⁷ Inclusive education¹⁷⁸ is the education framework for including children with disabilities; it was originally based on a principle that all should have the opportunity to learn together. This is not a principle universally acknowledged. ‘Children who learn together, learn to live together’ is the philosophy underpinning inclusive education. Due to the failure of effective learning in inclusive schools, children with disabilities either go back to special schools or drop out of school, ending up illiterate (and hence spiraling into unemployment and poverty). Children with disabilities need more than just social skills, they need academic skills as well to live a decent life in an inclusive society. Hence it is worthwhile to promote the education which promotes the acquisition of decent academic skills.¹⁷⁹

4.9.6 Research

Further research on disability is needed to guide interventions and policy making. Research is also required to demonstrate conclusively to employers that there will not be a hefty cost to them for employing persons with disabilities. Research is also needed to ensure "Universal design". This means the design of products, environments, programmes and services be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. It does not exclude assistive devices for particular groups of persons with disabilities where this is needed¹⁸⁰.

¹⁷⁶ Isaac, R., Raja, B.W & Ravanah, M.P (2010). Integrating People with Disabilities: Their Right – Our Responsibility, *Disability & Society* 25, 627- 630.

¹⁷⁷ Ibid.

¹⁷⁸ Article 24 of the Convention on the Rights of Persons with Disabilities calls upon state parties to ensure an inclusive education system at all levels.

¹⁷⁹ Ibid.

¹⁸⁰ The Convention on the Rights of Persons with Disabilities, Article 2

The UN Convention on the Rights of Persons with Disabilities at Article 4(1)g requires state parties to undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost. The need for research in disability can, therefore, not be gainsaid.

4.9.7 Employment of Persons with Disabilities

Policy and administrative actions should explore the introduction or improvement of the promotion of the employment of persons with disabilities in a number of ways. These are discussed below.

Clear employment guidelines for employers

There is a definite lack of clear policies and guidelines for employers of persons with disabilities. One of the roles that can be taken by up by the National Council for Persons with Disabilities is to formulate such guidelines. These could either be part of the Disability Policy, an off-shoot of it or separate guidelines altogether. This is because, many times, employers are either unaware or are unwilling to comply with the provisions of the Persons with Disabilities Act, which are very vague and do not contain any specific tangible requirements for employers of persons with disabilities. These guidelines need to be very specific and compliance with them on the part of employers compellable. A person with a polio-related disability had this to say about employment guidelines:

“They need to be more specific in what they’re saying...If you read some of their publications about employing persons with disabilities, it’s very vague and it’s very general. ‘Make reasonable adjustments to work load’...the difficulty is, what is reasonable? And what is reasonable for one person , is not reasonable for another person...Disability Rights Commission could be saying, ‘It is reasonable to give disabled people a coffee-break, a lunch break,’ they don’t have to say how long but just say, and then you go back to you employer... I mean that was one of the things I had huge arguments about at the beginning about my entitlement to have a coffee break”.¹⁸¹

¹⁸¹ Supra Note 192.

Incentives and compensations for employers that employ persons with disabilities

This is especially important because the idea of employing persons with disabilities and having to make reasonable accommodation is not readily welcomed by employers who feel that they have to choose between failure and stagnation on the one hand, and aggressive competition for which persons with disabilities are not capable on the other hand.¹⁸² They, therefore, feel that reasonable accommodation such as vocational rehabilitation is a luxury they cannot afford.¹⁸³

This study has already discussed the incentives and reliefs for employers provided by the Act, and pointed out that most of the employers are not aware about them.¹⁸⁴ In other jurisdictions such as Spain, France and the United Kingdom, incentives for employers have particularly worked well.

In Spain, subventions to employers taking on workers with disabilities have led to a steady increase in the employment of persons with disabilities. It has taken the form of a close co-operation between the National Employment Institute and the National Social Service Institute.¹⁸⁵

In France, incentives to employers have comprised support for individual vocational rehabilitation contracts, costs of adapting work places and of additional staff for the training of apprentices with disabilities and a scheme of recruitment grants over three years for employers willing to take on workers with disabilities and to promote and train them.¹⁸⁶ If the productivity of the workers with disabilities falls way below the norm, the employers are permitted to reduce the wages of those workers, while the deficit is paid for by the state.¹⁸⁷

In the United Kingdom, there is an established package of provision to employers to promote the employment and self-employment of persons with disabilities and to provide employers with advice and practical support, for instance, 50 percent contribution to adaptation costs, loans of special equipment and short term introduction grants.¹⁸⁸

¹⁸² Supra Note 68.

¹⁸³ Ibid.

¹⁸⁴ Supra Note 168

¹⁸⁵ Ibid at 68.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

Self-employment

It is true that not all persons with disabilities can work within the formal work environment. The question to ask is, is paid employment actually or foreseeably a realistic option for people with disabilities? The answer lies in the fact that while we may advance the cause of persons with disabilities through paid employment, at the same time, we may actually be downgrading or marginalizing further those with the most difficult impairments.¹⁸⁹

It is in that regard that self-employment as a feasible option for persons with disabilities has recently received some popularity. Pagan found that persons with disabilities are more likely to be self-employed than persons without disabilities, and that persons with severe disabilities are more likely to be self-employed than those who are slightly limited or not limited at all in their day-to-day activities.¹⁹⁰ He based these findings on the premise that self-employment provides flexibility and a better adjustment between disability status and working life, so that it leads to higher productivity than if the person with a disability was in paid employment caused by having better and flexible working hours and schedules, a peaceful environment among others.¹⁹¹

Callahan, Shumpert and Mast have also emphasised that self-employment is a realistic option for persons with disabilities.¹⁹² They give the following indications regarding self-employment for persons with disabilities:

- a. They will likely choose self-employment at approximately the same rate as the general population;
- b. They will occasionally choose self-employment out of frustration associated with their lack of ability to find a willing service provider to represent them for a more traditional job;
- c. They will spend only marginally more than others who pursue more traditional employer/employee forms of work;
- d. They will likely need information and assistance in order to plan for all the issues associated with starting and running a business as well as feedback on the potential viability of their idea or, possibly, input on possible ideas for self-employment;

¹⁸⁹ Ibid.

¹⁹⁰ Pagan, R. (2009). Self-employment among People with Disabilities: Evidence from Europe, *Disability & Society*, 24, 217-229

¹⁹¹ Ibid at 224.

¹⁹² Callahan, M. Shumpert, N. and Mast, M. (2002). Self-employment, Choice and Self-determination, *Journal of Vocational Rehabilitation*, 17, 75-8

- e. They have the opportunity to welcome others– family, friends, peers – into the effort to develop and run the business more easily than it is possible when pursuing a regular job;
- f. It is possible to blend public resources with investments from the participant, family and others;
- g. It is possible that some new businesses will fail, but at this time it looks as though the failure rate for self-employment efforts by persons with disabilities is no worse than for traditional employment and, in fact, may be better;
- h. It will be necessary for both funders and providers to rethink the typical employment relationship with participants and embrace generic solutions and processes in addition to those individualized strategies used to facilitate and fund traditional employment;
- i. It will almost inevitably cause questions of feasibility to be raised directed both at the individual and the idea for the business venture;
- j. People can more easily tailor job duties, environments, hours and other features of work as a part of the business plan design as compared to traditional employment;
- k. It is not necessary to have a “successful” business by typical business standards, rather it is possible to fashion a business with outcomes that meet the individual’s needs;
- l. It is possible for participants to combine their resources with others – individuals with disabilities, family and friends, business entrepreneurs – in a manner that leverages more resources;
- m. Support needs can potentially be met through employees, thus turning support costs into business expenses;
- n. As with everyone else, business ventures can provide an avenue to build real wealth and capital as compared to regular employment.¹⁹³

Rizzo maintains that while persons with disabilities are utilising self-employment as a work option in greater numbers than ever before, it is imperative that those persons with severe impairments of severe support needs require a network of business support and personal social support networks as well.¹⁹⁴

Technology and employment of persons with disabilities

The changing work environment requires that employees be trained in Information Technology (IT) in order to give companies an edge over their competitors. There exist several IT programs targeting university and tertiary students, particularly for blind and partially sighted persons. Some of them include the Sight Savers International IT project in

¹⁹³ Ibid.

¹⁹⁴ Rizzo, C. (2002). With a Little Help from my Friends: Supported Self-employment for People with Severe Disabilities, *Journal of Vocational Rehabilitation*, 17, 97-105. See also Hagner, D and Davies, T. (2002). Doing my own Thing: Supported Self-Employment for Individuals with Cognitive Disabilities, *Journal of Vocational Rehabilitation*, 17, 65-74.

conjunction with Kenyatta University and the Centre for adoptive Technology under the rehabilitation department of the Kenya Society for the Blind¹⁹⁵.

There has been a steady realisation that computer work is a highly satisfactory and suitable employment for persons with disabilities.¹⁹⁶ There is, therefore, a need to encourage students with disabilities and trainees in rehabilitation centres into computing courses even at a graduate level, since it is also very competitive.¹⁹⁷ There is also need for funding initiatives in this regard. Equipping persons with disabilities with computer technology skills will also enable them to work at, and earn a living from, home.¹⁹⁸

Vocational rehabilitation/training

Vocational rehabilitation and training is a very important area for persons with disabilities since it helps them cope with life in the community. In Kenya, this is carried out in special education schools and centres in vocational areas such as carpentry, tailoring and so on. The biggest outcry against vocational rehabilitation centres is their tendency to offer training in areas that are no longer viable for the fast-evolving labour market. There is need for persons with disabilities to undergo training in courses that will help them to get employment in the labour market. This will require innovation and quality control so that persons with disabilities are not excluded further but are also integrated in the labour market.

Wehbi and El-Lahib caution that some persons with disabilities may be aware of their right to partake of the mainstream labour market but face discrimination or lack the qualifications when searching for opportunities of employment.¹⁹⁹ In such a scenario, they advise that such persons with disabilities should be given support through opportunities of training in skills needed in the mainstream labour market to make them more employable.²⁰⁰ One way through which this can be achieved is integration. Integration would ensure that trainees with disabilities spend all their learning time in centres where majority of the other learners are without disabilities. It would also allow them to go through their training in a mainstream

¹⁹⁵ Supra Note 52

¹⁹⁶ Roulstone, A. (1998), *Enabling Technology: Disabled People, Work and New Technology*, Open University Press

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Wehbi and El-Lahib 2007, at 11

²⁰⁰ Ibid.

institution. Alternatively, rehabilitation training centres could take it upon themselves to integrate their centres by enrolling non-disabled trainees as well.²⁰¹

Good examples in which vocational rehabilitation centres are ensuring that recipients of their training are trained in such a way that they are employable afterwards are to be drawn from Europe. One is the National Training College at Roslyn Park, Sandymount, near Dublin founded by the Irish Rehabilitation Institute in the 1980s.²⁰² The college is for young people with physical disabilities and histories of mental illness and abuse of alcohol and drugs. Its aim is to provide training that is relevant to actual employment opportunities in the contemporary economy.²⁰³ It, therefore, offers courses and programmes in business and computer studies, graphic design, mechanical engineering and electronics.²⁰⁴ There is also an advisory board in each course to ensure the continued relevance of the courses in a rapidly changing economy and to potential employers.²⁰⁵

The second example is the Vocational College set up by the Royal National Institute for the Blind, in association with the Loughborough College in Leicestershire. This college is applauded for its bold leap in combining the best of integration and special needs as all the special training takes place in the new college at the Royal National Institute for the Blind while at the same time allowing trainees with disabilities to take courses in the established mainstream Loughborough College according to individual needs, and sharing social facilities with the main student body.²⁰⁶

²⁰¹ Daunt 1991 at 73.

²⁰² Ibid at 74.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Supra Note 68.

CONCLUSION

This study has analysed the impact of the Persons with Disabilities Act, 2003 on the employment of persons with disabilities in Kenya.

This study began on the hypothesis that the high rate of unemployment among persons with disabilities is caused by extralegal factors. These factors include negative attitudes of the society towards persons with disabilities that equate disability with inability to work, personal reasons such as the internalisation of societies' negative attitudes by persons with disabilities themselves, lack of proper education to guarantee placement for jobs, corruption, an environment that is inaccessible to persons with disabilities and lack of a national health insurance to take care of their health needs. The second hypothesis was that the Persons with Disabilities Act is not sufficient to guarantee the employment of Persons with Disabilities in Kenya. Both hypotheses have been proved true from the research undertaken.

The conceptual understanding of disability adopted in this study is guided by the UN Convention on the Rights of Persons with Disabilities. The Convention defines persons with disabilities as to 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.

This study is based on the improved social model of disability. This model recognises the close connection between the limitations experienced by individuals with impairments, the design and structure of the environment and the attitudes of the general population. There must be both the understanding of disability and impairment as social concepts and the recognition of the individuals' experiences of their bodies. Hence, any measures taken in dealing with issues affecting persons with disabilities must aim at confronting all the aspects of disability.

In critiquing the Persons with Disabilities Act, this study identifies several gaps in, and weaknesses of, the Act. For instance, the Act does not make provision for the rights of self-employed persons with disabilities, which is significant because for many persons with disabilities in developing countries, self-employment or micro-business may be the first, and perhaps only, option of earning a livelihood. The Act also gives the Minister in charge of

Finance too much power without putting in place the necessary checks and balances. The employment quota in the Act is also not couched in mandatory language and hence does not unequivocally reserve five percent of all vacancies to persons with disabilities. The sluggish and half hearted implementation of the Act has also impacted negatively on the rights of persons with disabilities in Kenya.

Finally, this study proposes some broad recommendations for the employment of persons with disabilities. The first part of the recommendations involves amendment of the Act to align it with the UN Convention on the Rights of Persons with Disabilities. Hence the provisions of the Act with regard to the definition of disability, the National Council for Persons with Disabilities, employment quotas and accessibility of buildings need urgent review. Review is also required for the additional rights under the Convention that have not been included in the Act.

The second part of the proposals consists of measures beyond the review of the Act. These include awareness raising on issues of persons with disabilities to curb the negative perceptions of society on disability. There is also need to create awareness among persons with disabilities and employers about the Act. Further, there is need for policy and funding measures to implement the salient provisions of the Act.

In addition, there is need for accessibility of public facilities and public transport. This measure recognises that for many persons with disabilities, it is not only the discriminatory acts of particular employers that keep them out of the workforce, but also the structural barriers of the built environment. Further, it is necessary to ensure appropriate education for persons with disabilities that imparts skills that are relevant to the labour market and vocational training that is geared towards increasing the chances for persons with disabilities accessing employment.

An additional measure is research on disability to guide interventions and policy making. Research is also necessary to ensure the availability and use of new technologies to improve qualifications and employability of persons with disabilities. Finally, there is need for clear employment guidelines for employers of persons with disabilities. Employers also need incentives, compensation, training and support. Measures are also required towards ensuring that self-employment is a viable option for persons with disabilities.

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