



The Role and Enforceability of Anti-discrimination Laws to the Promotion and  
Protection of Right to Employment of Persons with Disabilities: A Comparative Study of  
Ethiopian, South African and European Union Laws.

By Wendmeneh Beyene

LL.M. LONG THESIS  
COURSE: Human Rights Law  
PROFESSOR: Csilla Kollonay Lehoczky Dr.  
Central European University  
1051 Budapest, Nador utca 9.  
Hungary

## Acknowledgments

First and foremost, I would like to thank God the heavenly father for he has given me endurance to accomplish this thesis and offering me opportunity to study in a more advanced academic setting which has been considerably difficult without his unending help and care. I am also grateful for CSLA scheme of OSF for it has provided me with fully funded scholarship during my study at CEU and for all of its provided pre-CEU supports. My utmost gratitude also goes to my thesis supervisor Prof. Csilla Kollonay Lehoczky for her constructive and positive comments to make my thesis more sensible and appropriate. Her unreserved cooperation, softhearted approach, and sense of understanding make me to feel as if I have been interacting with my mam at home. My thanks also go to Robert Handicott for his care and treatment both as a friend and a father through the walks of my academic life. I pretty much value his all-rounded effort of providing me with his lived experience, spiritual, material as well as financial support to enable me in becoming a more useful citizen contributive of one's own community. I would also like to thank all my families for their love, care and encouragement for my success in my study. All 2015/2016 CEU students also deserve mention for their assistance to go to and back from school, more particularly Husen, Henok, Huong, Lavender, Abdu, Tsega, Altayesh and Abdi.

## Table of Contents

Acknowledgments .....	i
Acronyms.....	iv
Executive Summary .....	vi
INTRODUCTION.....	1
Subject matter of the thesis.....	1
The Choice of Jurisdictions for Comparison .....	4
Methodology.....	5
Structure of the thesis .....	6
CHAPTER ONE .....	7
Socio-Economic, Historical and Legal Background of PWDS .....	7
1.1 Socio-Economic, Legal and Historical context of PWDS in General .....	7
1.2 Ethiopia.....	14
1.3. The Republic of South Africa .....	19
1.4 Europe – The Council of Europe and the European Union .....	22
1.4.1. The Council of Europe.....	24
1.4.2 The European Union .....	28
CHAPTER TWO .....	32
Disability Models and alternative policy/legal approaches in Employment for PWDS.....	32
2.1. The Individual/Medical Model of Disability .....	32

2.2 The Social Model of Disability .....	33
2.3 Different forms of Policy/Legal Options for PWDS in Employment.....	37
2.3.1 Counterbalances-rehabilitation.....	39
2.4. Quota Schemes vs. Antidiscrimination Approaches.....	45
CHAPTER THREE.....	51
Obligation of the Employers under Anti-Discrimination Legislations of Ethiopia, South Africa and EU.....	51
3.1 General Overview of Employment Regulation .....	51
3.2 Definition of the concept of PWDS.....	57
3.3 Equality and non-discrimination .....	59
3.4 Provision of Reasonable Accommodation.....	68
3.4.1 Reasonable accommodation in Ethiopia .....	68
3.4.2 Reasonable accommodation in South Africa.....	73
3.4.3 Reasonable accommodation in Europe. ....	75
3.5 Obligation of Affirmative Action or specific measure .....	78
CHAPTER FOUR.....	86
Enforcement of Anti-Discrimination Laws in Ethiopia, South Africa and EU.....	86
4.1. The Scope of the Beneficiaries in the Context of Enforcement. ....	86
4.1.1. Enforcement of Anti-Discrimination Laws in Ethiopia. ....	86
4.1.2. The Definition of PWDs Under the SAEAA .....	92
4.1.3. The Definition of PWD under EUEED.....	95

Scope of Proc. 568/2008, SAEEA and EUEED .....	97
4.2.1. Scope of Proc. 568/2008 .....	98
4.2.2. Scope of SAEEA .....	108
4.2.3 Scope of the EUEED .....	110
4.3 Enforcement Bodies and sanctions or remedies .....	112
4.3.1. The Enforcement agency models/bodies.....	114
4.3.2. Group justice Model/Enforcement through Representation .....	119
4.3.3. Effectiveness of Sanctions or Remedies .....	123
CHAPTER FIVE.....	129
Conclusions and Recommendations .....	129
5.1 Conclusions.....	129
5.2 Recommendations .....	133
Bibliography .....	136

## Acronyms

BMI-Body Mass Index

CEDAW-Convention on the Elimination of all forms of Discrimination against Woman

CESCR-Committee on the Economic and Social Rights

CRPD-Convention on the Rights of Persons with Disabilities

ECJ-European Court of Justice

ESC-European Social Charter

EPRDF-Ethiopian People Revolutionary Democratic Front

EUEED-European Union Equal Employment Directive

FDRE-Federal Democratic Republic of Ethiopia

FENAPD-Federation of Ethiopian National Association of Persons with Disabilities

HOF-House of Federation

ICERD-International Convention on the Elimination of Race Discrimination

ICESCR-International Covenant on Economic, Social and Cultural Rights

ILO-International Labor Organization

MOLSA-Ministry of Social and Labor Affair

PEPUDA-Promotion of Equality and Prevention of Unfair Discrimination Act

PWDS-Persons with Disabilities

SAC-South African Constitution

SAEEA-South African Employment Equity Act

WB-World Bank

WHO-World Health Organization

ZACC-Constitutional Court of South Africa

ZAGPHC-High Courts Gauteng

## Executive Summary

The number of people with disabilities (hereafter PWDs) in the world is too huge to overlook it in the process of designing laws or policies. Despite this reality, the group continues experiencing exclusion from various aspects of life including employment. The past three decades however have illuminated positive changes to address the plight of PWDs through different mechanisms. Anti-discrimination laws are one of such mechanisms that have become the most appropriate tools in tackling discrimination in all spheres of life for PWDs including employment. Ethiopia has also been engaged in reforming its laws to make in line with changing conditions. One of the changes made is the enactment of Proclamation No. 568/2008 designed to realize equal opportunity of PWDs in employment. The proclamation has actually introduced vital transformations such as the obligation of reasonable accommodation, equality with its substantive context, prohibition of discrimination with its different forms, shifting burden of proof, setting up enforcement mechanism as well as provision of sanctions and remedies to the violation of right in the proclamation. In fact, mere enactment or existence of laws does not serve to achieve the purpose for which they are sought. Proclamation 568/2008 cannot escape from this assertion. The sanction against the employers is not sufficient to effectively tackle the prevalence of discrimination at work place; since the fine against the employers is minimal which would invite employers to make cost-benefit analysis of the punishment. If cost of reasonable accommodation is higher than the sanction, there is a tendency to pay the punishment rather than providing reasonable accommodation. Thus, the penalty has to be revised to embrace deterrence or dissuasiveness principle. If hiring assistant is an obligation upon the employer,

which the law never wants to negotiate, the government also should share the burden through different schemes to increase employability of PWDs particularly in the private sector, which is not that much developed to facilitate such accommodation in Ethiopia's case. Furthermore, the proclamation recognizes that discriminated job applicants with disabilities can be represented before the court of law by means of their association to which they associate. Fund restriction imposed by proclamation 621/2009 makes it more difficult the operation of association of PWDS. With respect to scope, the federal cassation division bench in the case of *Teklu Mekkonenn v. Addis Ababa Justice Bureau* ruled that appointees with disabilities could not bring a case by virtue of Proclamation 568/2008. The intention of the legislature is to combat objectively unjustified discrimination so that the error of cassation should be corrected by legislative means to include broader scope.



## INTRODUCTION

### Subject matter of the thesis

The main purpose of this thesis is to examine the role and enforceability of anti-discrimination laws for PWDs in the employment context of Ethiopia, by comparing to its counterparts in South Africa and EU. Anti-discrimination laws have become widely accepted legal and policy tools to outlaw discrimination against marginalized groups including PWDs. However, the extent to which such laws could protect and promote employment is different from jurisdiction to jurisdiction depending on the level of effective enforcement.

In Ethiopia, it has been about a decade since legislative responses have been exerted to realize the right to employment of PWDs through anti-discrimination law. Following the ratification of the Convention on Vocational Rehabilitation and Employment of Disabled Persons No. 159 of ILO, the Ethiopian government adopted and promulgated Proclamation number 101/1994 on the right to employment of disabled persons. This proclamation adopted a quota scheme of employment, which requires both private and public employers to reserve a vacancy suitable to disabled workers when recruiting employees.<sup>1</sup> However, the quota scheme could not ensure PWDs right to employment, because it had a connotation that disabled workers are incompetent so that they are employed with reservation.<sup>2</sup> Moreover, the approach to disability followed by the Proclamation was a kind of medical/individual model, which implies

---

<sup>1</sup> The Federal Democratic Republic of Ethiopia Rights of Disabled Persons to Employment Proclamation No. 101/1994.

<sup>2</sup> Shimeles Ashagre, 'Appraising Employment Accommodation Rights for Visually Impaired Teachers in Ethiopia: Overview of Selected Cities' (2014) 8 (2) Mizan Law Review 406

that ‘physical and mental impairment are responsible for the disadvantages of Persons with disabilities’.<sup>3</sup>

Hence, there was a need for changing the conception about disability as well as to realize the right to employment for PWDs in a better way. To that effect, Proclamation on the Right to Employment of Persons with Disabilities Proclamation No. 568/2008 has been enacted. This proclamation has included many impressive transformations, which include reformation of the disability philosophical conception, reasonable accommodation, shifting burden of proof and ensuring legal representation before the court of law with regard to employment discrimination. All these features make the proclamation a much better legislation compared to its predecessor. Yet most of its major useful provisions seem to be virtually inoperative because of factors resulting in ineffective enforcement.

Ineffective enforcement of a law may arise from different reasons. On the one hand, the rights guaranteed in the legislation may insufficiently be incorporated or addressed and create uncertainty and vagueness that inhibit enforcement of the rights. On the other hand, enforcement provisions in the legislation may not provide sanctions or remedies capable of deterring re-occurrence of discrimination as well as fail to assign strong enforcement bodies. Ethiopia’s anti-discrimination law in employment Proc. 568/2008 involves both enforcement difficulties.

Therefore, this thesis presents or frames two major themes, which will include other sub questions. All themes will be presented and analysed in a comparative way, comparing the Ethiopian regulation to the chosen two comparator jurisdictions, the Republic of South Africa and the European Union. While the thesis is written and structured as a comparative piece of writing, the main motive behind writing the thesis and choosing its themes was to examine issues

---

<sup>3</sup> Ibid

that have primary relevance for the Ethiopia on the subject matter and gain insights from its comparison to the two – admittedly more developed – legal regimes.

The thesis will first present the historical and social as well as legal background of the present day regulation. (Chapter One) Besides the common point that legal protection of the PWDs with special regard to non-discrimination is a novel, a late 20<sup>th</sup> century or even 21<sup>st</sup> century progress, the history and cultural heritage shows significant differences. Considering the main feature of the thesis – its legal nature – the emphasis in the presentation of the background will be on the legal developments.

The various concepts, academic and legal approaches to disability show a greater variation than the straight social and legal developments. The progress by leaps and bounds in Africa and the law of African countries could lead to the acknowledgement of models and attributes (e.g. the shift from the medical model to the social model of disability) in some way preceding the results of gradual development in the more developed countries, with some fluctuations and variations.

Similarly the personal coverage and field of application will show in part parallel evolutions between the three jurisdictions and also jumps and setback when national legislatures and jurisdictions have to cope with new institutions and approaches. (Chapter II.) The differences will be of particular interest in the context of differences in employment under private and public law, as well as with regard to the different categories of employment in public service, in Chapter III and, in part in Chapter IV. Last, but not least issues of giving effect to the mandatory provisions, the ways and procedures of enforcement and the relevant bodies and institutions will be compared in Chapter IV.

A main interest and motive behind this research is the realization of the fact that the existence of legislation by themselves could not be a relief to the immediate problems of a certain group in a society and to look for more efficient ways of enforcement. Moreover, having scrutinized proclamation 568/2008, it became clear that other meaningful and effective measures have to be (and perhaps can be) taken to assure that PWDs actually benefit from the law. It is also my purpose to provide a fresh perspective on the matter since it has never been dealt by other researches from a comparative point of view.

As noted above, the general objective of this thesis is identifying critical factors that are responsible for the ineffective enforcement of Proclamation No. 568/2008 by comparing it to the laws of South Africa and the European Union.

As such, it attempts to provide contribution for those who are interested to conduct further research on this area. Policy makers and legislators may also get useful information in case there is a need for changing or amending the existing law. Moreover, since employment is major source to lead and live productive life, stakeholders like NGOs, policy makers, academician will depend on this study to find more appropriate way of mainstreaming disability in the employment sector. Methodologically, the thesis adopts a comparative and doctrinal research methods.

### The Choice of Jurisdictions for Comparison

South African and EU laws are selected for the purpose of comparison. Both South Africa and Ethiopia are situated in the same continent of Africa, embracing a federal state structure, being ratifying state parties to CRPD and promulgating anti-discrimination law to ensure equal

opportunity in employment for PWDs. However, the reason why South Africa is selected for this thesis more particularly is that the country has become exemplary for enacting an advanced extensive legislation including active implementation of the laws.<sup>4</sup> What is more, PWDs in this country have been provided a greater opportunity to take part in government decision-making process.<sup>5</sup> The similarities and differences in the implementation of the UNCRPD in the two countries will be also touched since it is ratified by all states. The European Union is selected as a third jurisdiction because of its continental feature of legal system like that of Ethiopia in which both of them frequently share elements from the common law. Despite both Ethiopia and EU have enacted anti-discrimination laws concerning PWDs in employment, there are still important lessons that Ethiopia can learn from the equal employment directive of EU as well as from the case law of the ECJ for its future legal reform.

### Methodology

I have used both primary legal sources (international treaties and other instruments, national laws, judicial decisions and interpretation) and secondary sources, academic literature as well as the academic analysis of primary social science research, which are necessary and relevant to the study. Considering the necessity of supporting my hypothesis through primary research within the framework of this thesis and given the financial limitation, I conducted interviews with responsible persons in the Ministry of Labour and Social Affairs, and Ministry of Federal Civil Service and some managers in private companies to get practical insights. The comparative

---

<sup>4</sup> ILO 'People with disabilities: Pathways to decent work: Report of a tripartite workshop Pretoria South Africa, 19-21 September 2006 '(Geneva ILO Office 2007) 40.

<sup>5</sup> H Hahn, 'Academic Debates and Political Advocacy: The US Disability Movement' in C Barnes, M Oliver and L Barton (eds), *Disability Studies Today* (Polity Press 2002) 183.

analysis is applied to assess the development, achievements and necessary tasks to make steps ahead in the examined jurisdictions.

### Structure of the thesis

The thesis is organized into five chapters. The first chapter provides a socio-economic, historical, and legal situation of PWDs in employment from international documents in general and in the comparator jurisdictions in particular. The second chapter also elaborates different legal and policy employment approaches with respect to PWDs. The third chapter of the thesis discusses particular obligations imposed upon employers by anti-discrimination laws. The fourth chapter, analyses enforcement/remedy issues and chapter five forwards conclusions as well as recommendation to the presented questions in the thesis.

## CHAPTER ONE

### Socio-Economic, Historical and Legal Background of PWDs

This chapter discusses the socio-economic, historical and legal situation of PWDs from the viewpoint of employment in the comparator jurisdictions of this thesis Ethiopia, South Africa and EU. I will endeavour to describe what sort of status do PWDs have within their society in terms of social, economic, historical as well as the legal protection they are given toward employment.

The chapter comprises four sections to address all of the concerns it needs to deal with. In the first section, a general overview of socio-economic, legal and historical aspects of PWDs is highlighted. In doing so, I will show how PWDs are considered in their society, how their economic and historical situation looks like and will look into some of legal framework from general international law documents. The second, third and fourth sections of the chapter also continue on providing the socio-economic, legal and historical realities of PWDs within comparator jurisdictions of Ethiopia South Africa and EU respectively. This is to show some specific country context and to clearly delineate specific factors that shaped the socio-economic, legal and historical conditions of PWDS in each jurisdiction.

#### 1.1 Socio-Economic, Legal and Historical context of PWDS in

##### General

Work is central to remain out of poverty, maintain social integration, realization of rights and other elements of life. ‘Employment can form a conduit to a spectrum of civil and human

rights'.<sup>6</sup> Work gives material means to acquire adequate food, shelter, clothing, access to education, health care and to have engagement in socio-cultural life in the community. As pointed out by Judith Shklar, productive work brings fruitful viability and active engagement within the society while the opposite leads to neglect and dereliction.<sup>7</sup>

Inclusion of PWDs in workplace also offers opportunity to interact with many individuals and contributes to minimize social exclusion and to promote equity and inclusion. WHO report indicates that there are over one billion PWDs constituting 15% of the world population.<sup>8</sup> This also signifies that PWDs are the world's 'largest minority' group.<sup>9</sup> It is also reported that 80% of the disabled population is found in developing countries.<sup>10</sup>

Disability is a cause for poverty for all PWDs anywhere in the world. This is mainly due to deprivation of equal opportunity to earn one's own income. Hence, poverty is a vicious cycle for most PWDs<sup>11</sup> because, the impact of disability is likely to increase poverty and, vice versa, condition of poverty may also significantly contribute to the occurrence of disability.<sup>12</sup> The reason is that if a person becomes with a certain type of disability, his opportunity to engage in productive life also decreases due the fact that he/she is perceived as if he/she is of no value or use.

---

<sup>6</sup> J Hayman, M Stein and G Moreno, 'Employment and Inclusion Worldwide' in J Heymann, M Stein and G Moreno (eds), *Disability and equity At Work* ((OUP2014) 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> Who and World Bank world report 2011.

<sup>9</sup> United Nations Convention on the Rights of Persons with Disabilities Some Facts about Persons with Disabilities (2006) <http://www.un.org/PWDS/convention/pdfs/factsheet.pdf> Accessed March 20 2016.

<sup>10</sup> WHO (n8)

<sup>11</sup> G Quinn, 'the United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability' (2009) 15(1) *Texas Journal on Civil Liberties & Civil Rights* 34.

<sup>12</sup> A Kanter, *The development of disability rights law Under International law: From Charity to Human Rights* (OUP 2015) 39.



Non-inclusion of PWDs in the labour market also causes the total loss of 1.37 and 1.497 USD<sup>13</sup> in the domestic GDP of the countries of the world. Exclusion of PWDs from engaging in a productive way of life does not only affect the PWDs themselves. Families and close relatives also share the effect of exclusion because of the responsibility to provide assistance to their disabled member.

Joseph Fishkin defines ‘bottlenecks’ cited in Areheart and Stein as ‘narrow spaces through which people must pass to reach greater opportunities’.<sup>14</sup> PWDs could not however pass through those spaces as a consequence of many external barriers including negative attitudes, flawed laws and policies.

There have been international efforts to address equal opportunity of PWDs in employment to address such challenges primarily from ILO a specialized agency of UN and the General Assembly of the UN itself. Most of the endeavours resulted in the adoption of resolutions and recommendations as well as conventions featuring different legal effect. While conventions produce a binding legal effect, resolutions, declarations and recommendation, which are referred as soft laws, do not create binding legal effect. However, it does not mean that they are adopted for no purpose since they can have a role to play in awareness raising, influencing future development and encourage national policy initiatives.<sup>15</sup>

ILO takes priority in adopting employment-oriented measures for PWDs. In 1925, ILO adopted recommendation No. 22 to set standards for workman compensation, which also

---

<sup>13</sup> M Robert, ‘Disability Issues, Trends And Recommendations For The WorldBank Social protection’ 2000 5 also available <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172606907476/DisabilityIssuesMetts.pdf> Accessed June 24 2018.

<sup>14</sup> B Areheart and M Stein, ‘The Disability-employability Divide: Bottlenecks to Equal Opportunity’ (2015)113 Michigan Law Review 877, 878.

<sup>15</sup> An example is given (albeit not directly on PWDs) by: European Union Anti-discrimination policy: From Equal Opportunities Between Women and Men to Combating Racism’ Directorate-General for Research Working document Public Liberties Series <[http://www.europarl.europa.eu/workingpapers/libe/102/text1\\_en.htm](http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm)> Accessed November 20, 2016.

included vocational re-education of injured workman given suitable condition by the government.<sup>16</sup> In 1944, recommendation No. 71 was adopted in order to respond to consequences of the Second World War. In this recommendation, whatever the origin of PWDs disablement, a criterion for training and work was only focused on employability.<sup>17</sup> Moreover, the recommendation also requires employers to apply a reasonable quota to hire PWDs.<sup>18</sup> Besides rehabilitation and quota, it additionally insists that measures have to be taken to tackle employment discrimination against PWDs.<sup>19</sup>

In 1955, ILO adopted recommendation No. 99, which was the first comprehensive non-binding document only meant for PWDs vocational rehabilitation. It also defined for the first time, who a disabled person is and what does vocational rehabilitation mean.<sup>20</sup>

ILO has not only provided non-binding recommendations but it has also incorporated the concern for PWDs in other binding conventions. For instance, Article 35.1 of the 1952 Social Security Convention No. 102 provides that, ‘the institutions or Government departments administering the medical care shall co-operate, wherever appropriate, with the general vocational rehabilitation services, with a view to the re-establishment of handicapped persons in suitable work.’<sup>21</sup> This reflects the era of the medical approach coupled with assistance.

Convention No. 111 of 1958, which tackles employment discrimination, does not include disability as one protected ground of discrimination. Given the fact that ILO’s previous consideration to include PWDs, it may create a bit surprise to observe that PWDs are absent

---

<sup>16</sup> ILO Workmen's Compensation (Minimum Scale) Recommendation 22, Adopted June 10 1925 Para IV.

<sup>17</sup> ILO Employment (Transition from War to Peace) Recommendation 71 Adopted May 12 1944 Para 39.

<sup>18</sup> Employment (Transition from War to Peace) Recommendation 71 Adopted May 12 1944 Para 43.1.

<sup>19</sup> Ibid Para 43.3.

<sup>20</sup> ILO Vocational Rehabilitation (Disabled) Recommendation, June 22 1955 Art. I Para 1.A and B.

<sup>21</sup> ILO Convention No. 102 Social Security (Minimum Standards) Adopted June 28 1952 Art. 35.1.

from the list of protected grounds of discrimination in the convention.<sup>22</sup> Nonetheless, Article 5.2 of the same convention expressly stipulates that, ‘sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination’.<sup>23</sup> Hence, it can be concluded that Convention No. 111, while distinguishing between assistance and non-discrimination, by recognizing special protection provided for PWDs has contributed to preventing discrimination against others.

The 1967 Convention No. 128 on invalidity, old-age and survivors’ benefits obliges the ratifying states to provide rehabilitation service through which PWDs can resume their previous work or if that is not possible, to ensure that alternative suitable means of gainful living is provided according to the skill and capacity of the PWDs as well as to take measures that will further assist the placement of PWDs in employment.<sup>24</sup>

Convention No. 159 on vocational rehabilitation in employment is one of the most significant achievements of ILO with respect to employment opportunity of PWDs because of the fact that this convention is binding upon all ratifying states, more specifically about PWDs. The convention most importantly stresses that the purpose of vocational rehabilitation is enabling PWDs to secure, retain and advance suitable employment that will help integration and reintegration in the society.<sup>25</sup> In addition to appropriate rehabilitation services, the convention also requires states to evaluate their vocational rehabilitation services by a periodic review.<sup>26</sup>

---

<sup>22</sup> A O'Reilly, *The Right to Decent Work of Persons with Disabilities* (revised edn Geneva, International Labour Office 2007) 31.

<sup>23</sup> Convention (No. 11 concerning Discrimination in respect of Employment and Occupation Adopted on 25 June 1958 entry into force 15 June 1960 Art. 5.2.

<sup>24</sup> ILO Invalidity, Old-Age and Survivors' Benefits Convention No. 128 June 29 1967 Art. 13.A and B.

<sup>25</sup> ILO Convention No. 159(N 20) Art. 1.2.

<sup>26</sup> Ibid Art. 2.

Moreover, equal opportunity including special positive measure without which equal opportunity could not be realized has been also emphasized in the convention.<sup>27</sup>

The role of the UN has been originally limited in respect of the protection of rights of PWDs. Article 2 of the UDHR<sup>28</sup>, which prohibits discrimination, does not mention disability as one of the protected characteristics; Article 2.1 of the ICCPR<sup>29</sup> similarly does not stipulate PWDs as a protected group from discrimination. The same is true for the ICESCR. All of them manifest a general entitlement of human rights without explicit mention of PWDs. However, such kind of general protection cannot be taken as if the UN has ignored the issues of PWDs. This lacuna corresponds to the very conception of disability at the time as an issue of assistance and rehabilitation rather than a human rights issue. It is possible to argue that the UN system failed to appreciate the specific reality and invisibility of PWDs which is a common experience in every part of the world.

At the same time there were some declarations adopted by the UN though they had not been binding. The 1971 declaration on mentally retarded persons in terms of employment for instance provides that mentally retarded persons have the right to engage in productive economic life according to their capabilities.<sup>30</sup> The 1975 UN Declaration on the Rights of Disabled Persons also recognized the same right that was included in the previous declaration including the right to join trade union for PWDs.<sup>31</sup>

In addition to these Declarations, the UN Standard Rules on the Equalization of Opportunity and the CESC General Comment No. 5 have greater significance in promoting and

---

<sup>27</sup> Ibid Art. 4.

<sup>28</sup> Universal Declaration of Human Rights (UDHR) December 10 1948 Art. 2.

<sup>29</sup> International Covenant on Civil and Political Rights (ICCPR) Adopted December 16 1966 and entry into force March 23 1976 Art. 2.1.

<sup>30</sup> Declaration of mentally Retarded Persons General Assembly Resolution 2856 (XXVI) December 20 1971 para 3.

<sup>31</sup> Declaration of Disabled Persons General Assembly resolution 3447 (XXX) December 9 1975 Para 7.

recognizing the rights of PWDs in different areas of life in general and particularly in employment. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities was the outcome of international decade of disabled persons which run from 1983-1993.

Prevention, rehabilitation and equalization of opportunity are the most important pillars of this document.<sup>32</sup> Prevention is concerned with actions that may be taken to preclude the occurrence of disability.<sup>33</sup> Rehabilitation also refers to those measures enabling a PWDs to have an independent life and helping to advance for other possible opportunities.<sup>34</sup> Equalization of opportunity on the other hand involves those adjustment in the society and the environment which are capable of being accessible to PWDs.<sup>35</sup> Moreover, rule 7 Paragraph 2 of this document also clearly provides that states have an obligation to integrate PWDs in open labor market by employing various schemes and requires encouragement of employers to make reasonable accommodation.<sup>36</sup>

The CESCR General Comment No.5 on Persons with Disabilities<sup>37</sup> on its part has made recognition to the exercise of those work-related rights provided in the covenant to be similarly enjoyed by PWDs. For instance, paragraphs from 20 up to 27 of the general comment have clearly incorporated or transformed those provisions which talk about work related rights found under article 6-8 of the ICESCR.<sup>38</sup> The General Comment also acknowledges that failure to

---

<sup>32</sup> See: UN Standard of Equalization, Introduction, Fundamental concepts in disability policy (hereafter UN Standard Rule)

<sup>33</sup> Ibid Para 22.

<sup>34</sup> Ibid Para. 23.

<sup>35</sup> Ibid Para. 24.

<sup>36</sup> Ibid Rule 7 Para 2.

<sup>37</sup> Committee on Economic, social and Cultural Rights (CESCR) Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on December 1994 (Contained in Document E/1995/22)

<sup>38</sup> Ibid Para. 20-27.

explicitly address the issues of PWDs in the covenant was because of lack of awareness about them.<sup>39</sup>

In spite of the adoptions of declarations, recommendations and standards, the first binding international legal instrument Convention on the Right of Persons with Disabilities has been adopted in 2006 and came in to force in 2008. This specific treaty on PWDs has been necessitated because of many reasons. For example, the adoption of this specific instrument is very essential to create a binding obligation in the prevention of discrimination on the ground of disability since the previously existing instruments had been ‘toothless tigers’ in regards to their effectiveness. See Degener and Quinn for more detail on the principal arguments why specific treaty on disability was required.<sup>40</sup>

The CRPD comprises all sorts of rights including civil political rights and socio-economic rights. With respect to the right to employment, article 27 lays down the obligations of the ratifying parties that they have to guarantee the right of PWDs and provide them with the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to them.

## 1.2 Ethiopia

Like in any part of the world, PWDs in Ethiopia face many socio-economic challenges to realize their meaningful life. Due to extreme segregation and lack of public understanding that PWDs are not able to be productive citizens, they could not benefit from social and economic

---

<sup>39</sup> Ibid Para. 6.

<sup>40</sup> T Degener and G Quinn, A Survey of International, Comparative and Regional Disability Law Reform <<https://dredf.org/news/publications/disability-rights-law-and-policy/a-survey-of-international-comparative-and-regional-disability-law-reform/>> Accessed October 30 2016.

activities of their own country. Even worse, in the mind of some people disability is associated with the consequence or result of evil spirit so that it is common to hide or keep PWDs inside home not to be publicly seen.<sup>41</sup> This population has not been recognized even as one category of society that needs protection and inclusion within the state policy and program. As such, it was not a legal, instead, only a moral obligation of the society to take care of PWDs by providing food and shelter as a form of charity. This had been made mainly by churches, some community groups and to a certain extent by foreign missionaries despite the country was not colonized.

The population and housing census of 2007 of Ethiopia shows that the number of PWDS is less than one million about 805,492.<sup>42</sup> Due to lack of a reliable definition, what disability is and due to the motivation to conceal PWDs at the time of the population and housing census makes their exact number unidentifiable.<sup>43</sup> The world report on disability which was published just after five years following Ethiopia's population and housing census result indicates that, Ethiopia has an estimated fifteen million populations of disabled persons<sup>44</sup> out of a population of about 90 million.

Disabled people in Ethiopia have been experiencing marginalization from major life activities in the society including employment. The 2010 report of Ministry of Labor and Social Affairs also evinces that 95% of PWDS in Ethiopia are estimated to live in poverty many of whom are dependent on family support and begging to earn their means of living.<sup>45</sup> The higher rate of poverty among the disabled population has a downside effect not only to their

---

<sup>41</sup> Country profile on PWDS, Federal Republic of Ethiopia, Japan international cooperation agency plan and evaluation department March 2000.

<sup>42</sup> Central Statistical Agency Population and Housing Census Report-Country - 2007, 174.

<sup>43</sup> ILO Ethiopia country profile, Employment of peoples with Disabilities: The Impact of Legislation (Eastern Africa) 3. March 2012.

<sup>44</sup> WHO world report on disability 2011.

<sup>45</sup> FDRE(MOLSA Report Baseline Study on the Status of Persons with Disabilities and the Influence of the African Decade PRONOUNCEMENT in Ethiopia 2010

psychological, material and social condition but also impedes the level of growth and development of Ethiopia. For instance, an ILO study indicates that economic loss to Ethiopia as a result of excluding PWDs from participating in labor market is estimated to be \$667 million or 5% of the country's GDP.<sup>46</sup> Policies and laws have contributed to such exclusion and abandonment by failing to address the concern of PWDs or by framing flawed policies and laws regarding disabled people. Although it is precarious to conclude that Ethiopia had not any attempt to consider PWDs in its policy and legal framework, it was in fact negligibly considered.

If one looks at the country's legal and policy documents, he/she finds no disability specific instrument until 1971 of the imperial order to provide for the establishment the rehabilitation agency. Hence, it is possible to speak confidently that 'disability was not a matter of law and policy before 1991'.<sup>47</sup> This is because of the fact that Ethiopia's serious policy and legal regard towards the right of PWDS had begun after the introduction of a new constitutional order in the country.

The Pioneer legal instrument about PWDS, which does not actually involve entitlement to rights and protection from discrimination, was Imperial Order No. 70/1971 to provide for the establishment of the Rehabilitation Agency enacted during the era of the Emperor Haile Selassie I. According to this Piece of legislation, 'Disabled shall mean any person who because of limitations of normal physical or mental health, is unable to earn his livelihood and does not

---

<sup>46</sup> S Backup, 'the price of Exclusion' 2009 on ILO discussion paper

<sup>47</sup> Kasahun Yibeltaal, 'Law and policy situation of Persons with disabilities in Ethiopia' Disability Risk Management Conference(2013) [https://www.dppc.gov.et/downloadable/reports/Early\\_warning/DRR%20DAY-2013/FENAPD%20Law%20and%20policy%20situation%20of%20persons%20with%20PWDS\\_Kassahun%20yibel-tal.pdf](https://www.dppc.gov.et/downloadable/reports/Early_warning/DRR%20DAY-2013/FENAPD%20Law%20and%20policy%20situation%20of%20persons%20with%20PWDS_Kassahun%20yibel-tal.pdf)> Accessed October 5 32016.



have anyone to support him; and shall include any person who is unable to earn his livelihood because of young or old age.’<sup>48</sup>

The spirit of this legislation as it can be easily understood is aimed at providing support and assistance to those who have mental health and physical limitation and to those who are in need. As this law clearly stipulates, PWDs become recipients of assistance because of mental and physical limitation and cannot support themselves like the young and people. A typical medical model of disability is expressly incorporated within this legislation since it makes disabled persons recipients of charity and welfare depending on their functional limitation. Despite the fact that disabled persons were regarded as those who are incapable of making life with no equal opportunity in employment was formulated, it had laid down at least a ground for further policy and legal consideration in the country.

The Rights of Disabled Persons to Employment Proclamation 101/1994 is the first legislative measure to realize the employability of PWDS in Ethiopia. Ratification of the ILO convention No. 159 in January 28, 1991 by Ethiopia might have possibly triggered the promulgation of this proclamation during the transitional government of the then time.

Article 2 of this Proclamation provides that: ‘a person who is unable to see, hear, or speak or is suffering from injuries to his limbs or from mental retardation, due to natural or man-made causes.’<sup>49</sup> From the definition provided in the proclamation, one can infer that PWDs are the consequence of their impairment. Hence, the Proclamation unequivocally adheres to medical-individual model of disability.

Unlike its predecessor i.e. Order No. 70/1971, Proclamation 101/1994 acknowledges that PWDs are able to engage in productive economic life. Paragraph 2 of the Preamble recognizes

---

<sup>48</sup> Imperial Order to Establish the Rehabilitation Agency for the Disabled Art. 2.

<sup>49</sup> Proc. No. 101/1994 Art.2.

that: ‘WHEREAS, it has been realized that disabled persons have got less job opportunities, despite the fact that some of them have acquired the appropriate training and skills through their own efforts and the assistance of the Government and humanitarian organizations’.<sup>50</sup> Reserving posts to realize employability of PWDs is the core idea of Proc. 101/1994. Art. 4 sub. 1 and 2 of the Proclamation clearly provide that:

1. Posts suitable for Disabled Persons shall be identified and reserved from among vacancies created in offices and undertakings.
2. Only Disabled Persons may compete for posts reserved pursuant to this Article.

The Constitution of the Federal Republic of Ethiopia (hereafter FDRE Constitution) of 1995 which devotes two-third of its provisions for the protection of fundamental human rights, can be taken as the typical of its kind in recognizing basic citizen’s right. Yet, in terms of recognizing the rights of PWDs, it remains inadequate. Particularly, with respect to right to employment of PWDs, no statement for inclusion has been made in the constitution except providing rehabilitation and assistance.

Article 41.5 of the FDRE constitution stipulates that ‘within its available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.’<sup>51</sup> This provision, which is found in the socio-economic rights of citizens, does not ensure the equal employment opportunity of PWDs. Rather, it conveys a message that PWDs are among those who deserve assistance since they are incapable of engaging in productive life. Namely, they are placed in the same category with those who are unable to engage in productive life like older people and children. This stipulation is a typical reflection of medical model of disability. The constitution does not even

---

<sup>50</sup> Ibid Preamble Para2.

<sup>51</sup> FDRE Constitution Art. 41.5.

recognize PWDs under the provision that provides about labor rights of the citizens.<sup>52</sup> Further, Article 25 of FDRE constitution also does not enumerate disability as a protected ground of discrimination. It could be possible to interpret the open-ended phrase ‘other statuses as it also include PWDs. Nevertheless, it may be argued that even if the constitution mentions PWDs as those groups to receive assistance, it does not dictate subsidiary laws to be passed in light of social welfare approach.<sup>53</sup>

To the view of the author, non-recognition of disability expressly under article 25 as a protected ground of discrimination, failure to ensure the equal opportunity of PWDs under article 42, and categorizing them under article 41.5 with those who are unproductive respectively suggests that the constitution seems to maintain the status quo.

### 1.3. The Republic of South Africa

South Africa’s statistics on the basis of the 2011 census reveal that the prevalence rate of PWDs is 7.5%. According to the 2014 updated statistics, the composition according to the type of impairment shows visual difficulties 11%, cognitive difficulties (remembering, concentrating) 4.4%, hearing 3.6%, and communication, self-care and walking difficulties about 2.0%.<sup>54</sup>

The socio-economic condition of PWDs in South Africa is much different from that of Europe and Ethiopia since the country was under the domination of apartheid regime for many years. This means that PWDs had to face discrimination on the basis of their disability as well as their race .

---

<sup>52</sup> Ibid Art.42.

<sup>53</sup> Seyum Yohannes, ‘Towards Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/2008 on the Employment of Persons with PWDS’ (2010) 24(1) Journal of Ethiopian Law 90,99.

<sup>54</sup> Statistics of South Africa 2011 <http://www.statssa.gov.za/?p=3180> Accessed November 21 2016.

Vernon and Swain point out to this fact by noting that, ‘factors of gender, race, class and disability interact and impinge differently in different situations, sometimes in combination and sometimes individually, either exacerbating or modifying the experience of discrimination’<sup>55</sup> so that black PWDs suffered from a strong magnitude of discrimination compared to their white counterparts. Black women with disabilities were also the most disadvantaged compared to black and white men with disabilities as well as with white women with disabilities. Besides, disabilism and racism considerably reduce opportunities of disabled, black and ethnic minority groups to be employed or even if they get hired, they are most likely to be found in ‘low-paid and low-skilled jobs’.<sup>56</sup>

The apartheid system did deprive the PWDs from access to education, employment and health care.<sup>57</sup> They had been also regarded as ‘object of petty and in need of care’.<sup>58</sup> However, during the transition period (1990-1994) of South Africa, disability right oriented non-governmental organization called “Disabled People South Africa” (DPSA)<sup>59</sup> was formed and it allied with the African National Congress.<sup>60</sup> As a result, the concern of PWDs has been incorporated in the new Constitution of South Africa of 1996 (hereafter referred as CSA). Equality clause of Section 9 Sub section 3 explicitly mentions that: ‘the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.<sup>61</sup> Moreover, the constitution

---

<sup>55</sup> A Vernon and J Swain, ‘Theorizing Divisions and Hierarchies: Towards a Commonality or Diversity?’ in C Barnes, M Oliver and L Barton, *Disability Studies Today* eds (Polity Press 2002) 83.

<sup>56</sup> *Ibid.* 82.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> <<http://www.dpsa.org.za/>> Accessed April 8, 2017

<sup>60</sup> *Ibid.*

<sup>61</sup> Constitution of the Republic of South Africa Act No. 108 1996 Section 9.3 Hereafter SAC.

recognizes that such discrimination is prohibited both at private and public spheres.

While Section 9.3 expressly prohibits the state from unfair discrimination, Section 9.4 lays down the same prohibition for (private) persons on the basis of the stated grounds.<sup>62</sup> It also requires that ‘National legislation must be enacted to prevent or prohibit unfair discrimination’.<sup>63</sup> Unlike other developing countries, South Africa has enacted several pieces of legislation and formulated ample policies to address issues relating to PWDs including the right to employment.

The White Paper on Integrated National Strategy on Disabilities of 1997 explicitly recognized the barriers and disastrous situations faced by PWDS, in particular in the intersection of race, gender and disability and called for national policy action in all areas of life, and chapter three of the Strategy incorporates specifically the right to employment.<sup>64</sup> Following this strategy, the Employment Equity Act (hereafter SAEAA) has been promulgated to abolish unfair labor practices against PWDs, members of racial groups and women at the work place.

The Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter PEPUDA) has also been enacted in 2000 to ensure the prevention, prohibition and elimination of unfair discrimination on one or more protected grounds of discrimination of race, gender and disability. This legislation is different from SAEAA because this act is meant to be applicable outside employment matters. There is no clear prohibition of hate speech under the SAEAA. Therefore, in case of hate speech committed at the workplace, the victim has the possibility to take the case to equality courts established under PEPUDA. The silence of SAEAA regarding

---

<sup>62</sup> IbidSection 9.4.

<sup>63</sup> *Ibid.*

<sup>64</sup> White Paper Integrated National strategy on disabilities <<http://www.independentliving.org/docs3/sa1997wp.pdf>> Accessed April 8, 2017 .

hate speech may be interpreted or understood as if the matter can be resolved by PEPUDA.<sup>65</sup> Discrimination in the supplying of goods and services and accessibilities can also meaningfully be complained by means of PEPUDA.

A new document titled as “White paper on the right of PWDs” has been also issued in 2015 in order to update the former white paper on disabilities and to endorse South Africa’s obligation under the CRPD<sup>66</sup> as well as to strengthen other efforts.

#### 1.4 Europe – The Council of Europe and the European Union

In Europe, similar to Ethiopia and South Africa, PWDs have long been one of the marginalized segments of the society facing exclusion and segregation although surrounded with pity and charity. There is a reciprocal causality between disability and poverty (not only disability results in poverty, but also poverty causes disability). Poverty and disability is more prevalent in under-developed states. Nonetheless, in highly developed states such as in Europe, the high life expectancy can also contribute to the incidence of disability.<sup>67</sup> In Europe, according to 2017 statistics, the disability rate in the working age population is 14%. As to the types of impairment, lifting and carrying difficulties is 5%, walking is 3.8%, bending 2.9 %, sitting 2.3, seeing 2, remembering or concentrating 1.6%.<sup>68</sup>

Even though PWD are excluded and lack opportunity to engage in the open labor market to earn their means of living, the strong social welfare system developed in many EU Member States can at least respond to the needs and challenges of PWDs.. Yet, such model also has an

<sup>65</sup> R Kruger, ‘Small Steps to Equal Dignity: The Work of the South African Equality Courts’ (2011) Equal Rights Review <[http://www.equalrightstrust.org/err7\\_kruger.pdf](http://www.equalrightstrust.org/err7_kruger.pdf)> Accessed 23 January 2015.

<sup>66</sup> White Paper on the Rights of Persons with Disabilities (N64) foreword.

<sup>67</sup> D Mont, ‘Measuring Disability Prevalence’ (WB 2007) 6.

<sup>68</sup> [http://ec.europa.eu/eurostat/statistics-explained/images/8/8c/Infographic\\_Disability\\_statistics\\_final.png](http://ec.europa.eu/eurostat/statistics-explained/images/8/8c/Infographic_Disability_statistics_final.png)

exclusionary effect. This is because of the fact that the system ‘permits society to establish public services and social institutions without regard for people with disabilities’, considering them inevitably unable to participate.<sup>69</sup> The rate of poverty in the disabled society is also estimated to be some 70% higher than the general population.<sup>70</sup> Exclusion of PWDs from employment is financially detrimental not only to the disabled workers but also it results in financial consequence of the European Union economy.<sup>71</sup> A study conducted in 2008 evinces that the Union faces a total loss of 40.3 billion EUR as a result of PWDs non-involvement in employment and low level of their qualification.<sup>72</sup>

The social and historic presence of disability – in the wake of wars, accidents, lack of public health and birth risks – resulted in general legal developments in Europe only in the 20<sup>th</sup> century<sup>73</sup>. The legislative development in the EU countries pertaining to PWDs can be divided to three periods or phases – as it is presented by the paper of G Quinn and T Degener.<sup>74</sup> The first phase which started after the World War I was mainly concerned with the protection or maintenance of veterans through social welfare system. In this period, veterans had exclusively been entitled to assistance, rehabilitation and employment quota which can be regarded as a societal compensation. The second phase commenced in the 1960s. During this phase, there had

<sup>69</sup> L Waddington and M Diller, ‘tension and coherence between disability policy The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law’ <http://dredf.org/news/publications/disability-rights-law-and-policy/tensions-and-coherence-in-disability-policy/> Accessed February 16 2016.

<sup>70</sup> A Lawson, ‘Disability employment in the European union: Collective Strategies and Tools’ in J Heymann M Stein and G Moreno (eds), *Disability and Equity at Work* (OUP 2014) 391.

<sup>71</sup> *Ibid.*

<sup>72</sup> European Policy evaluation consortium (2008) *Study on discrimination on grounds of religion and belief age disability and sexual orientation outside of employment* Brussels EPEC.

<sup>73</sup> There were isolated national legislative steps, e.g. the Bismarckian social security system, among its legislative acts the 1889 Old Age and Disability Insurance Bill, however, these were isolated and not overall European developments.

<sup>74</sup> T Degener and G Quinn, *A Survey of International, Comparative and Regional Disability Law Reform* <https://dredf.org/news/publications/disability-rights-law-and-policy/a-survey-of-international-comparative-and-regional-disability-law-reform/> Accessed October 30 2016.

been a trend of broadening the groups of beneficiaries qualified for social welfare. The origin of the disability was comprehensive and PWDs in all forms were included to be beneficiaries of social welfare measures like veterans. The third phase is the period of anti-discrimination laws. Unlike the previous periods, the focus was on tackling discrimination against PWDs and by considering the fact that they are human beings with dignity entitled to legal protection, rather than groups deserving pity as well as provision of social welfare.

The Council of Europe and the European Union (originally the European Economic Communities) have been the major international (supranational) institutions formed in Europe in the aftermath of World War II with a view to creating united Europe according to Churchill's vision.<sup>75</sup> Both institutions pursue their own different objectives; the Council of Europe promotes protection of human rights, respect for the rule of law and democratization. In contrast the goal of the original EEC was purely economic integration. Today, the EU is also based "on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".<sup>76</sup>

The detailed discussion below on the development of anti-discrimination laws in Europe protecting the PWDs will be presented separately: first the institutions of the Council of Europe and then the relevant law of the European Union.

#### 1.4.1. The Council of Europe

The Council of Europe was founded in 1949, having 47 member states presently. In 1950 the organization adopted the European Convention on Human Rights and Fundamental Freedoms

---

<sup>75</sup> G Weil, A Handbook on the European Economic Community (Frederick A. Praeger, Inc.) 1995 14.

<sup>76</sup> Consolidated version of the Treaty on European Union (part of the Lisbon Treaty), Art. 2.



(ECHR) a treaty of civil and political rights, meant to be the European equivalent of the 1948 Universal Declaration of Human Rights. In 1961 the Council of Europe adopted the European Social Charter (ESC), regarded as a counterpart of the ECHR in the fields of economic and social rights. The two documents are frequently labelled as the European equivalents of the ICCPR and the ICESCR, the two UN documents adopted later, in December 1966, and coming into force in 1976.

The ECHR and the ESC reflected the earlier post-war approach to the protection of PWDs: disability was not considered as a matter of equal treatment, rather as a task for welfare and social assistance. The drafters of the ECHR have not considered disability as an attribute to be protected against discrimination, and the drafters of the ESC considered disability as an express ground for protection rather in the forms of assistance than on equality grounds.

Under the ECHR protection from discrimination is provided under article 14 guaranteeing that “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>77</sup> The non-discrimination clause of ECHR does not mention disability as a protected ground. Relying on the open ended formulation of Article 14 (“such as” and.. “any other status”) the European Court of Human Rights included by interpretation disability as a protected “other status”.<sup>78</sup> Although it is acceptable that PWDa are entitled to enjoy all rights without discrimination, exercise of the rights is however limited to only those specified rights in the ECHR. The adoption of Protocol No. 12 could have solved the problem with article 14 that

<sup>77</sup> European Convention on human Rights, November 1950 Art. 14.

<sup>78</sup> See for example the cases of *D.H. and others v. the Czech Republic* (13/11/2007), *Biao v. Denmark* (24/05/2016), *Guberina v. Croatia* (12/09/2016)

guarantee the ‘enjoyment of any rights set forth by law’<sup>79</sup> that extends protection to areas most important for PWD, including economic rights among others. Unfortunately, the low level of ratifications<sup>80</sup> has undermined the significance of the provision.

The European Social Charter, protecting fundamental economic and social rights, dedicated its Article 15 explicitly to the protection of the economic and social rights of the physically or mentally disabled, regardless to the nature or origin of the disability.

The Charter has been adopted in 1961 and entered into force in 1965. It recognized 19 different sets of rights in the area of employment, training and education, social security and social assistance.

In 1996 the Council of Europe adopted the Revised European Social Charter (RESC)<sup>81</sup>, in part extending significantly the list of protected rights (from 19 to 31, including for example the right to protection against poverty and social exclusion and the right to housing) and in part amending a number of provisions, adjusting them to the changed approach to human rights and equal treatment in Europe.

Article 15 has been one of the provisions primarily affected by this evolution and new spirit intending better protection of PWDs redrafted into an entirely new text.

While the 1961 Charter granted the right of the PWDs to “vocational training, rehabilitation and resettlement”, the RESC guarantees their right to “independence, social integration and participation in the life of the community”.<sup>82</sup> Correspondingly, the obligations of the States Parties have changed substantially. Instead of providing specialized placing services, sheltered

<sup>79</sup> Protocol No. 12 to the convention for the protection of Human Rights and Fundamental freedoms ETS No. 177 open and entered to enforce 04/11/2000 and 01/04/2005.

<sup>80</sup> 19 ratification out of 47 member states at the end of 2016.

<sup>81</sup> The RESC is gradually replacing the ESC, today only 9 countries out of 44 have not yet ratified the RESC.

<sup>82</sup> See Principle 15 of the 1961 European Social Charter, and Principle 15 of the 1996 Revised Social Charter.

workshops and employment quotas, and the new article 15 provide PWDs with guidance, education and vocational training in the framework of general schemes, integrating them into the ordinary working environment and to adjust the working conditions to the needs of the disabled (i.e. providing reasonable accommodation), also encouraging employers to hire and keep them at the workplace.

Quota and shelter workshop which were at the center of the previous charter are given less emphasis in RESC. Quota system has no recognition under Art. 15 section two of the RESC. However, if it has been applied by a certain state party, the committee which is mandated to supervise the implementation and enforcement of the charter must examine the effectiveness of applied quota.<sup>83</sup>

Sheltered workshops must also be reserved for those PWDS who would not be able to integrate in the ordinary labor market owing to reason of disability. Nonetheless, unlike the traditional mode of sheltered facility which targets keeping PWDS in the segregated setting, the main purpose of such sheltered facility is to help PWDS entering to open labor market. Moreover, PWDS who work in shelter facilities whereby the primary business is production must have at least basic labor rights, just salary as well as trade union rights.<sup>84</sup>

Art. 15 (1) of the RESC recognizes the mainstreaming of PWDS in ordinary schools unless otherwise effective justifications are forwarded to keep PWDS in separate or segregated schools.

As a further sign of progress, the new Article 15 (3) extends to areas beyond employment, and requires ratifying states to adopt provisions promoting the full social integration and

---

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>83</sup> Digest case law of the RESC 2008 112.

<sup>84</sup> Digest of the Case law of the RESC, 2008, 113.

participation of the PWDS. in the life of the community. This includes taking measures to provide technical aids, aiming to overcome barriers to communication and mobility. Such aids include accessibility of public transportation as well as assistance in adjustment of housing and public buildings, access to cultural and other activities.<sup>85</sup>

In summary, as regards to the main subject matter of this thesis which is employment, art. 15 section two of the RESC recognizes that PWDS have the right to engage in ordinary labor market and employers must arrange environment of the working place as well working condition. Reasonable accommodation for workers with disabilities is also guaranteed.

#### 1.4.2 The European Union

The picture given on the historic and social background of PWDS in the European Union cannot be much different from the situation in the countries associated in the organization of the Council of Europe, considering, that all EU Member States are a member of the Council of Europe and all of them has ratified the European Social Charter as well. With other words, the situation of social segregation, economic and social disadvantages of the PWDS coupled with their assistance through charity and/or social assistance was the same as all over Europe.

The legal background, on the other hand, has developed along a different path. The 1957 signing of the Rome Treaty<sup>86</sup> and the establishment of the European Economic Community had not among its goals either promoting human rights or social welfare, as it has aimed exclusively establishing a common market with the free movement of capital, goods, services and people.

---

<sup>85</sup> Ibid 114.

<sup>86</sup> The treaty establishing the European Economic Community (the EEC treaty), signed in Rome on 25 March 1957.

The prohibition of discrimination was not a general rule: it was only prohibited with regard to nationality among member state actors. Further, an exceptional provision on equal pay for men and women<sup>87</sup> was also accepted purely with the aim not to distort economic competition between countries. The current EU is the outcome of several processes gradually developing the social dimension and then a human rights face of the today European Union. The Maastricht Treaty of 1992 extended the competence of the EU to certain social and employment matters. A milestone step in this regard was the 1997 Amsterdam Treaty empowering the European legislative organs to adopt non-discrimination laws, prohibiting discrimination among others on the ground of disability.

The last phase of the development has opened with the Lisbon Treaty signed in December 2007, entering into force in December 2009 that declared its new foundations based on democracy and human rights<sup>88</sup> and the parallel adoption of the Charter of Fundamental Rights in its Article 26 declaring that the “Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. This provision is almost identical with Article 15 of the RESC, promising equality, inclusion and autonomous valuable life in the community.

The Charter has in principle the same mandatory force as the Treaty, however, only, when EU law is adopted by the EU or implemented by Member States. Thus, Article 26 of the Charter of Fundamental Rights has not yet mandatory power beyond the prohibition of discrimination being a part of EU law based on Directive 2000/78/EC.

---

<sup>87</sup> Article 119 of the EEC Treaty.

<sup>88</sup> See on Article 2 of TEU above in note....

Discrimination on the basis of disability had been unaddressed until the coming into force of the Amsterdam treaty. This has denied the Union any legal base in the Treaties to take legislative measures toward discrimination against PWDs. The Amsterdam Treaty laid the foundation for tackling discrimination, among others, on the basis of disability. More specifically, art. 13 of this Treaty states that: “without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.<sup>89</sup>

Yet, it is important to note that article 13 is not a mandatory non-discrimination rule. Rather it is only permitting, providing the legal base to regulate on discrimination. For some proponents of anti-discrimination law, phrases like ‘appropriate action’ in the treaty were somewhat confusing<sup>90</sup> and that this general principle could not be legally binding by itself.<sup>91</sup> However, the union issued directive 2000/78/EC general framework for equal treatment in employment and occupation completing the directives regulating the prohibition of discrimination on the ground of race and ethnicity<sup>92</sup> and on the ground of sex<sup>93</sup> so as to give life for Art. 13 of the Amsterdam Treaty.

The EU equal employment directive which is referred as EUEED throughout this thesis is a kind of framework anti-discrimination legislation to prevent employment related discriminations at work place on the basis of religion, age, sexual orientation and disability. This legislation sets

<sup>89</sup> Article 13 of the Treaty of Amsterdam, today Article 19 of the Lisbon Treaty.

<sup>90</sup> M Campbell, ‘Disability Rights and the EU Labour Market: An Analysis of Legislation and Policy’ (2010) 6 Volume Croatian Yearbook of European Law & Policy 232,

<sup>91</sup> *Ibid.* 241.

<sup>92</sup> Directive 2000/43/EC

<sup>93</sup> Directive 2006/54/EC, the so called Recast directive on equality between men and women in employment and social security.

out the minimum standards that member states have to comply while allowing them to give more protection in their national laws. The directive also comprises four chapters, thirty seven Preamble paragraphs and 21 articles.

Substantively speaking, the directive outlaws both direct and indirect discrimination. Reasonable accommodation is also included in the directive as a requirement under the equal treatment obligation. Positive action has been also recognized in order to achieve substantive equality and taking such measure does not amount to discrimination.

Details of this regulation, including procedures will be dealt with in the Chapters on the coverage and enforcement.

## CHAPTER TWO

### Disability Models and alternative policy/legal approaches in Employment for PWDS

The policy and legal context of disability has been formed by various approaches that are used to conceptualize what disability refers to. The most common forms of such models are known as medical-individual and social model of disability. Any country's national policy regarding PWDs is likely to be influenced by one of these models depending on the choice of the model that policy makers inclined to favor.

#### 2.1. The Individual/Medical Model of Disability

The medical disability model is the traditional-long-lived one which 'locates the problem of disability', within the individual himself/herself<sup>94</sup>. Moreover, the model associates the origin of disability from the person's functional limitation. It was believed that something 'wrong'<sup>95</sup> happened to an individual because of unfortunate fate. Providing care and attempting to cure the impairment takes the primary measure to deal with the problem. The involvement of the physicians is very immense since they are the competent professionals to determine the state of the impairment. If curing is impossible, then PWDs are placed in a segregated rehabilitative

---

<sup>94</sup> M Oliver: The politics of disability 1996 32.

<sup>95</sup>M Oliver: 'If I had a hammer: the social model in action' in J Swain, S French, C Barnes and C Thomas Disabling Barriers Enabling Environments, eds (2nd edn, Sage Publication 2004) 8-9.



center to receive charity since they are perceived to be incapable of leading a fruitful life by themselves as a consequence of their impairment including employment. This model served for too long in conceptualizing disability as purely health related issue, sign of abnormality and viewed disabled persons as patients. The primary mechanism of addressing issues of disability was also through medical and rehabilitative interventions until 1970s that marked the beginning of disability right movement.

## 2.2 The Social Model of Disability

The social model of disability which contrasts to the conception and understanding of individual-medical model of disability emerged around 1975 by the time the Union of Physically Impaired Against Segregation (UPIAS) made an articulation that ‘it is society which disables physically impaired people. Disability is something imposed on top of our impairments; by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.’<sup>96</sup>

The concept of the social model of disability was further developed and expanded by the disabled academician Mike Oliver in 1983. The social model of disability distinguishes between impairment in medical terms and disability as a result of those barriers that arise from an impaired person’s interaction with the external environment. Unlike that of the individual/medical model, the social model of disability attributes the deficiencies of the disabled persons to the attitudinal, environmental and legal barriers. Thus, disability according to this model is caused loss and limitation of opportunity within the society. By removing such existing

---

<sup>96</sup> Fundamental Principles of Disability. Available: <http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf> See also: M Oliver, the politics of disability ( Palgrave Macmillan 1996) 83.

barriers, disabled persons can be owners of their affairs rather than ‘passive recipients of care’.<sup>97</sup>

Both medical and social model of disability consider disability as a ‘difficult predicament’ albeit the solution they offer is very different. While the medical model stops at the intervention of medical professionals, the social model requires the transformation of societal attitude and state policy interventions.<sup>98</sup>

Despite the fact that the social model of disability seems the overarching modern conception about disability, it faces critique from different point of views. In this respect, Mike Oliver identifies and raises five basic critiques against the social model of disability. Firstly, there is a claim which asserts that the social model of disability does not sufficiently deal with the realities of impairment.<sup>99</sup> This is because, personal experiences of a disabled individual is not at the core of the social model of disability.<sup>100</sup> Albert also argues that the realities of impairment are often overlooked by non-disabled people.<sup>101</sup> Furthermore, they add that ignoring impairment ‘is problematic in the North, but when applied to the South it is catastrophic.’<sup>102</sup> This assertion is contested by Oliver who is an academician with disability himself. He argues that such views are the result of mistaken perception of the social model.<sup>103</sup>

---

<sup>97</sup> Bill Albert ‘Briefing Note: The Social Model of Disability, Human Rights and Development’. Disability KaR (Knowledge and Research) Research Project: Enabling disabled people to reduce poverty. (2004)

<sup>98</sup> K Lamichhane, *Disability, Education and employment in Developing countries From Charity to Investment* (Cambridge University Press 2015) 3.

<sup>99</sup> M Oliver, ‘If I had a hammer: the social model in action’ in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 8-9

<sup>100</sup> *Ibid.*

<sup>101</sup> B Albert (N 97) 4.

<sup>102</sup> *Ibid.*

<sup>103</sup> M Oliver, ‘If I had a hammer: the social model in action’ in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 8-9

Secondly, there is a claim which provides that 'subjective experiences of the 'pains' of both impairment and disability are ignored by the social model.<sup>104</sup> In this regard, Oliver argues that the critique is not tenable.<sup>105</sup>

Thirdly, the social model is also claimed to be inadequate because of its failure to incorporate different social divisions like race, gender, age and etc.<sup>106</sup> However, non-inclusion such dimension does not reflect its inadequacy. Those who criticize on this ground should nonetheless design the model in light of those social divisions rather than finding the perceived failures of the social model.

Fourthly, the social model is criticized on the basis of its lack of focus on the issue of 'otherness'.<sup>107</sup> Such claim mainly stems from the cultural positioning of PWDs. Hence, political representation should have been focused or embedded in the social model of disability. Yet, while there are numerous PWDs in absolute poverty, it is inappropriate to shift the attention of disability movement into a realm of politics.

The fifth and last critique of the social model, addressed by Mike Oliver, concerns its inadequacy to be titled as a social theory. Oliver challenges that none of the scholars have ever claimed the model as a social theory.<sup>108</sup>

---

<sup>104</sup> M Oliver, 'If I had a hammer: the social model in action' in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 8-9

<sup>105</sup> M Oliver, 'If I had a hammer: the social model in action' in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 8-9

<sup>106</sup> M Oliver, 'If I had a hammer: the social model in action' in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 8-9

<sup>107</sup> M Oliver, 'If I had a hammer: the social model in action' in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 8-9

<sup>108</sup> M Oliver, 'If I had a hammer: the social model in action' in John Swain, Satfy French, Colin Barnes and Carol Thomas (eds), *Disabling barriers and Enabling Environments* (Sage Publication, 2004) 9

Bill Albert also analyzes the relevance of social model in light of developing countries. In his “Brief Note” he criticized the social model of disability because of ignoring impairment, assistive technology, cultural differences, disability differences and poverty.<sup>109</sup>

Shakespeare also asserts on the other hand that ‘Impairments may not be a sufficient cause of the difficulties which disabled people face, but they are a necessary one’.<sup>110</sup> Shakespeare’s assertion attempts to show that negative effects of an impairment are not negligible despite difficulties that PWDs face is mostly attributable to the living environment.

Furthermore, Degener criticizes the social model of disability on the basis of proposed solution of anti-discrimination law remedies. Anti-discrimination laws mainly claim civil right reform for PWDs. Yet, societies even facing no barrier and discrimination require socio-economic and cultural rights.<sup>111</sup> This is also true for all PWD as a human being. Moreover,’ because impairment often leads to needs for assistance, it is especially true that disabled persons need more than civil and political rights.<sup>112</sup>

With all of these controversies however, social model of disability has achieved practical changes towards the conception of disability. The author in this regard subscribes to the understanding that has been provided by the World Report on Disability. The report defines the concept of disability as ‘complex, dynamic, multidimensional and contested’ concept rejects the ‘dichotomous’ approach of disability and asserts that disability is ‘neither purely medical nor purely social’.<sup>113</sup> Thus, both factors may possibly have limiting effect and they have to be

---

<sup>109</sup> Albert (N 97) 5-7.

<sup>110</sup> T Shakespeare Disability Rights and Wrongs Revisited, (2nd edn, Routledge 2013) 22.

<sup>111</sup> T Degener, ‘Disability in a Human Rights Context’ (2016) 5(35) <[www.mdpi.com/journal/laws](http://www.mdpi.com/journal/laws)> Accessed September 2 2017.

<sup>112</sup> *Ibid.*

<sup>113</sup> World Report on Disability, 2011. 186.

studied in combination without preferring one over the other. The comparator jurisdictions of this thesis Ethiopia, South Africa and the EU anti- discriminatory laws of employment have also embraced the social model of disability.

### 2.3 Different forms of Policy/Legal Options for PWDS in Employment

Achieving effective employment opportunity for PWDs requires a well-studied and carefully scrutinized policy. Implementing ‘one size fits all’ policy approach would not make possible to bring equal opportunity in employment. With a view to promoting opportunities and assisting PWDs in finding job in the open market, a broad variety of options has to be provided and individual needs and capacities have to be taken into consideration.

People with disabilities are not lacking in abilities; rather, they have varying and different potentials, which can be maximized, harnessed or developed through proper education and training. The traditional charitable approach in essence assumes people with disabilities to be passive recipients of pity who require sympathetic help. The relegation of responsibility for disability issues to charitable organizations ensured their continued exclusion from mainstream society.<sup>114</sup> Employment is one of those exclusions preventing PWDs from having better economic as well as social status. In order to enable PWDS to take part in the open labor market, barriers should be abolished and the working places have to be adjusted so that PWDs can be employed and retain job. Accordingly, if workplaces in the open labor market are reasonably

---

<sup>114</sup> K Lamichenne (N 98)8.

accommodated to the needs of PWDs, including the accessibility of the working sites, PWDs can have equal opportunity to compete.

Different approaches may be favored to realize the right to employment of PWDs. However, the applied measures and policy approaches have to be assessed in light of the circumstances and particularities of disabled people. Because disability groups comprise many types of abilities, depending on the situation like age, severity and other factors, policy tools have to be designed to address or meet the ‘heterogeneous’ nature of PWDs.

According to Semlinger and others cited by Mont,<sup>115</sup> general employment policy typologies for PWDs can be classified into three broad categories. These are counterbalances, substitutions and regulations. Counterbalances are those policy options which are designed to offset extra cost of employment ‘either to disabled person himself or herself or to the employer’.<sup>116</sup> Vocational rehabilitation and supported employment can be included in this policy approach since both of them assist workers with disabilities in transition of employment.

Substitution policy typology also consists of segregated employment settings where PWDs could work secluded from the rest of the society. These types of settings may be referred as sheltered employment or workshop featuring different legal approaches in different countries.

The third policy typology of regulation strives to ensure employability of PWDS through legislative roots. Quota and anti-discrimination laws are some of the approaches under this typology.

---

<sup>115</sup> D Mont, ‘Employment policy approaches an multi-sectoral implementation in low-and middle-income countries’ in J Heyman, Staine and Moreno (eds) (Oxford University Press 2014) 26.

<sup>116</sup> Ibid27.

### 2.3.1 Counterbalances-rehabilitation

According to the definition of WHO AND WB, Rehabilitation refers to ‘a set of measures that assist individuals who experience, or are likely to experience, disability to achieve and maintain optimal functioning in interaction with their environments’.<sup>117</sup>

Paragraph 23 of the Standard Rule on the equalization of opportunity in its definition provides that rehabilitation is ‘a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels, thus providing them with the tools to change their lives towards a higher level of independence.’<sup>118</sup> As it can be understood from the reading of both documents that, rehabilitation is a measure which should be designed to enable PWDs to be independent and reintegrated in their community. Rehabilitation and habilitation are different concepts not in their purpose but on the targeted groups of PWDs. Habilitation aims to help those who acquire disabilities congenitally or early in life to develop maximal functioning’, rehabilitation on the other hand concentrates on ‘those who have experienced a loss in function are assisted to regain maximal functioning’.<sup>119</sup>

Although Rehabilitation is the creation and solution of the medical model of disability, today the concept of rehabilitation goes beyond medical rehabilitation (restoring the impaired bodily or intellectual function) and extends to occupational (labor market) rehabilitation. Contemporarily, rehabilitation does not fall within the purview of health. Rather, it has become a distinct area of service separated from medical treatment.

---

<sup>117</sup> Who 2011

<sup>118</sup> UN standard rule on the equalization of opportunity Para. 23 1994.

<sup>119</sup> World health organization and world bank report on disabilities 2011

The UN standard rule and the CRPD have also confirmed in the same way. Paragraph 23 of the UN standard rule ensures that ‘the process of rehabilitation does not involve initial medical care’.<sup>120</sup> Article 26 Paragraph 1 of The CRPD also imposes obligation on state parties to ‘take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life’<sup>121</sup> including health, employment, education and social services. The CRPD in addition to the affirmation of rehabilitation as a means to maximize independent living and social integration, it has explicitly structured the issues of rehabilitation and health differently. While article 26 deals with rehabilitation, article 25 also health matters. Constructing different provision for rehabilitation and health-care in the convention seems helpful according to Cementwala’s view in order to increase ‘international understanding of disability and (re)habilitation through a rights-based perspective, and would provide a clear reference point for policy-making.’<sup>122</sup>

Vocational rehabilitation and training are helpful to equip disabled workers with adequate skill of work, which allows them to find their way back to normal conditions of work. Anti-discrimination laws of the jurisdictions compared in this thesis have different legislative make-up in recognition to the rehabilitation. Proc. 568-2008 of Ethiopia does not include any provision as regards to rehabilitation of the employees with disabilities. None of the provisions in the Pro. 568/20008 indicate that employees with disabilities have the right to vocational rehabilitation during the term of their employment. In fact, the FDRE constitution under article 41/5 provides that rehabilitation and assistance ‘within the available means of the state’ shall be provided to

<sup>120</sup> UN Standard rule on the Equalization of Opportunity Para. 23.

<sup>121</sup> CRPD Art. 5 Para. 1.

<sup>122</sup> M Cementwala, ‘Rehabilitation, International’s position paper on the Right to Rehabilitation’ <[www.un.org/esa/socdev/enable/rights/ahc3ri.pdf](http://www.un.org/esa/socdev/enable/rights/ahc3ri.pdf)> Accessed September 21 2017.



disabled persons. The growth and transformation plan 2010-2015 which is not an authoritative document has also included access to rehabilitation services in education and employment for PWDs.<sup>123</sup> The National Plan of Action on PWDs of 2010-2021 has also tried to address vocational rehabilitation in employment and training.<sup>124</sup>

The government of Ethiopia report to the CRPD committee has also indicated that rehabilitation centers are providing physical, vocational rehabilitation services to maximize skill as well as social integration of PWDs. However, the report seems to reflect some misconception about rehabilitation. Because, paragraph 66 elucidates that PWDs without nobody's support and 'suffer on the street are admitted for psychological, vocational and medical rehabilitation'.<sup>125</sup> This paragraph suggests at least that rehabilitation is a service which is provided primarily for poor disabled people. Moreover, the report under paragraph 67 discusses that the provision of rehabilitation service is based on willingness as well as need of the PWDs.<sup>126</sup> This paragraph is also contradictory to what has been provided under paragraph 66. Pursuant to paragraph 66, PWDs get rehabilitation if they could not have anyone to support while paragraph 67 requires willingness and need to join the rehabilitation service. Therefore, it can clearly be understood that the new concept and meaning of rehabilitation in light of the social model of disability has not been duly realized in the Ethiopia's situation.

The SAEA on the other hand requires employers to take measures to retain employees with PWDs through various programs. The code of good practice helps as explanatory of the SAEA

---

<sup>123</sup> FDREGrowth and Transformation Plan 2010-2015.

<sup>124</sup> FDRENational Action Plan on Persons with disabilities prepared by Ministry of Social and Labor Affair 2010-2021.

<sup>125</sup> Federal Government of Ethiopia Initial Report to CRPD committee Para. 66 2012.

<sup>126</sup> *Ibid.*

proffers examples of applicable measures like vocational rehabilitation and other transitional programs so as to reintegrate the disabled worker.<sup>127</sup>

The EUEED does not explicitly incorporate rehabilitation for disabled workers although there is a room in which it is possible to construe that rehabilitation service is permitted for workers with disability. A closer look at article 7 Para. 2 provides that: “With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”<sup>128</sup> The paragraph seems to indicate that measures which might be taken by states to create or maintain the reintegration of PWDs in the working environment is not contrary to equal treatment of individuals of a given state. To sum up, the incorporation of rehabilitation in the anti-discrimination laws of the three jurisdiction of this thesis, it can be concluded that while the Ethiopian Proc. 568-2008 fails to recognize, the SAEAA explicitly incorporates and expansively elaborates in the subsequent documents supplementing the SAEAA. The EUEED nonetheless does not expressly deal with rehabilitation service unless it could be construed through legal interpretation of article 7 of the directive.

[repeated] Shelter workshops which are common in almost all parts of the world seem appropriate for those PWD whose abilities are severely reduced to the extent that they are prevented from searching work in the open labor market.

---

<sup>127</sup> South africa Code of conduct section 11.3 and 11.1 2002.

<sup>128</sup> EUEED Art. 7 para. 2.

The term severely disabled persons is difficult to define in an 'objective way. However, Konig and Schalock define them<sup>129</sup> as 'Persons with severe disabilities are those who because of the severity of their handicaps would not traditionally be eligible for vocational rehabilitation services'. The definition does not seem to provide sufficient clarity particularly the degree of severity. Most severely disabled workers have ability to perform a work of economic value however; difficulties to secure the employment in the market justified their confinement to be kept in a separate and segregated workshop.<sup>130</sup>

Weber, a professor of clinical psychology as cited by Ferraina argues that workshops do not have recognition or article 27 of the CRPD does not show the incorporation of such systems in the convention.<sup>131</sup> Comment 10 the Convention recognizes the full and effective inclusion of PWDs in the labor market on equal basis with others. Thus, shelter workshops also do not promote inclusion since inclusive setting brings both disabled workers and non-disabled workers symmetrically.<sup>132</sup> Barbara Murray who is a senior specialist on disability at ILO as cited by Ferraina, also suggests that absence of a provision in article 27 of CRPD to include alternative forms employment especially to those who face temporary or long term unemployment is challenging.

The ILO proposes the inclusion of such sheltered forms of employment, Comment T 12 however such proposal faced strong opposition from the international disability caucus that did

---

<sup>129</sup> A Konig and R Shalock, 'Supported employment: Equal Opportunities for Severely Disabled Men and Women' (1991) 130(1) International Labor Review 21,22.

<sup>130</sup> Lisa Waddington, 'Changing attitudes to the Rights of People with Persons with Disabilities in Europe' in Jeremy Cooper (ed) Law, Rights and PWDS (Jessica kingsley 2000)

<sup>131</sup> S Ferraina, 'Analysis of the Legal Meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Settings' (2012) <(2012) <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/560/>> Accessed March 20 2016.

<sup>132</sup> *Ibid.*

not want to see ‘any departure from the principle of full and effective inclusion’ of the convention.<sup>133</sup>

General Comment No. 5 adopted by the eleventh session of the CESCO also rejects confinement of PWDs in shelter workshop since it is contrary to the right to choose opportunity of work to get one’s gainful living recognized under article 6.1 of the ICESCR.<sup>134</sup> On the other hand, also, research points out that people with intellectual disabilities including their families favor shelter employment setting because of ‘long-term placement, safety, work skills issues, social environment, transportation, agency support, disability benefits, and system of services’.<sup>135</sup>

Viser’s comprehensive study on shelter employment reflects that such forms of work settings do not demonstrate similar type of structure in all of the countries and he provides that there are three modes of employment status within shelter workshops<sup>136</sup> The first mode employment status is characterized by absence of any employment relationship including contract, formation of trade union, and other related employment right although the employees receive financial payment from the institution.<sup>137</sup> The second employment status also consists of several relationships with the shelter employment and while some of the employees are students, trainees and clients, some other employees are also formally employed having contractual agreement including right to create and form union as well as any other right of employees like those who work in regular employment setting.<sup>138</sup> In addition, the third kind of employment status in shelter

---

<sup>133</sup> *Ibid.*

<sup>134</sup> CESCO General Comment No. 5 December 9 1994 Para 21.

<sup>135</sup> A Migliorea, T Grossia, D Manka and P Roganb, ‘Why do Adults with Intellectual Disabilities Work in Sheltered Workshops?’ (2008) 28(1) Journal of Vocational Rehabilitation 29-40.

<sup>136</sup> L Visier, ‘Sheltered employment for persons with disabilities’ (1998) 137(3) International Labor review 348,354.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

employment is where there are purely employed workers in which they are entitled to exercise any kind of employment related rights.<sup>139</sup>

The judgment from the Court of Justice of the European Union in the *Bettray* case indicates that, ‘Article 48(1) of the EEC Treaty is to be interpreted as meaning that a national of a Member State employed in another Member State under a scheme such as that established under the Social Employment Law, in which the activities carried out are merely a means of rehabilitation or reintegration, cannot on that basis alone be regarded as a worker for the purposes of Community law’.<sup>140</sup> Therefore, this decision evidently tells that those within the shelter employment could not be considered as workers at least in EU’s framework. Therefore, since the nature and structure as well as the recognition of the law provided for sheltered workshops in different legal frameworks is varied, quick conclusion that these institutions are always a place of exclusion and segregation does not seem conclusively tenable. Parmenter’s study also asserts in this respect that the US experience shows that anti-discrimination laws could not effectively realize employability of persons with mental disabilities.<sup>141</sup> Thus, the author contends that for those in the open labor it is not able to respond as a result of severe disability, it would be quite important to maintain and improve the decent work condition in those institutions.

#### 2.4. Quota Schemes vs. Antidiscrimination Approaches

States have been striving to address the employability of PWDs applying various ways of legislative framework. The quota scheme of employment is one of such legislative intervention,

---

<sup>139</sup> *Ibid.*

<sup>140</sup> Case 344/87 *Bettray v Staatssecretaris van Justitie* (1989) ECR 01621 (20).

<sup>141</sup> Trevor Parmenter, ‘Promoting Training and Employment Opportunities for People with Intellectual Disabilities: International Experience’ (2011) <<http://digitalcommons.ilr.cornell.edu/gladnetcollect>> Accessed June 20 2017.

which has been common in most European countries following First World War.<sup>142</sup> Quota is a set percentage that requires employers to employ PWDs in order to promote PWDs participation at work. The scheme has been initially meant for those disabled veterans as the result of the First World War. The main idea was that the society owes duty for those who became disabled while serving to the interest of their society.<sup>143</sup> As a consequence of this assumption, it was only disabled veterans who got coverage the quota arrangement. However, the quota was extended after the Second World War to all kind of PWDs.

Legislative intervention by prescribing quota-employment reflects some three kinds of approaches. The first kind of quota is termed as legislative recommendation by which the state does not set any obligatory percentage to the employees. However, employers are recommended to do so.<sup>144</sup> The second form of quota is also known as legislative obligation without effective sanction, which requires enactment of the law by the state to oblige employers to hire set percentage of disabled workers. Yet, there remains effective sanction for its enforcement. The other and third form of quota is also called legislative obligation with effective sanction. It is a kind of levy-grant system. In case the employer fails to discharge the obligation or applying the set percentage required by law, there is a sanction that is imposed on the employer in form of fine. The money collected is then invested to the promotion of rehabilitation and employment as well as to assist those employers who hire exceeding the required percentage.<sup>145</sup>

On the contrary, anti-discrimination legislative intervention, which originated in USA, strives to promote employability of disabled employees in the labor market. It is guided by principles of

---

<sup>142</sup> L Waddington, 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-discrimination Laws' (1996) 18 Comparative Labor Law and Policy Journal 62, 63.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid* 64.

<sup>145</sup> *Ibid* 68.

non-discrimination and equal opportunity. Outlawing discriminatory practices and attitudes against PWDs is the core points in anti-discriminatory legislations. Since anti-discrimination laws most of the time endeavor to tackle discrimination without providing any other extra-advantage for PWDs, so that they promote negative rights.<sup>146</sup> Degener classifies forms of equality into three and analyzes in light of disability models. These are: formal, substantive and transformative.<sup>147</sup> Formal equality can be linked with medical model of disability since it ignore differences and always treats similar persons similarly and different persons differently.<sup>148</sup> The substantive equality can also be related to social model of disability because it challenges structural and indirect discrimination stemming from power relationship against PWDs.<sup>149</sup> Transformative equality shares many features with substantive equality and the basic difference from the latter is that the measures that are employed to tackle various forms of discrimination include positive measures.<sup>150</sup>

Anti-discrimination laws are embedded in civil right claims so that socio-economic conditions or well-being are not its prior consideration. This is to clearly indicate that anti-discrimination laws mainly involve negative right rather than positive rights. Therefore, anti-discrimination laws promotes equal opportunity and ‘blind justice’ as well in any decision or procedure which may also involve PWDs<sup>151</sup>

Both quota and antidiscrimination interventions have different underlying assumptions albeit promoting the right to employment of PWDs is their common objective. The assumption behind

---

<sup>146</sup> See J. Bickenbach, *Ibid.*

<sup>147</sup> T Degener, ‘Disability in a Human Rights Context’ (2016) 5(35) <[www.mdpi.com/journal/laws](http://www.mdpi.com/journal/laws)> Accessed September 2 2017.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> Broderick Cited by *Ibid.*

<sup>151</sup> Katharina Heyer, ‘Equality and Difference: The politics of Disability in JAPAN (2007) [https://www.dijtokyo.org/doc/dij-jb\\_11-heyer.pdf](https://www.dijtokyo.org/doc/dij-jb_11-heyer.pdf)> Accessed November 30 2016.

quota schemes is that (1) employers refuse to hire PWDs unless they are obliged by legislative compliance and (2) most disabled people are incompetent to hold a merit-based position like non-disabled workers in the labor market. On the other hand, antidiscrimination approach assumes that) 1) Disabled people are in almost all cases ‘able efficient, productive and efficient’ like any non-disabled people. (2) ‘Unjust and incorrect assumption about ability and disability’ and physical barriers and inflexible work pattern, and structures’<sup>152</sup> are primarily responsible to the exclusion of many disabled people from top ranking employment.<sup>153</sup>

Quota and anti-discrimination interventions have also both merits and demerits. Quota schemes ensure the employability of the disabled people since employers have an obligation to hire depending upon the set percentage by law. However, it is not always true to assert that employers all the time hire PWDs fearing the imposition of the fine. They are likely to compare the failure of obligation in light of the fine to be imposed. Therefore, they may prefer to be penalized rather than to employ disabled workers.<sup>154</sup> Most frequently, quotas are disadvantageous for disabled people because of high ostracizing result at work place. Such kind of approach is not helpful to achieve equality.<sup>155</sup> It creates also an image that PWDs are burden that employers should tolerate since they employ them for the sake of fulfilling the required quota.<sup>156</sup> These types of approaches do not also allow PWDs to realize their aspiration and rather it blocks their full talents to demonstrate properly. They do not feel more confident equally with others since they are also presumed by their peers that they have been employed for granted without genuinely assessing their merits and capacities.

---

<sup>152</sup> L Waddington (N 146)

<sup>153</sup> *Ibid.*

<sup>154</sup> Daniel Mont, (n34)

<sup>155</sup> R Sakuraba, ‘complementary Approaches: Japanese Disability and Employment law’ in J Heymann M Stein and G Moreno (eds), *Disability and Equity at Work* (OUP2014) 373.

<sup>156</sup> *Ibid.*



Despite the aforementioned critiques against quota systems, there are some scholars who assert or provide some positive sides of such system. For example, Stain remarks that 'quota systems can enable disabled persons to undertake productive work in inclusive settings and assist in changing social attitudes about the capability of disabled workers.'<sup>157</sup> He also further asserts that 'Quota regimes are most effective when they are targeted, judiciously implemented, and have rigorous enforcement mechanisms.'<sup>158</sup> In fact, quota schemes may have advantage in terms of productivity and social integration for PWDs. However, there should be an empirical study revealing higher employment opportunity through quotas for PWDs.

As compared to Quota systems, the anti-discrimination approach seems quite sound in ensuring employment on competitive basis by leveling the playing field for PWDs. It equips self-confidence and builds self-actualization and equality in general. Yet, the disadvantage is that 'to the extent disabled people do not want to compete for jobs or are not as productive as non-disabled people an anti-discrimination law will not, in and of itself, close the employment gap'.<sup>159</sup> Additionally, Bickenbach contends that anti-discrimination law 'might outlaw discrimination and offer legal recourse, but discrimination will continue to exist.'<sup>160</sup> Degener also argues that anti-discrimination law is half-way to the solution of achieving equality for PWDs.<sup>161</sup> Therefore positive measures which may assist PWDs to realize their negative rights must be accorded appropriate recognition since leveling the playing field by itself would not bring about the required equality. For instance, in order to be employed, PWDs first need to acquire education and training.

---

<sup>157</sup> M Staine, 'beyond Disability civil rights' (2007)58(1203) HASTINGS Journal of Law 1204,1233.

<sup>158</sup> Ibid 1232.

<sup>159</sup> Daniel Mont, (n 34)

<sup>160</sup> J Bickenbach cited by K Heyer, Rights enabled: the disability revolution, from the US, to Germany and Japan, to the United Nations(University of Michigan 2015) 45.

<sup>161</sup> T Degener,

Given some of its criticisms, anti-discriminatory legislations have become so prominent in ensuring right to employment of PWDS in the present days. To this effect, Proc. 568/2008 of Ethiopia, SAEAA 55/1998 of South Africa and the EUEED o 2000/78 of European Union have all become part of this new anti-discrimination legislative engineering. The proceeding chapter will also scrutinize obligation of the employers within the aforementioned legislations.

## CHAPTER THREE

### Obligation of the Employers under Anti-Discrimination

#### Legislations of Ethiopia, South Africa and EU

This chapter is predominantly devoted to the rights and obligation of the employers with regard to the promotion and protection of the right to employment of PWDs. In doing so, the first section provides an overview of how employment is regulated i.e. private/public in general and mechanisms of outlawing discrimination against PWDs. Having discussed this, the second section also explains for whom the employers owe obligation under anti-discrimination legislations. This part mostly elaborates concerns such as what disability is and who a disabled person is. After settling these issues, section three, four and five will discuss obligation of equality and non-discrimination, reasonable accommodation as well as affirmative action respectively.

#### 3.1 General Overview of Employment Regulation

Employment being a critical area of regulation by the states, it may be controlled by different sets of laws depending on the states' market ideology. In most countries including the compared jurisdictions of this thesis, employment is regulated by public and private acts or enactments. While the public employment is managed by the states itself, the private employment also is administered by private employers or companies upon the law enacted from the state. While there are variations with regard to the “public” nature of the regulation of employment by private employers (in common law countries it is predominantly a matter of private contracts, whereas

mainly in continental countries it is, to a great extent a public law limitation on the private autonomy of the parties) the detailed information on these variations goes beyond the thesis.

What is relevant and important with regard to the subject matter of this thesis, is, that the regulation of the employability and employment of PWDs is to a great extent extracted from the private autonomy of the parties in most countries where their employability is regulated. This is an attribute of all the three legislative systems compared here.

In Ethiopia, the FDRE constitution lays down that labor law is mandated to or within the exclusive power of the federal/central government.<sup>162</sup> Thus, all regional states apply the same kind of labor law throughout the country and to this effect the center has issued Labor Law Proclamation no 377/2003. This proclamation is meant to regulate or govern the employment relationship between workers and private employers. The proclamation sets out minimum labor standards that the employer has to follow and the rest is dependent on the collective bargaining power of the employer and employee. At this point, what motivates the author to see this labor law is that not only to give an overview of the act but also what the proclamation says about the employability of disabled workers. The anti-discrimination clause of the labor law is found under article 14 of proclamation No. 377/2003 and it recognizes that an employer should not make employment discrimination on the grounds of sex, political belief, ethnicity, birth and other status.<sup>163</sup> However one do not find an explicit reference to disability as one prohibited ground of discrimination, but the catch-all phrase “other status” may also embrace disability. The other employment governing law outside the scope of private employment relationship is the public sector employment, which is governed by civil servants proclamation no. 515/2007. Unlike labor law that is regulated by federal laws the regulation of employment in the civil service delegated

---

<sup>162</sup> FDRE constitution 1995 Art. 55.3.

<sup>163</sup> Labor law proclamation no. 377/2003 art. 14.

to the regulation by each respective regional states by of the Constitution.<sup>164</sup> Proclamation 515/2007 is only applicable to civil servants in the service of the federal government. The civil service proclamation guarantees the right to employment of PWDs in explicit terms and entitles preferential treatment under article 13/2.<sup>165</sup>

In 2008, by the time the CRPD was highly negotiated and following the signature of the Ethiopia, the government of Ethiopia enacted a disability specific legislation, Proclamation 568/2008. This disability specific proclamation has brought changes including conception of disability, reasonable accommodation and the shift of burden of proof from the employee to the employer in cases of discrimination claims. Although Proc. 568/2008 is enacted by the federal government, it seems as if the federal government needs to deviate from public-private approach of constitutional divisions applied in the general regulation of employment in the country.<sup>166</sup>

Similar to the Ethiopian regime, the South African system of employment is also controlled by the public and private division of arrangements. The public employment in South Africa is regulated by the Public Service act of 103/1994. This sector is administered by the Ministry of Public Service Administration. Private employment is also regulated by the Labor Relation Act of 66/1995. It is also administered by ministry of labor department.

South Africa also enacted a disability specific legislation titled as Employment Equity Act number 55/1998, the SAEAA<sup>167</sup>, most of its origin is from the Canadian employment regulation. The SAEAA is different from that of Ethiopia in its coverage of protected grounds. While the Ethiopian proclamation No. 568/2008 is only applicable to disabled employees, the South African employment equity has been intentionally designed to be applicable to black people,

---

<sup>164</sup> FDRE Constitution Art. 52.(2)(f)

<sup>165</sup> FDRE civil servants proclamation no. 515/2007 art. 13/2.

<sup>166</sup> See the discussion in detail under chapter 4.2 about scope.

<sup>167</sup> See above, Chapter 1, subchapter 1.3

women in addition to disabled workers as designated groups.<sup>168</sup> However, both Ethiopia and South Africa have different legislation in public and private sector of employment, South Africa does not apply different implementing ministerial structure to the employment of PWDS. The SAEAA is implemented by the Department of Labor (corresponding the ministry of labour) and the legislation governs both private and public employment. Therefore, unfairly discriminated groups are addressed by one governmental department and subject to one applicable rule.

On the contrary, PWDs in Ethiopia are subject to different tribunals and before they take an action of discrimination complaint or claim certain right they have to know which rule is applicable despite the original law Proc. 568/2008. For instance, PWDs working in civil service (currently reestablished as public service) are entitled for an additional of 4% as an affirmative action by the directive of such ministries while other workers with disability in companies-private institutions are entitled for an additional of 3% by a directive issued from MOLSA.<sup>169</sup> Similarly, PWDs serving in judiciary as a prosecutor or judge do not have a means to take their complaints to the regular courts since the judiciary is considered to be excluded from applicability of Proc. 568/2008. The Federal Cassation Bench has also confirmed such perception in its interpretation.

At this juncture, this paper author is not asserting that Ethiopia has contradictory laws to ensure right to employment for PWDs. Rather, it is to suggest that since the country's employment schemes are differently regulated, identifying the competent court to take a case as well as claiming rights is sometimes challenging.

---

<sup>168</sup> Federal republic of South Africa employment equity act no. 55/1998.

<sup>169</sup> Directives in the Ethiopia's legal regime are a type of delegated legislation which are issued by ministries at the federal level to enforce laws which are adopted by the Parliament as a proclamation and enacted in detail as a regulation by council of ministers. Similarly at the regional level, directives are issued by bureaus to implement laws adopted by state council as a proclamation and enacted in detail as a regulation by state administration.

South African PWDs nevertheless have predictable rules and very comprehensive system of disability oriented employment laws. This thesis will extensively address this concern under chapter four when dealing with enforcement challenges.

The EU system also provides different employment rules that have to be implemented by member states. With regard to employment of PWDS, the EUEED is the governing law and it is similar to the SAEEDA as much as it is applicable to other grounds besides disability. However, the EUEED is not prohibiting discrimination on all grounds, with a general nature, it covers discrimination on grounds of religion and belief, age and sexual orientation in addition to PWDs. The common feature of the three compared jurisdictions is that all of them protect PWDS' right of employment and do not guarantee other related rights that have implication to the realization of equal employment opportunity except South Africa, which tackles unfair discrimination in other areas of life by virtue of PEPUA.<sup>170</sup>

Countries in the world may follow different approaches in outlawing discrimination against PWDs. Degener's study of global comparative approach identifies four approaches, which include criminal law, constitutional law, civil right law (anti-discrimination) law and social welfare law.<sup>171</sup> Degener's evaluation however, shows that criminalizing disability based discrimination by criminal sanction may not be effective in reality due to the person who discriminates in most cases has no intent to discriminate. Most of the time, discrimination comes out of benevolent act of a person who does not know whether he-she is committing discrimination.<sup>172</sup> Outlawing disability-based discrimination through explicit mention in the

---

<sup>170</sup> For a detailed analysis of the development of the concept of PWDS and the surrounding discussions see: Chapter

<sup>171</sup> T Degener 'Disability Discrimination Law: A Global Comparative Approach' In a Lawson C Gooding, Disability Rights in Europe Eds (Hart Publishing 2005) 91.

<sup>172</sup> Ibid 93

constitution is also a better way than sanctioning in criminal code to achieve social change.<sup>173</sup> However, anti-discrimination clause within a constitution may not be also in all the time effective due to broader and vague as to what disability and discrimination is about. In this regard, Degener offers three examples in which the existence provision of antidiscrimination in a constitution has been subject to the understanding of the judiciary interpreting the constitution.<sup>174</sup> The third approach to tackle discrimination is civil right oriented or anti-discrimination laws. These laws are much broader in terms of their details including definition of the terms like equality, discrimination and also provide enforcement mechanisms.<sup>175</sup> The fourth approach is a social welfare laws, which are inclined towards providing rehabilitation and prevention. These laws also contain anti-discriminatory provision but are characterized by vagueness and limited to public employment or education.<sup>176</sup>

Among the typologies identified by Degener, the Ethiopian Proc. 568, the SAEAA and the European Equal Employment Directive (Directive 2000/78/EC) fall under the category of anti-discrimination approach. Each of the three legislations provide and elucidate concepts of equality and discrimination as well as they have their own mechanism of enforcement though the material scope of these instruments is limited to employment matters. Since Anti-discrimination legislations are a particular laws that need to outlaw discriminatory practices on the basis of distinct category including disability, such kind of laws impose obligation on the employer and entitle rights to the vulnerable or protected groups. Thus, those rights entitled to PWDS are also on the other spectrum are obligations of the employers. Therefore, the following discussion

---

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid* 95.

<sup>175</sup> *Ibid* 98.

<sup>176</sup> Degener 99



concentrate on obligation of employers by firstly defining who a disabled person is for the purpose of employment relationship.

### 3.2 Definition of the concept of PWDS

Regulation of the obligations of the employers under disability protection laws requires the definition of the concept of the PWDs: towards whom the employers are obliged to fulfill the duties prescribed by the law. Under Ethiopian law one of the major changes brought by Proc. 568/2008 is the shift to the approach in which PWDs are viewed and understood in the context of the social model of disability.<sup>177</sup> As the process has been summarized by Mr. Kasahun Yibeltaal, the former President of the Ethiopian Federation of the Associations of Persons with Disability ‘[t]here was a lengthy discussion among the members of the technical committee which was composed of members delegated by the Civil Service Agency, the Ministry of Labor and Social Affairs and our Federation which model to adopt, that is, the charity, the medical, or the social-constructionist model of disability. Of course, we have finally come to truce on the entrenchment of the social/human rights model in to the Proclamation.’<sup>178</sup> This is a vital and progressive change in shaping laws, policies and the society as well. The definition contained within the proclamation does not make any reference that puts together PWDs to charity or welfare seeker. Rather, it recognized that social and environmental interactions are preventive condition not to realize their enjoyment of rights. The Proclamation defines PWDs as, “Person with Disability” means an individual whose equal employment opportunity is reduced as a result of physical,

---

<sup>177</sup> See Chapter Two (2.1 and 2.2) above for a presentation of the shift from the earlier individual-medical model to the social model of disability.

<sup>178</sup> Shimeles Ashagre, Interview with Ato Kasahun Yibeltaal, the former President of the Ethiopian Federation of the Associations of Persons with Disability, 23 January 2008 as quoted in Shimeles Ashagre, 2009.

mental or sensory impairments in relation with social, economic and cultural discrimination.’<sup>179</sup>  
This definition reflects a wider coverage of disability.

The South African SAEAA on the other hand seems reflecting a medical model of disability in defining PWDs. According to the definition given in Section 1 this act, PWDs are ‘people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment’.<sup>180</sup> Nonetheless, the Code of Good practice on the employment of Persons with Disabilities guides without doubt that ‘The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.’<sup>181</sup>

The Code of Good Practice is, in fact a mandatory document. Moreover, it has been issued by virtue of section 54 of the SAEAA. Its main purpose is to help employers to know and understand their obligation under the EEA. Nonetheless, courts are allowed to take it into consideration when a case arises on the basis of the EEA.<sup>182</sup>

Regarding EU law, the EUEED has not given a definition for the term PWDs, it has been left to the interpretation by the CJEU. In the course of the time a rich case law has provided Member States with a broad definition of the term that will be presented in more detail in Chapter Four, subsection 4.1.3 below.

Surprisingly, the definition that is provided by Proc. 568/2008 is broader than CRPD. Namely, while CRPD in its definition under Article 1 requires “long-term” physical, mental intellectual or sensory impairment for its personal scope coverage, Proc. 568/2008 is silent on the term of the impairment.

---

<sup>179</sup> Proc. 568/2008 Art. 2.1.

<sup>180</sup> Republic of South Africa Employment Equity Act No. 55/1998 Section 1.

<sup>181</sup> the Code of Good Practice on The Employment of Persons With Disabilities 2002 as amended 2015.

<sup>182</sup> See the Code of Good Practice on The Employment of Persons With Disabilities 2002 as amended 2015.

On the other hand they are also different in terms of their material scope, namely the CRPD covers a broad material scope under its Article 4, practically covering all areas of life, all relationships, policies and regulations while Proc. 568/2008 is limited to the employment sphere. Similarly, the EUEED while having a broad interpretation of the personal scope, in its field of application is limited to Employment. Despite the three jurisdictions have different conception and understanding on the term PWDs in their specific domestic laws, ratification of the CRPD will possibly make them to have a common view of defining PWDs. More analysis regarding definition is provided under part 4.1 of this paper.

### 3.3 Equality and non-discrimination

Equality is a highly respected concept in almost all part of the world. Yet, the word “equality” has not an unequivocal meaning.

Fredman rightly holds that equality is ‘a contested notion with many different interpretations’.<sup>183</sup> Similarly, Mark Bell underlines that equality is ‘an open textured concept, with alternative and competing visions of what it should entail’.<sup>184</sup> While Niall Crowley also assert that equality is ‘a contested concept’.<sup>185</sup>

In order to find a definition among the various views the distinction between formal and substantive equality, emphasized by most authors has to be looked into. Formal or juridical equality is the common form of equality, which means equal application of laws to everyone and treating everyone equally, prohibiting discrimination (unfavourable treatment) on certain

---

<sup>183</sup> S Fredman, *Discrimination Law* (Oxford University Press first edn 2011) 1.

<sup>184</sup> Mark Bell, ‘The Right to Equality and Non-Discrimination’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights Under The EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2003) 91.

<sup>185</sup> D Macleod, *Pregnancy as a source of discrimination: A comparative study of antidiscrimination legislation in the European Union and the United States of America* (University of York PHD dissertation 2015) 20.

grounds, listed in the relevant legal instruments. As it is said, formal equality ‘prohibits direct discrimination, and aims at shifting the focus of a potential discriminator away from such characteristics as race, gender, disability, or sexual orientation.’<sup>186</sup> Juridical equality then dictates the society to disregard differences as a result of certain characteristics.<sup>187</sup> However, this form of equality does not achieve equality for PWDs since it fails to provide adjustment of structural and social differences in the society, attached to the mentioned attributes.

Equality of results is the other conception of equality which it is based on outcome approach. If for instance PWDs are not able to lead a good life as a result of meager income, there must be allocation of resources since all humans cannot be equal in terms of the wealth they can have.<sup>188</sup> Unpersuasive side of this type of equality is that it does not provide who should be responsible to cover such resources.<sup>189</sup> Additionally, equality of outcome does not recognize treatment other than result and does not go in line with market economy.<sup>190</sup>

The third kind of equality which has been highly accepted in these days is equality of opportunity. Fredman asserts that equality of opportunity ‘steers a middle ground between formal equality and equality of results.’<sup>191</sup> This is because of the fact that the equality of opportunity attempts to correct the deficiencies of formal equality and equality of result. Such model of equality is embedded in creating equal chances rather than equal outcomes or results. Besides, it recognizes those structural barriers and stereotypes.

---

<sup>186</sup> T Degener and G Quinn, A Survey of International, Comparative and Regional Disability Law Reform <<https://dredf.org/news/publications/disability-rights-law-and-policy/a-survey-of-international-comparative-and-regional-disability-law-reform/>> Accessed October 30 2016.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.* 39

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> S Fredman Discrimination law (2<sup>nd</sup> edn Oxford University press 2011)

Beyond all the mentioned terms, substantive equality is the concept presented by the dominant part of the world of scholars and commentators. Equality of opportunity coupled with equal respect of differences – not considering the different attributes as primary or secondary, higher rank or lower rank, at the same time equalizing differences by positive measures.<sup>192</sup> It can create equality in the substance without the controversies of the “equality of results” approach.

Proc. 568/2008, the SAEED and EUEED are also principally grounded with the goal of substantive equality and they provide affirmative action as well as ensure the provision of reasonable accommodation, which is indispensable to achieve real equality when persons are burdened with hindrances.

Discrimination is defined as the failure to equally treat individuals both formally and, in some cases the failure to adopt positive actions for substantive equality may qualify as discrimination.

Discrimination has different forms, which include direct, indirect, harassment and instruction to discriminate.

Direct discrimination happens when a person is treated less favorably than another similarly situated person because of a certain characteristics such race, sex, disability and etc. without objective justification. Indirect discrimination occurs when an apparently or facially neutral criteria or law results in unfavorable effect to a certain group or person. In such sort of discrimination, it is not the treatment but the effect of the criteria applied that causes discrimination. This type of discrimination is known as disparate impact in the American legal context. It had a considerable role in preventing masked discriminatory employment practices

---

<sup>192</sup> B. Hepple: *Equality - The New Framework* (Oxford & Portland (Oregon) Hart, 2011) (pp. 134-140). Sandra Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008).

and some authors see it as a means of limiting the doctrine of employment at-will<sup>193</sup>, which permits employers to take measure against their workers with no cause, however, if the measure results in disadvantage on prohibited ground the measure might be challenged at court.

The EUEED also prohibits harassment, as a form of discrimination. It is defined as an ‘unwanted conduct related to a protected ground takes place with the purpose or effect of violating the dignity of a person and/or of creating an intimidating, hostile, degrading, humiliating, or offensive environment’. Instruction to discriminate happens ‘when a person or institution demands or encourages others to treat a person less favorably than another similarly-situated person because of a particular characteristic protected by non-discrimination law.’<sup>194</sup>

Proc. 568/2008 defines discrimination as, ‘to accord different treatment in employment opportunity as a result of disability; provided, however, that any inherent requirement of the job or measures of affirmative action’s may not be considered as discrimination,’<sup>195</sup> In this definition, affirmative action measure cannot constitute discrimination since they are objectively justified and legitimate. Article 5.1 and 5.2 provide that: “(1) Any law, practice, custom, attitude or other discriminatory situations that impair the equal opportunities of employment of a disabled person are illegal. (2) Without prejudice to Sub-Article (1) of this Article, selection criteria which can impair the equal opportunity of disabled persons in recruitment, promotion, placement, transfer or other employment conditions shall be regarded as discriminatory acts.”<sup>196</sup> According to this provision, both direct and indirect discrimination are prohibited. It however provides no specific element to determine whether certain discrimination exists or not in

---

<sup>193</sup> I Tourkochoriti ‘Disparate Impact’ and ‘Indirect Discrimination’: Assessing Responses to Systemic Discrimination in the U.S. and the E.U’ (2015) 3(1) European Journal of Human right 297-298.

<sup>194</sup> See Art. 2. Para (A), (B), 3 and 4 of EEUD respectively to understand more on the definitions of these forms of discrimination.

<sup>195</sup> Proc. 568/2008 Art. 2.4.

<sup>196</sup> IbidArt. 5.1 and 2.

particular case. Paragraph (1) of the article stipulates a general prohibition of discrimination and Paragraph (2) defines indirect discrimination. The other two kinds of discrimination defined in the EUEED, that is harassment and instruction or incite to discriminate do not seem to be covered under Proc. 568/2008. However, paragraph 1 of article 5 of the proclamation should be interpreted to include these types of discrimination. Proc. 568/2008 obliges employers to protect women with disabilities from Sexual violence and employers have to take administrative measure against the perpetrator.<sup>197</sup> Nonetheless, this would not be considered as clear prohibition of harassment since the act is related with sex rather than disability. This prohibition is however a good example of regulatory effort to reach multiple forms of discrimination that are not addressed so far efficiently in the various national and international regulations.

In the Republic of South Africa the SAEAA also prohibits direct, indirect and harassment forms of discrimination. Section 6.1 of the SAEAA comprises unfair direct and indirect discrimination. It stipulates: “[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth” .<sup>198</sup> However, it is not defined which elements could constitute both direct and indirect discrimination.

Harassment is a form of discrimination prohibited under Section 6.3<sup>199</sup> of the SAEAA without defining its elements. The act also recognizes exceptions from the prohibition: when

---

<sup>197</sup> Ibid Art. 6.1.D.

<sup>198</sup> SAEAA Sec. 6.1.

<sup>199</sup> Ibid 6.3.

exclusion and distinction is based on inherent requirement of the job and it gives entitlement of affirmative action measures, as an exception that would constitute no discrimination.<sup>200</sup>

Even though the SAEAA and SAC do not give clue as to how discrimination and unfair discrimination can be comprehended, the Constitutional Court of South Africa in the case of *Harksen v Lane*<sup>201</sup> clearly articulated that distinction:

“The determination as to whether a differentiation amounts to unfair discrimination... requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether secondly, it amounts to 'unfair discrimination'. It is well to keep these two stages of enquiry separate. There can be instances of discrimination which do not amount to unfair discrimination on the grounds specified in section 8(2) of the interim constitution, which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.”<sup>201</sup>

In Europe Article 2 of the EUEED specifically identifies direct, indirect discrimination, harassment and instruction to discriminate as forms of discrimination including their constitutive elements.<sup>202</sup> Moreover, it also provides under article 4 and 7 respectively that genuine and inherent requirement and positive measures could not be considered as discrimination.<sup>203</sup>

The CRPD’s approach in defining discrimination is different from all jurisdictions discussed above. This is because, it follows the definition provided by other international human right instruments and ILO conventions. Article 2 Paragraph 3 of CRPD defines discrimination as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of

<sup>200</sup> IbidSec. 6.2.

<sup>201</sup> *Harksen v Lane*<sup>201</sup> ZACC 9 (1997) Para 45.

<sup>202</sup> Ibid Art. 2.

<sup>203</sup> EUEED Art. 4 and Art. 7.



all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’<sup>204</sup> The definition reflects a much broader conception of discrimination than the three aforementioned jurisdictions. Among them, the Ethiopian Proc. 568/2008 seems a bit closer with CRPD as it provides a broader scope in prohibiting discrimination under article 5.1 that qualifies illegal “[any] law, practice, custom, attitude or other discrimination situations that impair the equal opportunities of employment of a disabled person are illegal”.<sup>205</sup>

Failure to provide or denial of reasonable accommodation is also another form of discrimination. In the next sub-section of section 3.4, the paper will analyze the definition of reasonable accommodation and how it can be provided. But for the purpose of this sub-chapter on “equality and discrimination” in respect of PWDs reasonable accommodation has to be presented as a part of the concept of equality. It requires positive measures, taking action, nonetheless by concept it is not belonging to “favorable treatment”, it is a part of, a form of “equal treatment”.

The Ethiopian Proc. 568/2008 clearly provides that: ‘when a disabled person is not in a position to exercise his equal right of employment opportunity, as a result of absence of a reasonable accommodation, such an act shall be regarded as discrimination.’<sup>206</sup>, Hence, if a worker with a disability is prevented from exercising his/her equal opportunity in employment due to the lack of such accommodation, discrimination can be established and the sanctions provided against the employer are applicable.

The SAEAA and the EUEED do not provide explicitly that failure to provide reasonable accommodation qualifies as discrimination however both of them require employers to make

---

<sup>204</sup> CRPD Art. 2 Para 2.

<sup>205</sup> Proc. 568/2008 Art. 5.1.

<sup>206</sup> PRoc. 568/2008 Art. 5.3.

such accommodation. Some authors regarding SAEAA have also noted that absence of recognition and the denial of reasonable accommodation as a distinct form of discrimination in legislations. Further, the failure of courts to provide clear guideline for obligation of reasonable accommodation expose PWDs to remain excluded from the South African labor market.<sup>207</sup>

Article 2 Para 2 (b)(II) of EUEED expressly stipulates that: ‘as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.’ Pursuant to this provision of the EUEED, reasonable accommodation is regarded as defense for indirect discrimination. Quinn and Flynn in this respect strongly argue that, EU law appears to restrict the scope of courts by directing them to look ‘whether discrimination has occurred irrespective of whether any accommodation has been provided’.<sup>208</sup> Besides, they also contend that although the original draft prepared by the commission contained that failure to achieve reasonable accommodation amounts to discrimination, it was for the mere reason of ‘textual elegance’ that reasonable accommodation was lifted up and moved to article 5 of the directive due to drafting of the council took a view that it was ‘textually inelegant to overburden the definition of discrimination’ under article 2 of the directive.<sup>209</sup> Practically speaking though, report made by the EU parliamentary research service indicates that quite several EU member states treat failure to provide reasonable accommodation as direct form of discrimination.<sup>210</sup>

---

<sup>207</sup> J Modise, M Olivier and O Miruka ‘Reasonable Accommodation for People with Disabilities in the Labour Market’ (2014) 5(4) Mediterranean Journal of Social Sciences 586.

<sup>208</sup> G Quinn and E Flynn, G Quinn and E Flynn, ‘Evolutions in Antidiscrimination Law in Europe and North America: Transatlantic Borrowings: The Past and Future of EU Non-discrimination Law and Policy on the Ground of Disability’ (2012) 60 American Journal of Comparative Law 23,42.

<sup>209</sup> Ibid 42.

<sup>210</sup> EU Parliamentary Research Service, The Employment Equality Directive European Implementation Assessment study 2016 30.

Moreover, the report made by the EU commission also shows in the same way that failure to provide reasonable accommodation be regarded as discrimination in most member states, without identifying whether such discrimination is treated as indirect, direct or distinct form of discrimination.<sup>211</sup>

The CRPD also states under article 2 paragraph 3 that failure or denial to provide reasonable accommodation constitutes discrimination. Thus, the compared jurisdictions recognize this form of discrimination since all of them have ratified the said convention. Unless the provision of reasonable accommodation is ensured and failure to provide it is sanctioned as an instance of discrimination, equality would absolutely be deteriorated. The is because, the essence of such accommodation is primarily aimed at achieving equality by removing possible barriers which may limit the performance of workers with disabilities when a work is done through a conventional way, i.e. without providing accommodation

Under the EUEED there is another kind of discrimination that is identified and developed by court interpretation. Discrimination by association has been recognized by the ECJ decision in the case of *Coleman v Attridge Law and Steve Law*. In that case, Coleman had a disabled child for whom she was a primary care giver. There were difficulties with her availability for work and the Employer dismissed her for this reason. The CJEU to which decided the case g held that, ‘where an employer treats an employee who is not himself disabled less favorably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favorable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct

---

<sup>211</sup> EU Commission report ‘ Reasonable accommodation for disabled people in employment Contexts’ 2016 10.

discrimination’<sup>212</sup> Moreover, with regard to the hostile conduct of the employer preceding the dismissal the court ruled that ‘unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment’.<sup>213</sup> Assumptive discrimination which can be understood as discriminating someone ‘because the discriminator thinks that they have a particular religion, belief, disability, sexual orientation and age’<sup>214</sup> and multiple discrimination are not recognized within EUEED. However, the resolution of the EU parliament to the proposal submitted by the commission has emphasized for the inclusion of these forms of discrimination.<sup>215</sup>

### 3.4 Provision of Reasonable Accommodation

Reasonable accommodation has been referred to as a part of the concept of equality in the previous section. This part will analyse the ways and means of providing such accommodation including its legal limitation.

#### 3.4.1 Reasonable accommodation in Ethiopia

Reasonable accommodation in some jurisdictions may be termed as “reasonable adjustment”, or “effective accommodation”. Under Proc. 568/2008 reasonable accommodation is defined as ‘an adjustment or accommodation with respect to equipments at the work place, job-requirements, working hours, structure of the business and working environment with a view to

<sup>212</sup> Case C-303/06 Ms Coleman v Attridge Law and Steve Law (2008) ECR I-05603 Para 56.

<sup>213</sup> Ibid Para 59.

<sup>214</sup> E Howard, ‘EU Equality Law: Three Recent Developments’ (2011) 17(6) European Law Journal 785,789.

<sup>215</sup> Erica Howard 789.

accommodate PWDs to employment<sup>216</sup> The employer is obliged to provide reasonable accommodation for effective participation of workers with disabilities.

However, provision of this accommodation is subject to exceptions. Reasonable accommodation is sought as far as it may not cause undue hardship. Under Proc. 568/2008 undue burden is defined as ‘an action that entails considerable difficulty or expense for the employer in accommodating PWDs when considered in light of the nature and cost of adjustments, the size and structure of the business, the cost of its operations, and the number and composition of its employees’.<sup>217</sup> Such exception is very subjective particularly in Ethiopia where there is no standard and detailed guideline, it will not be easy to enforce in practice. Subsequent directives<sup>218</sup> issued do not provide in detail circumstance that amounts to undue burden that relieve employers from duty. Determining undue burden requires case by case analysis of the circumstances. It is not done by considering only the cost to be spent. Each situation should be separately examined.

Providing the PWDs with assistant is a part of the adjustment or accommodation under Ethiopian law. One innovation of Proc. 568/2008 in terms of reasonable accommodation is that it never negotiates on the provision of personal assistant and it provides in this respect, ‘the assignment of an assistant for a person with a disability shall, under no circumstance, constitute undue burden to an employer.’<sup>219</sup>

The Ethiopian system of ensuring the provision of reasonable accommodation in general and assignment of assistant in particular face so many constraints.

---

<sup>216</sup> Proc. 568/2008 Art. 2.5.

<sup>217</sup> Ibid Art.2.7.

<sup>218</sup> For the term of “directives” in Ethiopian law see fn..... above.

<sup>219</sup> Proc. 568/2008 Art. 6.1.C Para 2.

#### 3.4.1.1 General Problems

One of the problems regarding fulfilling reasonable accommodation obligation is lack of awareness on the part of the employers. The concept is relatively new and therefore intensive awareness-raising among employers is indispensable to increase the provision of this accommodation. It is not always true that the existence of the law by itself would not improve the employability of PWDs.

The CRPD Committee<sup>220</sup> in this regard has also recommended Ethiopia to provide training for public and private sectors in its concluding observation on the initial report from the FDRE.<sup>221</sup>

With respect to question who and when should initiate, raise the question of reasonable accommodation there are three approaches. The first one is accommodating when the employer knows or ought to know, the second is when the disabled worker makes such request and the third one is when the employer is ordered to provide by competent authority.<sup>222</sup> Although Proc. 568/2008 is silent on this matter, subsequent directives of Federal Ministries of MOLSA and Civil Service<sup>223</sup> provide that the employer should ask the disabled worker what type of accommodation the disabled person requires at work place.<sup>224</sup> Employers are not aware of their obligations and possibilities, therefore unless an employer is informed his/her duty, he/she may fail to discharge obligation of providing reasonable accommodation. The South African Labor Department for instance has a lot of guidelines to provide information on the obligation of employers including adopting a code of good practice and technical guideline.

---

<sup>220</sup> The the body of independent experts which monitors implementation of the Convention by the States Parties.

<sup>221</sup> Concluding observations on the initial report of Ethiopia CRPD/C/ETH/CO/1 November 2016 Para 10.

<sup>222</sup> European Commission report ' Reasonable accommodation for disabled people in employment Contexts' 2016 66.

<sup>223</sup> Federal Civil Service Minister Directive No. 1 2009 Art. 7.2.B.

<sup>224</sup> Ibid Art. 7.2.B.

The second general constraint regarding reasonable accommodation is the absence of any rule or guidance on sharing the burden of the costs incurred by reasonable accommodation. Making profit is the primary purpose of an employer of a company. If an employer can find a person from the market, which will not cost except salary, why they would care about recruiting PWDs? Some commentators, like Portillo and Lock believe that ‘anti-discrimination laws are a limit to the freedom of property’.<sup>225</sup> However, prominent representatives of the legal academia in the area of business law and property, represent the view that the principle of non-discrimination rather protects than hinders the freedom of contract and contributes to the balanced operation of the market.<sup>226</sup> Furthermore, employing PWDs in these days is also becoming advantage for employers since consumers have begun to appreciate not only brand of the product but also contribution of companies to the society.<sup>227</sup> Ethiopia has assumed obligation under CRPD that ‘in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided’.<sup>228</sup> Therefore, one of such ways to ensure is sharing the burden of expense with employers. Concerning the concept of undue hardship, Lawson asserts that companies that are found in a state where there is access to subsidy may not easily prove undue hardship compared to those business entities in poor countries without subsidy.<sup>229</sup>

The third general problem is poor understanding or inability to differentiate reasonable accommodation and accessibility. This lacuna equally was present on the side of employers and

---

<sup>225</sup> J Portillo and W Lock, ‘anti-discrimination laws: undermining our rights’ (2012) 109(2) *Journal of Business ethics* 210, 212.

<sup>226</sup> Michael J. Trebilcock: *The Limits of Freedom of Contract*. Harvard University Press, Harvard University Press, 1993. Chapter Nine: Discrimination, mainly pp. 195-214

<sup>227</sup> G Siperstein, N Romano, a Mohler and others, ‘A national survey of consumer attitudes towards companies that hire people with PWDS’(2006) 24(3) *Journal of Vocational rehabilitation* 9.

<sup>228</sup> CRPD Art.5.3.

<sup>229</sup> A Lawson, *Disability and Equality Law in Britain* (HART Publishing 2008) 31.

beneficiaries and even among law enforcement organs and judges. The two concepts are, indeed, very close to each other, however, General Comment No. 2 of the CRPD Committee on Accessibility (Article 9 of the Convention, makes some distinction. Reasonable accommodation is individual oriented adjustment and it is '*ex nunc*' duty which is enforceable as soon as request is made by the disabled worker.<sup>230</sup> On the contrary, accessibility is an '*ex ante*' duty, which is always ready and automatic.<sup>231</sup>

#### 3.4.1.2 Personal assistant

The problem with respect to personal assistant is unavailability of well-studied assessment to know the assistance required and for which kind of disabled persons it is appropriate. Moreover, the participation of a disabled worker during selection and recruitment must be emphasized and the worker with disability should make self-assessment checks.<sup>232</sup> Issue of privacy is also something unaddressed in Ethiopia when assigning personal assistant. However, privacy is strictly associated with one's dignity, in case of PWDs 'it is often neglected'.<sup>233</sup>

One instance which can be appreciated under Proc. 568/2008 is the incorporation of a specific paragraph regarding provision of reasonable accommodation for women with disabilities in employment.<sup>234</sup> Recognizing particular realities of women with disabilities in fact arises from understanding the effect of multiple discrimination upon such groups of the society. However, there are no legal or practical situations in which the provision of reasonable accommodation for women with disabilities at work place could be observed. Therefore, if there is determination on part of the government to outlaw discrimination against PWDs, it must conduct a detailed study

<sup>230</sup> Committee on the Right of Persons with Disabilities General Comment 2 2014 Para 26.

<sup>231</sup> Ibid Para 25.

<sup>232</sup> E Turner, 'Finding the right Personal Assistant' (2003) 18 Journal of Vocational Rehabilitation 87-91

<sup>233</sup> G Quinn T Degener and others, The current use and future potential of United Nations human rights instruments in the context of disability (United Nations New York and Geneva 2002) 57.

<sup>234</sup> Proc. 568/2008 Art. 6 Para 1(B).



and assessment on reasonable accommodation in general and reasonable accommodation for women with disabilities in employment. The CRPD committee in its concluding observation on the initial report of Ethiopia commends the presence of reasonable accommodation in the context of employment. However, it did not assess effective implementation of such measure other than recommending the state party to adopt comprehensive reasonable accommodation standards in all areas of life.<sup>235</sup>

#### 3.4.2 Reasonable accommodation in South Africa.

Reasonable accommodation under SAEAA is defined as, ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’.<sup>236</sup> Section 15 of the act which has a title on affirmative action measures also provides under its paragraph “C” that ‘[c]making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer’<sup>237</sup> the construction of reasonable accommodation under the SAEAA reflects both affirmative measure and the provision of appropriate measure.

Reasonable accommodation is understood as a means of bringing equality of opportunity and at the same time ensuring the equal participation in employment. Moreover, the measure of reasonable accommodation under the SAEAA does not also seem to be limited to PWDs since the act mentions that the measure is also for other designated groups. Hence, the definition of the term designated group also includes gender and black people as well. See Section one of the act to understand what is included in by designated groups.

<sup>235</sup> Concluding observations on the initial report of Ethiopia CRPD/C/ETH/CO/1 November 2016 Para 9.

<sup>236</sup> SAEAA Section 1.

<sup>237</sup> IbidSection 15 Para [C]

The exception or limitation for reasonable accommodation which is undue burden or disproportionate burden in EU has not been provided and defined in the SAEAA. The Code of Good Practice issued by the Department of Labor without non-binding effect as has elucidated the exception from the obligation of taking reasonable accommodation measures. The Code under paragraph 6.11 mentions that an employer is not obliged to accommodate a qualified PWD if the accommodation would impose unjustifiable hardship.<sup>238</sup> The Code further defines the unjustifiable hardship to mean as ‘action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business’.<sup>239</sup> Compared to the undue burden standard, unjustifiable hardship seems to adopt a stringent requirement, i.e. it is more difficult for the employers to be exempted from the obligation with reference to “unjustifiable hardship”.<sup>240</sup> This has been highly remarked with regard to South Africa’s history of PWDS discrimination.<sup>241</sup>

South Africa’s provision of reasonable accommodation for employees with PWDs is supported by the adopted guidelines and policies. The availability of such policies and guidelines also helps the employers and PWDs to understand the content of their obligation and right respectively. For instance, the reasonable accommodation policy developed by the department of public service administration identifies and categorizes assistive devices into independent living

---

<sup>238</sup> Code of Good Practice Para 6.11.

<sup>239</sup> IbidPara 6.12.

<sup>240</sup> United Nations General Assembly A/AC.265/2006/CRP.1, ‘Concept of Reasonable Accommodation in Selected National Disability Legislation’ Background conference document prepared by the Department of Economic and Social Affairs 2005, <<http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>> Accessed June 21 2016.

<sup>241</sup> United Nations General Assembly A/AC.265/2006/CRP.1, ‘Concept of Reasonable Accommodation in Selected National Disability Legislation’ Background conference document prepared by the Department of Economic and Social Affairs 2005, <<http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>> Accessed June 21 2016.

and employment related devices.<sup>242</sup> Going beyond employment, but with influence to the labour market opportunities of PWDs, independent living devices are thus materials which PWDs should require to lead their own life and employers are not obliged to provide such devices as work-related accommodation.<sup>243</sup> Yet, employment-related devices are those which are necessary to accomplish work-related responsibilities and employers are duty-bound to provide such accommodation.<sup>244</sup>

Furthermore, the Technical Assistance Guidelines on the Employment of People with Disabilities which is formulated by the department of labor with the purpose to assist employers, employees, trade unions and people with disabilities to understand the SAEAA and its Code of Good Practice extensively deals with major aspects of reasonable accommodation. See chapter five of the guideline for more detail. As regards to subsidizing the cost of reasonable accommodation, the SAEAA provides no assistance.<sup>245</sup>

### 3.4.3 Reasonable accommodation in Europe.

As regards to reasonable accommodation in EU's framework, the obligation is clearly stipulated under article 5 of the EUEED.<sup>246</sup> Moreover, paragraph 20 of the preamble of this directive elaborates that appropriate measures should be effective and practical. Such paragraph also states some example measures that could be provided as reasonable accommodation. Accordingly, example of such instances include 'adapting premises and equipment, patterns of

<sup>242</sup> Department of Public Service and Administration POLICY ON REASONABLE ACCOMMODATION AND ASSISTIVE DEVICES FOR EMPLOYEES WITH DISABILITIES IN THE PUBLIC Service 2012 Para 11.

<sup>243</sup> Ibid Para 11.1.

<sup>244</sup> Ibid Para 11.2.

<sup>245</sup> M Plisses, access to Work for Disabled Persons in South Africa: The Intersections of Social Understandings of Disability, Substantive Equality and Access to Social Security (PhD thesis university of cape town 2015) 186.

<sup>246</sup> See section 3.3 for more detail on reasonable accommodation in Emu.

working time, the distribution of tasks or the provision of training or integration resource’.<sup>247</sup> List of such measures are not exhaustive and other similar measures may be included. The CJEU in the *HK Danmark* case has also decided that the list of appropriate measures provided under paragraph 20 of the directive are not exhaustive.<sup>248</sup> Hence, the court further confirmed that so long as reduction of working hours could possibly enable the disabled persons to continue his/her employment, the measure is regarded as reasonable accommodation provided in the directive.<sup>249</sup> Therefore, employers in member states of EU are obliged to provide reasonable accommodation to enable such workers to effectively perform their work responsibilities.

Like in the case of Ethiopia and South Africa, the obligation of reasonable accommodation under EU legal framework is subject to exception. Thus, duty to accommodate upon the employers is to the extent that the measures do not impose disproportionate burden. Paragraph 21 of the EUEED also provides considerations which have to be taken into account in the determination of disproportionate burden such as, ‘financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance.’<sup>250</sup>

The EUEED’s determinant factors of disproportionate burden are the same in all aspects with that of Ethiopia and South Africa. Yet, the EUEED is different in one respect. The possibility of obtaining public fund or other kind of assistance has been considered in the determination of the disproportionate burden. This is because of the fact that the availability of public fund or similar assistance reduces the likely burden upon the employer.

---

<sup>247</sup> EUE ED Preamble Para 20.

<sup>248</sup> *HK Danmark*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222 Para 56.

<sup>249</sup> *Ibid.*

<sup>250</sup> EUEED Preamble Para 21.

Nevertheless, it should be emphasized that the EUEED does not oblige member states to design public fund schemes for the purpose of subsidizing employers to their cost of employment related reasonable accommodation of disabled people. Since directives in EU are a type of legislations that provide general framework, it is up to the member states to opt for establishment of public subsidy or other assistance schemes for employers incurring cost of reasonable accommodation. However, according to report of the EU commission, several member states of EU offer subsidy to those employers incurring cost of reasonable accommodation except in Greece where there is very much limited access and in Cyprus which does not exist at all.<sup>251</sup>

To sum up this discussion, despite the presence of clear rules on reasonable accommodation in each of the compared jurisdictions, there are significant differences in the effective realization or enforcement of such norms. Ethiopia's Proc. 568/2008 obliges employer to make reasonable accommodation, the absence of clear policies and guidelines to comprehend the concept has created challenges to effectively implement the measure. Unavailability of state subsidy or incentive to the employers to the cost they may incur for reasonable accommodation is also another constraint limiting the employability of PWDs. Thus, state subsidy not only encourages employers to hire PWDs but also it contributes to minimize the effect of undue hardship.

Therefore, the summary conclusion is that without the involvement of governmental intervention through subsidy or other forms of incentives, the obligation of making reasonable accommodation particularly assignment of a personal assistant could not be fully realized.

---

<sup>251</sup> European Commission report ' Reasonable accommodation for disabled people in employment Contexts' 2016 10.

### 3.5 Obligation of Affirmative Action or specific measure

Affirmative action is the general term used for a wide scope of measures improving the labour market opportunities of disadvantaged classes of the society that may also assign certain sort of obligation imposed on the employers.

The term is recognized in many different terminologies like positive action, affirmative measures, special or specific measures. While affirmative action is dominantly used in non-EU states, positive action has also been used by EU states.<sup>252</sup> It is in general designed to bring or ensure equality, which might be difficult, by the conventional means of formal equality.

Affirmative action or specific measure was adopted, first in the United States, as an instrument to increase equal chances and substantive equality of women and racial groups with regard to the social disadvantages accumulated in the history. It also intends to address the aggravation discrimination and present stereotypes towards women and racial minorities.

The legislative approach to affirmative action or specific measure regarding PWDs is different from state to state. Tucker for example attempts to argue that the primary goal of affirmative action is to correct past discrimination while reasonable accommodation is aimed at tackling immediate or prospective discrimination.<sup>253</sup> Thus, what could be understood is that the traditional form of affirmative action which has been implemented for racial groups and women is not similarly applicable for PWDs. The jurisdictions compared in this paper, Ethiopia, South Africa and EU have similarly varied approach to affirmative action or specific measure for PWDs. Ethiopia and South Africa recognize the application of affirmative action for PWDs while the European Union reflects different understanding.

---

<sup>252</sup> European Commission, International perspectives on positive action measures A comparative analysis in the European Union, Canada, the United States and South Africa 2009 9.

<sup>253</sup> B Tucker, 'The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm' (2001) 62 Ohio State Law Journal 335.

These differences will be discussed in detail below, in the context of the comparator jurisdictions.

At the international level, affirmative action is given a place both under Article 1.4 of International Convention on Ethnic and Racial Discrimination ICERD<sup>254</sup> and Article 4.1 of Convention on the Elimination of All Forms of Discrimination against Women CEDAW.<sup>255</sup> CRPD, which is a specific convention, meant for PWDs has included a similar provision under article 5.4: “Specific measures” to achieve *de facto* equality of PWDs shall not be considered discrimination. However, this is not called ‘affirmative action’ and only permitted. Therefore such measures are different from those laid down in the ICERD and CEDAW.

Both affirmative action and the specific measures are specific measure with a view to achieving *de facto* equality. While affirmative action under the ICERD and CEDAW are of temporary nature, they might be applied until equality in the labour market is reached. The specific measures under the CRPD on the other hand do not have temporary nature and their discontinuation is not foreseen. Hence, they are needed as long as the disability of the person requires them. In this regard, Lawson states that CRPD ‘differs from them in the one important respect that, unlike them, it is not subject to the limitation that ‘these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved’.<sup>256</sup>

---

<sup>254</sup> ICERD

<sup>255</sup> Convention on the Elimination of All Forms of Discrimination against Women Adopted December 18 1979, entered into force December 3 1981 Art.4.1.

<sup>256</sup> A Lawson, ‘United Nations Convention on the Rights of People with Disabilities: New Era or False Dawn?’ (2007) 34 Syracuse Journal of International Comparative Law 563

In Ethiopia, the FDRE Constitution entitles affirmative action only to women to a broader extent and to very limited extent to certain minority groups. Subsequent acts are extending this program for PWDS and ethnic minority groups to wider extent.

The FDRE constitution article 35.3 entitles women as a group to affirmative measures, to redress the legacy of inequality and discrimination in order to enable them to participate equally in all areas of life.<sup>257</sup> Similarly to the CRPD, this provision also does not mention the discontinuation of affirmative action when the objectives are achieved.

Preferential treatment as a form of affirmative action that aims to increase employment opportunity of PWDs is provided under Article 4.2<sup>258</sup> of Proc. 568/2008. The Proclamation in fact entitles job applicants with disabilities to be preferentially treated when they have equal or closer score to that of applicants without disabilities.<sup>259</sup> The first requirement of scoring equal result to that of non-disabled applicants is pretty much clear to give preference to applicant with disability. However, the problem arises when trying to favor disabled job applicants depending on closer score. Closer score is so imprecise to determine as it is a matter of subjective judgment.

In order to avoid this problem, implementing the directives may be helpful. The directive issued by MOLSA for instance set a closer score to 3% discrepancies between the score of disabled applicant and non-disabled ones.<sup>260</sup> Civil service directive also interprets closer score as 4% difference between the score of applicant with disability and that of without disability.<sup>261</sup> Whether the determination of closer score in such way is sufficient by itself requires critical view of circumstances. The practice on the ground however is somewhat different when applying the

---

<sup>257</sup> FDRE Constitution Art.35.3.

<sup>258</sup> Proc. 568/2008 Art.4.2.

<sup>259</sup> Ibid Art. 4.2.

<sup>260</sup> Molsa Directive 2009 Art. 10.

<sup>261</sup> Federal Civil Service Minister Directive No. 2014 Art.9.6.C.



closer score during recruitment and promotion. The other problem surrounding affirmative action in realizing equal employment opportunities arises from inconsistently applied measures.

There is no minimum standard to guide all institutions and employers regarding the starting level of such affirmative action. As a result of this, citizens of the same nation would have different treatment. For instance, this may occur when a disabled job seeker in private undertaking finds lower level of affirmative measure, than those in the public employment sector. Additionally, when a disabled applicant at Amhara regional state enjoys higher level of affirmative action during employment, a disabled applicant in the federal civil service meets only minimum level of affirmative measures. This is because, the revised Amhara regional state civil servant proclamation no. 171/2010 Article 15.4<sup>262</sup> and its implementing directive Art.2.7.7<sup>263</sup> entitle any job applicant with disability to have a preferential treatment to the vacant position, without upper limit, if he/she scores the minimum passing score while in the federal civil service permits admission up to a maximum of 4% through affirmative action.<sup>264</sup> Such incoherent applications could have been balanced, if the council of ministers had issued its regulation as stated under Article 9.1<sup>265</sup> of Proclamation 568/2008.

Furthermore, affirmative action/specific measure for PWDs has also been incorporated in the directive issued by the Charities and Societies Agency. The measure provided in this directive is different from the former directives. This directive is dealing with the costs spent on the salary of a disabled worker and his personal assistant in NGOs with respect to the financial law

---

<sup>262</sup> The Revised Amhara Regional State Civil Servants' Proclamation No. 171/2010 Art. 15.4.

<sup>263</sup> Revised Amhara Regional State Civil Service Proclamation Implementing Directive No.1 2015. Art.27.7.

<sup>264</sup> Federal Civil Service minister Directive No. 1 2014 Art.9.6.C.

<sup>265</sup> Proc. 568/2008 Art. 9.1.

qualification and regulation of these costs, laying down favourable rules in order to promote the hiring of such applicants.<sup>266</sup>

Shifting to the South African situation, one can see a constitutional and legislative approach that does not distinguish between the PWDs and other disadvantaged groups.<sup>267</sup>

Section 9.2 of the SAC recognizing the full and equal enjoyment of all rights and freedoms and permits taking legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.<sup>268</sup> One of such measure taken by the state is the SAEAA to achieve employment equity at work place. Affirmative action measure according to the decision of constitutional court has to pass or meet three requirements to get constitutional legitimacy:

- they must target people or categories of people who have been disadvantaged by unfair discrimination;
- they must have been designed to protect or advance these people or categories of people, and
- They must promote the achievement of equality.<sup>269</sup>

The measure has been accorded to designated groups, which include blacks, PWDs and gender.<sup>270</sup> Therefore, employers should take affirmative action measure to eliminate unfair discrimination and promote equal employment opportunity. Preferential treatment and numerical goals are permitted while quotas are prohibited in implementing affirmative action.<sup>271</sup> In

---

<sup>266</sup> See Charities and Societies Agency Directive Regarding Operational and Administrative Costs No. 3/2011 1.2.7 and 1.2.2 respectively(in Amharic)

<sup>267</sup> See chapter 1.3 discussion on legislative and constitutional inclusion of PWDS.

<sup>268</sup> SAC Section 9.2.

<sup>269</sup> Minister of Finance and Another v Van Heerden 2004 (6) ZACC Para 37.

<sup>270</sup> SAEAA Section 1.

<sup>271</sup> Ibid Section 15.3.

applying affirmative action measures, employers must comply with chapter two of the act, which requires consultation, analysis, preparation of employment equity plan, report and publication of the report.<sup>272</sup> However, affirmative action is designed for designated groups. , Dupper cited in Budeli argues that actual implementation ‘favor race over gender and disability over black African and color Indians’.<sup>273</sup> Nonetheless, most of the affirmative action jurisprudence in South Africa emerges not from PWDs but that of black people and women.<sup>274</sup>

In the European Union, the term positive action is most frequently used term, affirmative action is not used by the language of the European legislature. Such measure has also been defined as ‘proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage’.<sup>275</sup> From this definition, one can infer that positive action measures in the first place are not limited to a certain kind of measure rather they may involve many different sets of actions. Second, such measures must be proportionate, not entitling unconditional preference to the socially and economically disadvantaged groups and thirdly, the purpose is to realize full and effective equality in practice.

Article 7.1<sup>276</sup> of the EUEED requires member states to adopt and maintain specific measure in order to ensure full equality in practice to those protected grounds in the directive. Furthermore, sub article 2 of this Article particularly emphasize that: “with regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States

---

<sup>272</sup> Ibid chapter 2 section 15-24.

<sup>273</sup> F Budeli ‘Employment Equity and Affirmative Action in South Africa: A Review of the Jurisprudence of the Courts since 1994’ (2014) Conference on Twenty Years of South African Constitutionalism <<http://www.nylslawreview.com/south-africa-program/>> Accessed December 9 2016.

<sup>274</sup> D Hurling, Disability Discrimination And Reasonable Accommodation In The South African Workplace (LLM. Mini-thesis University of Western Cape 2008) III.

<sup>275</sup> European Commission, International perspectives on positive action measures A comparative analysis in the European Union, Canada, the United States and South Africa 2009 9.

<sup>276</sup> EUEED Art. 7.1.

to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”<sup>277</sup>

The directive permits additional safety and health measures to be taken in consideration of PWDs to exercise their right to employment and occupation. Provision of quota in the form of positive action for PWDs under EUEED may be challenging given the restrictive attitude of the CJEU in respect of gender quotas in employment. However, , if the ECJ is confronted the same issue of quota for PWDS, it may probably consider different social realities of PWDs as well as EUEED article 7.2 that broadens the scope of positive action for PWDS may help the court to decide in favor of PWDs.<sup>278</sup>

As a conclusion to the discussion the compared jurisdictions of this thesis recognize the provision of affirmative action or specific measure to realize full and effective equality for PWDs. However, there is a difference in which the measure has been constructed or reflected. The Ethiopian and South African laws seem to reflect the traditional approach to affirmative action which has been targeted to disadvantaged groups like women and racial groups. The EU directive incorporates positive action for PWDs and the measure is not like affirmative action. this is because positive action is aimed at ensuring full and effective equality in practice, by using a set of various ways for those who have been socially and economically disadvantaged through a proportionate means. Thus, instead of using the traditional form of affirmative action, under EU law the focus of affirmative action must be on the availability of various forms of

---

<sup>277</sup> Ibid Art. 7.2.

<sup>278</sup> **European Commission** Directorate-General for Employment, Social Affairs and Equal Opportunities Report on Disability and non-discrimination law in the European Union (2009) 36. See also European Commission, International perspectives on positive action measures. A comparative analysis in the European Union, Canada, the United States and South Africa 2009 for additional understanding on positive action.

programs like trainings and provision of reasonable accommodation in order to fully enable and empower them in the labor market without inserting discriminatory elements against other groups.

## CHAPTER FOUR

### Enforcement of Anti-Discrimination Laws in Ethiopia, South Africa and EU

This Chapter will deal with the main subjects of the enforcement in the following order. First, the coverage of beneficiaries – who may claim non-discrimination and reasonable accommodation – will be compared in the three jurisdictions. Second, the scope of the obligation with regard to the employers who are covered as subjects of the legal obligations. Third, the enforcement bodies and the types of enforcement procedures will be presented. Each sub-topic will be presented in the context of the three compared jurisdictions.

#### 4.1. The Scope of the Beneficiaries in the Context of Enforcement.

##### 4.1.1. Enforcement of Anti-Discrimination Laws in Ethiopia.

Despite the fact That Ethiopia has been taking legal and policy measure by enacting Proc. 568/2008, ratification of the CRPD and other policy formulations, PWDs could not realize their right to equal opportunity in employment as it has been envisioned. The constraining factors

come from different angles and this part discusses the principal ones. Effective implementation seems to be hindered as a result of the following challenges including but not limited to:

1. Controversy regarding who a disabled person is;
2. Poor understanding concerning the governing proclamation i.e. Proc. 568/2008,
3. Poor sanction measures against employers who violate the rights stated under proc. 568/2008,
4. Enactment of other laws limiting the implementation of the proc. 568/2008,
5. Ineffectiveness of responsible bodies assigned to implement Proc. 568/2008 and etc.

Therefore, this part attempts to deal with such challenges and endeavors to indicate the way out.

Defining disability is not an easy task both at the national and international legal arenas. The Ethiopian legal set up is not an exception to this assertion albeit Proc. 568/2008 embraces what disabled person mean in light of the social model of disability.

In sub-chapter 3.2 of Chapter Three, the general definition of the PWDS in the three jurisdictions was presented. Here, with regard to the practical scope of enforcement, the implementation and concrete realization of the legislative definitions will be looked into. As provided under section 3.2 of Chapter Three, proclamation 568/2008 seems pretty much generous when defining the concept of persons with disability. According to Seyum's analysis, the proclamation is characterized by 'more inclusive and broader definition' even when it is compared to some international instruments.<sup>279</sup> For Instance, the ILO Convention No. 159 defines a disabled person as, 'an individual whose prospects of securing, retaining and advancing in suitable employment are substantially be reduced as a result of a duly recognized physical or

---

<sup>279</sup> Seyum Yohannes (N 53) 90,102.

mental impairment<sup>280</sup> In this regard, Seyum asserts that in order to be covered by the convention, one's employment opportunity should be substantially reduced due to mental and physical impairment, and such kind of definition is a reflection of those laws aimed at providing specific support or subsidy.<sup>281</sup> Proc. 568/2008 does not give any impairment related definition, as its objective is outlawing and tackling discrimination in general without limiting it to a certain level of impairment.<sup>282</sup>

In fact, laws, which are designed to provide specific support, reflect restrictive definition for the term disability. However, the author does not agree with the point that the ILO convention 159 defines disability in light of those laws aimed at granting support. This is because , the convention itself does not imply provision of subsidy; rather, its fourth preamble<sup>283</sup> and article 1 paragraph 2 of the convention<sup>284</sup> recognize equal opportunity in employment through implementation of rehabilitation services.

Broadening the definitional scope of a disabled person is under Proc. 568/2008 looks like more of a positive step forward. However, we may sometime fall in unending difficulty when putting laws in practice. This is because of differing nature of impairments that one may encounter. A certain level of minimum threshold may be necessary in order to properly implement those anti-discriminatory laws to which they are prescribed for including Proc. 568/2008. During practical implementation of the rights ensured, enforcing or implementing bodies may get in trouble in identifying for example who is entitled for reasonable accommodation and affirmative action.

---

<sup>280</sup> ILO Convention 159 Vocational Rehabilitation and Employment of Disabled Persons 1983 Art.1.1.

<sup>281</sup> Seyum Yohannes (53) 103.

<sup>282</sup> See the Proclamation Art. 2.1, defines a PWD as an individual whose equal employment opportunity is reduced as a result of physical, mental or sensory impairments in relation with social, economic and cultural discrimination.' See also Seyum 103.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid* Art. 1 Para. 2.



Author's interview with Mr. Desse Seyum who is a Director at Amhara Regional State Justice and Legal Research department seems to strengthen the point at hand. According to his view, disability should not be understood in a much broader concept.<sup>285</sup> He also further adds that, unless a certain qualifying threshold is determined, everyone with minor bodily impairment may manipulate when one's interest so requires.<sup>286</sup>

While it cannot be denied that there might be manipulation of laws, such manipulation by some individuals should not lead to the narrower application of non-discrimination laws. Laws are at the first place created for the law-observing majority and not for exceptional law breakers. In the second place, reasonable step exists in non-discrimination laws to measure possible levels as to how a person can be accommodated. Therefore, that, if one make requests that go beyond what is reasonably required for his or her accommodation, such requests can legally be limited or restricted. In the third place, setting a threshold to narrow the scope of PWD, may also prevent from tackling unobservable forms of disablement constituting discriminatory effect which are not noticeable presently but embedded in the society.

Although Proc. 568 provides a very wide definition for the term person with a disability, directives that are issued by the mandated organs of the government like the Ministry of Labor and Social Affairs (MOLSA) to enforce and follow up the implementation of the proclamation seem to qualify or putting a specific threshold to the word disability. MOLSA Directive of 2009 to implement Proc. 568/2008 under its article 3/1 defines PWDs as, 'an individual who has a physical, mental or sensory impairment and where the impairment has a substantial limit and

---

<sup>285</sup> Interview with desse

<sup>286</sup> Desse seyoun

long-term effect on his or her ability to carry out normal day-to-day activities’.<sup>287</sup> Moreover, the directive elaborates under art.4.B some exclusion from the ambit of disability protection such as if the disablement is occurred as a result of alcoholic behavior or if the cause of the impairment is because of using illegal drug.<sup>288</sup>

Another Directive issued by Civil Service Ministry, (recently renamed as Ministry of Public Service and Human Resource Development) incorporated the definition, provided in Proc. 568/2008 with some modification. Art. 2.1<sup>289</sup> of the directive use a definition of PWDs copied from the Proc. 568/2008. Nonetheless, it does not mean that this directive follows the track of Proc. 568/2008 in the interpretation of the concept of disabled person. Because, in the subsequent provisions the directive indicates the criteria set to qualify the term disabled person.

Four qualifiers can be identified in both directives, which are not indicated in the Proclamation: 1. long-term effect, 2.recurring impairment, 3.substantial limitation, 4. impact on normal day-to-day activities.

The first requirement is the long-term effect, which is illuminated under Art. 2.4 as, ‘if the impairment is likely to persist up to 12 months from the date of its occurrence, if the impairment lasted more than 12 months, or if the impairment lasts with the person throughout his/her life’.<sup>290</sup> The second threshold for qualifying disabled under the directive is recurring impairment. In addition to long-term effect impairment, the directive needs to respond to frequent occurrences of impairment under limited circumstances. Thus, the directive delineates recurring impairment

---

<sup>287</sup> FDRE MOLSADirective of 2009 to Implement Proclamation No. 568/2008 Art.3.1. Amharic (author’s translation to English)

<sup>288</sup> Ibid Art.4.B.

<sup>289</sup> Federal Civil Service Directive No. 1 2014 Art.2.1.

<sup>290</sup> IbidArt. 2.4.

as, ‘one that is likely to happen again, that creates substantial limit on one’s activity at work, and which is not curable.’<sup>291</sup>

The third test to determining criteria is also substantial limitation that may arise from the impairment. In this regard, art. 2.8 of the directive make cross reference to Art. 4/1 what substantial limitation is referring to. Thus, the term “substantial limitation” has no clear cut definition, so that the directive simply provides four criteria as exhaustive list, which may constitute substantial limitation.

An individual who claims having physical, sensory or mental impairment is tested according to the following criteria to determine whether the impairment has caused substantial limit to his or her function.

- A. Nature and gravity of the impairment.
- B. The time which the impairment takes to recover or likely to recover.
- C. The permanent and long-term effect that the impairment may or likely to cause.
- D. When the individual could not perform the major function of the job for which he/she is assigned as a result of substantial limitation.<sup>292</sup>

The fourth qualifying criteria in defining PWD is the normal day-to-day activities added in the implementing directives to mean, ‘seeing, walking, hearing, speaking, thinking, breathing, learning, working, caring for oneself and includes doing physical work.’<sup>293</sup>

A clear and concrete message that transpires out from both MOLSA and Civil Service Directives is that there is a principal inconsistency between the centrally legislated Proc. 568/2008 and the Directives that are issued by subsidiary power. While Proc. 568/2008

---

<sup>291</sup> Ibid Art.2.7.

<sup>292</sup> Ibid Art.4.1.

<sup>293</sup> Ibid Art.2.13.

subscribes to the social model of disability, the implementing Directives are still running with the medical model of disability that considers impairment as a primary barrier to one's pursuance of productive socio-economic life.

In general, as one looks at Proclamation 568/2008 and its implementing directives, the former reflects a very broad definition without any minimum threshold, embracing a typical social model of disability in the Proclamation. However, this is coupled with the medical model of disability with a certain threshold that respectively defines disability in Ethiopia, which really creates insurmountable difficulties to understand who a PWD is.<sup>294</sup>

#### 4.1.2. The Definition of PWDs Under the SAEAA

As it has been discussed under subchapter 3.2 of this thesis, both the SAEAA and the Code of Good Practice define PWDs. Moreover, the SAEAA categorizes PWDs under the term "designated groups". The phrase designated groups pursuant to section 1 of the SAEAA includes black people, women and PWDs. The inclusion of PWDs in the designated groups category is to entitle the protection from unfair discrimination in employment and recognize that they are beneficiaries of such act. It has no any implication or clue with respect to the model of disability that it has adopted. Nonetheless, the code of good practice which has been issued following the SAEAA has come up with the social model of disability.<sup>295</sup>

According to the SAEAA and also restated under the Code of Good Practice, three cumulative requirements must be fulfilled in order to be regarded as a PWD.<sup>296</sup> In the first place,

---

<sup>294</sup> For more detail on this see Yohannes Teressa, Ensuring the Right to Equal Employment Opportunities of Persons with Disabilities: Critical Examination of the Ethiopian Legal Framework Ensuring the Right to Equal Employment Opportunities of Persons with Disabilities: Critical Examination of the Ethiopian Legal Framework (AAU unpublished LLM thesis 2012) 96.

<sup>295</sup> See subchapter 3.2 regarding the status of the code of good practice and the type of disability model it has incorporated.

<sup>296</sup> See Section of the code of good practice Item 5.3.

there must be a physical or mental impairment. Secondly, such impairment must exist for long term or recurring again and thirdly, the impairment must have a substantial limitation upon the prospect of entry into and advancement in employment.<sup>297</sup>

The Code of good practice further provides the substantive content of the three conditions. Firstly, impairment as a primary requirement must be present upon the physical or mental state of a person. In this respect, the code defines physical impairment as: ‘a partial or total loss of a bodily function or part of the body.’<sup>298</sup> Pursuant to this definition, physical impairment may occur partially or totally and the occurred loss also involves bodily function and part of a body. Therefore, it is not only the absence of part of a body but also the presence of the part of body without function. Besides, it seems also that sensory impairment is not a part of the definition of physical impairment. However, the code of good practice in its elaboration puts, in another provision, that physical impairment includes sensory impairment like visual impairment and hearing impairments.<sup>299</sup> Mental impairment has been also defined as: ‘a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions.’<sup>300</sup>

Duration of the impairment is the second requirement. The code of good practice also determines long-term and recurring duration of impairment. According to the code, impairment can be considered as long-term if it ‘has lasted or is likely to persist for at least twelve months.’<sup>301</sup> The impairment is also a recurring ones if it is likely to happen again and to be substantially limiting.<sup>302</sup> In addition to recurring impairment, the code of good practice defines progressive

---

<sup>297</sup> SAEAA Section 1 and The Code of Good Practice Item 5.3.

<sup>298</sup> See the Code of Good Practice Item 5.4 Para I and II.

<sup>299</sup> Code of Good Practice Item.4 Para II.

<sup>300</sup> Ibid Item 5.4 Para III.

<sup>301</sup> Ibid Item 5.4.1 Para I.

<sup>302</sup> Ibid Item 5.4.1 Para II.

conditions. These conditions are 'those that are likely to develop or change or recur.'<sup>303</sup> In fact, both recurring and progressive conditions could not be taken as impairment unless substantial limitation could result.

Substantial limitation is the third requirement and its major focus is on the effect of the impairment. Regarding substantial limitation, the code of good practice states that an impairment is substantial 'if in its nature, duration or effects it substantially limits the person's ability to perform the essential functions of the job for which they are being considered.'<sup>304</sup> Moreover, some kind of impairments, which could be easily corrected with the aid of spectacle or contact lenses do not have a limiting effect. Determination of substantial limitation requires mandatorily whether the effect of the impairment could be controlled or corrected through medical treatment or other devices. Therefore, impairment fulfills the requirement of substantial limitation when there is no any means to avert the adverse effect of the impairment.<sup>305</sup>

In the case of *Immatuand Murdock v. The City of Cape Town*, the second applicant i.e Murdock applied for the position of fire fighter.<sup>306</sup> However, the respondent, the city of Cape Town rejected the applicant on the ground that the applicant was a person with insulin dependent diabetic. The applicant however challenged the blanket ban of the respondent constitute unfair discrimination. The court analyzed the case in light of the SAEEDA. The court decided that the blanket ban of the respondent constitute unfair discrimination. Yet, it did not come up with the conclusion that type one diabetes falls under the definition of PWDs.

The court in determining whether diabetes fulfill the definition of PWDs under the code of good practice reached to the point that although type one diabetes is a long-term physical

---

<sup>303</sup> Ibid 5.4.1 Para III.

<sup>304</sup> Ibid 5.4.2 Para I.

<sup>305</sup> Ibid 5.4.2 Para III.

<sup>306</sup> IMATU and Murdock v The City of Cape Town, Case No. C 521/2003.

impairment, its adverse effect does not cause substantial limitation on the person. Because expert witnesses proved that ‘fast acting, analogue insulin controls or corrects the long term physical impairment diabetes mellitus’.<sup>307</sup> Thus, if the impairment or i.e. type one diabetes could be removed or prevented by such means, the person’s ability to perform the essential function of the job and the effect of the impairment in relation to the environment would not be substantially limiting ones.

#### 4.1.3. The Definition of PWD under EUEED

EUEED does not provide a definition of what PWD refers to and it was left to the Court to determine it on case by case basis. First, the ECJ in 2006 was confronted with a case from Spanish courts. In that case, Chacón Navas who was dismissed as a result of her certified sickness sued her employer that the dismissal amounts to discrimination on the basis of disability. Spanish courts were not sure whether sickness is covered as a disability under the EUEED and referred the issue to ECJ. The court analyzed that the directive has no intention to include sickness as a protected ground of disability and defined disability in its judgment as, “‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’.”<sup>308</sup> This definition is also very restrictive because it only views disability as it is impairment that hinders one’s engagement in professional life. Therefore, the court placed disability within the view of medical model of disability and also failed to elaborate whether it is a long term or recurring effect.

<sup>307</sup> IMATU and Murdock v The City of Cape Town, Case No. C 521/2003 Para 89.

<sup>308</sup> Case C-13/05 Sonia Chacón Navas v Eurest Colectividades SA Para 43.

This changed with the ratification of the CRPD by the European Union in December 2010. From that on, the CRPD concept of disability was defined and used by the ECJ. In its decision of 2013, the ECJ ruled that ‘if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of disability’.<sup>309</sup>

The case of *Ms. Z* which involved a request whether inability to give birth to a child constitutes disability, the ECJ ruled that although inability to bear a child is a limitation which lasts for long-term, disability within the EUEED must be understood as a ‘limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers’.<sup>310</sup> Hence, the court found that ‘the inability to have a child by conventional means does not in itself, in principle, prevent from having access to, participating in or advancing in employment.’<sup>311</sup>

Broadening the concept, in its milestone *Kaltoft* judgement<sup>312</sup> the ECJ decided that obesity may be considered as a disability under the equal employment directive. Obesity may be understood as ‘a general label used when an individual has excess body fat at such a level that it may have an impact upon a person's health.’<sup>313</sup>

The advocate general submitted his opinion to the court analyzing that ‘in cases where the condition of obesity has reached a degree that, in interaction with attitudinal and environmental

<sup>309</sup> HK Denmark, joined cases C-335/11 and C-337/11 (2013) ECLI:EU:C:222 Para 41.

<sup>310</sup> Case C-363/12, *Z v A Department* (2014) ECLI:EU:C:159 Para 79 and 80.

<sup>311</sup> Ibid Para 81.

<sup>312</sup> C-354/13 *Kaltoft v. Municipality of Billund*

<sup>313</sup> WHO, Obesity: preventing and managing the global epidemic: Report of a WHO Consultation <<http://apps.who.int/iris/handle/10665/42330>> Accessed November 13 2015.



barriers,... plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability.’<sup>314</sup> The advocate general basically does not accept that all forms of obesity to be treated as ‘freestanding characteristics’ deserving non-discrimination protection<sup>315</sup> and proposed the third classification of obesity to be considered as disability within the scope of EUEED.<sup>316</sup> Therefore, the court held that obesity does not always represent disability since its nature does not essentially cause the existence of limitation<sup>317</sup> and deserve non-discrimination protection ‘in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one’.<sup>318</sup> See also chapter 3.3 of this paper regarding discrimination by association as a prohibited disability-based discrimination.

### Scope of Proc. 568/2008, SAEAA and EUEED

Applicability of certain legislation is dependent on its scope as crafted by the legislature. Anti-discrimination laws of Ethiopia, South Africa and EU provide different scope of application and they are discussed respectively in the following sections.

---

<sup>314</sup> Case C-354/13 *Karsten Kaltoft v Municipality of Billund* (2014) ECLI:EU:C2106 opinion of AG Jääskinen Para 55.

<sup>315</sup> M Butler, ‘Obesity as a Disability: The Implications or Non-Implications of *Kaltoft* ’ (2014) 20(3) Web JCLI <<http://webjcli.org/article/view/358/466>> accessed October 24 2016.

<sup>316</sup> Case C-354/13 opinion of AG Jääskinen.

<sup>317</sup> Case C-354/13 *Karsten Kaltoft V Municipality of Billund* (2014) ECLI:EU:C:2463 Para 58.

<sup>318</sup> *Ibid* Para 59.

#### 4.2.1. Scope of Proc. 568/2008

Proc. 568/2008 is designed to tackle pervasive discrimination that PWDs are facing in Ethiopia. The legislature in the preamble of the proclamation also reaffirms such reality as, ‘Whereas, the negative perception of persons’ disablement in society is deep rooted that, it has adversely affected the right of persons with disability to employment;’<sup>319</sup> From this, one can realize the intent of the legislature is outlawing discrimination. The problem with respect to the application of Proc. 568/2008 starts from its conceptual understanding. The scope of this proclamation is provided under article 3 of the proclamation that it governs relationships “between a qualified worker or job-seeker with disability and an employer.”<sup>320</sup>

The scope of the proclamation identifies two parties that means job seeker with disability and employer which it intends to be applicable.<sup>321</sup>

In defining who an employer is, Proc. 568/2008 expressly provides that: “Employer” means any federal or regional government office or undertaking governed by the Labor Proclamation;’<sup>322</sup> from this provision, three categories of employers are identifiable. These are any federal government offices, any regional government offices, and those undertakings governed by labor law.

The first category of employers are federal government offices. Such offices are defined by Proc. 515/2007 ‘any federal government office established as an autonomous entity by a proclamation or regulations and fully or partially financed by government budget; included in the list of government institutions to be drawn up by the Council of Ministers. The federal

---

<sup>319</sup> Proc. 568/2008 Preamble Para 1.

<sup>320</sup> Ibid Art.3.

<sup>321</sup> The concept of disabled person was addressed above, in sub-section 4.1.1, also the Proclamation that is dealing with it under article 2.1

<sup>322</sup> Proc. 568/2008 Art. 2.3.

government has also a power to pass laws within its competence enshrined under article 51.1<sup>323</sup> of the FDRE constitution. Since the power to make law regarding civil servants of the federal government is an exclusive power of the central government, Proc. 515/2007 is adopted to that effect. This proclamation is only applicable for those civil servants who are working at a federal government institution as it has been defined by the proclamation. There are nonetheless expressly excluded institutions or offices albeit they are within the establishment or structure of the federal government.<sup>324</sup>

The critical point as one reads both Proclamation no. 568/2008 and 515/2007 is that whether disabled person's protection is limited to the scope of 515/2007 or, under 568/2008 may it include those that are excluded by proc. 515/2007. In this respect, Seyum contends that restrictive interpretation does not serve the purpose for which proclamation 568/2008 is enacted.<sup>325</sup> The author also shares this view as there are number of offices in which PWDs may involve at the federal level and restricting the scope of 568/2008 in such way would by itself create different form of discrimination among disabled workers on the basis of the profession they engage in. Demonstrating these concerns by raising supportive cases might be highly relevant for the reader.

Firstly, in the case of *Mekonnen Teklu v Addis Ababa Administration of Justice Bureau*, Mekonnen Teklu a Visually Impaired plaintiff brought a case to the federal first instance court claiming that his transfer from Chirqos sub-city to Lidetta sub-city office was unlawful which constituted discrimination on the basis of his disability. He further argued that the discriminatory and unlawfully conducted transfer, resulted in reduction of some benefit compared to his former

---

<sup>323</sup> FDRE constitution Art.55.1.

<sup>324</sup> Proc. 515/2007 Art.2.1.

<sup>325</sup> Seyum Yohannes (53) 90,106.

position.<sup>326</sup> The defendant in this case, Addis Ababa Administration Justice Bureau made an objection arguing that the court had no jurisdiction to hear the case since the defendant has a particular governing law.<sup>327</sup> The plaintiff proved to the court citing Proc. 568/2008 article 2.7 which provides that, ' "Court" means the Federal First Instance Court or regional High Court or federal or regional civil service administrative tribunal;'.<sup>328</sup> The court then assumed its jurisdiction and ruled in favor of the plaintiff that the defendant committed discrimination and ordered the defendant to reinstate the plaintiff to his earlier position.<sup>329</sup> However Addis Ababa Justice Bureau took an appeal for reversal of the decision to the Federal High court, it confirmed the decision of the lower court.<sup>330</sup>

The Federal Supreme Court Cassation Bench to which this case was lodged by Addis Ababa Justice Bureau (appellant) however found fundamental error of law and quashed the decisions of lower courts.<sup>331</sup>

The main gist of the decision is that disabled persons working in appointment offices or appointees with disabilities are not covered and can no longer bring suit using Proclamation 568/2008. When I say appointment offices, I am referring to those positions which are governed by special laws. In the Ethiopian context, both the civil servant proc. 515/2007 and Proc. 377/2003 exclude such types of offices from their scope of application.<sup>332</sup> Examples of such

<sup>326</sup> Mekonnen Teklu v Addis Ababa Justice Bureau, Federal First Instance Court FFIC File No 00746 July 16 2012 (Hamle 8 2003)

<sup>327</sup> Mekonnen Teklu v Addis Ababa Justice Bureau, Federal First Instance Court FFIC File No 00746 July 16 2012 (Hamle 8 2003 Ethiopian Calendar)

<sup>328</sup> Proc. 568/2008 Art.2.7.

<sup>329</sup> Mekonnen Teklu v Addis Ababa Justice Bureau, Federal First Instance Court FFIC File No 00746 July 16 2012 (Hamle 8 2003)

<sup>330</sup> Addis Ababa Justice Bureau v Mekonnen Teklu, Federal High Court File No 111843 November 30 2012 (Hider 22 2004 EC)

<sup>331</sup> Mekonnen Teklu V Addis Ababa City Administration Justice Bureau, Federal Supreme Court Decision Vol 13 Cassation File no 75034 November 11 2013 (Hidar 3 2005 EC)

<sup>332</sup> See Proc. 515/2007 Art. 2 Para.1 and Proc. 377/2003 Art. 3 para 2 for more Details on exclusions because of the applicability of other special laws

offices governed by special laws include: Office of the Prosecutor<sup>333</sup>, Judges<sup>334</sup> House of Peoples Representatives, House of Federation, Federal Police,<sup>335</sup> and academic staffs in higher education institution.<sup>336</sup> But in this paper, I employ appointment offices to specifically mean judiciary which embraces prosecutors and judges.

A careful view towards the decision of the cassation reveals hesitant and doubtful analysis whether the scope of Proc. 568/2008 includes appointment offices. Particularly, the statement which mentions ‘however, it does not mean those bodies employing appointees with disabilities may overlook the rights guaranteed under Proc. 568/2008’.<sup>337</sup> Of course, it seems a prudent recommendation even if it did not ensure greater protection than Proc. 568/2008 does. The main consideration that the cassation bench made when analyzing the case was narrowly concentrated on existing labor and civil service proclamation and it did not succinctly scrutinize core and actual rationale of tackling discrimination underpinning Proc. 568/2008. In the view of the author, the cassation has mistakenly interpreted the scope of Proc. 568/2008 at least in the following respects.

Firstly, the term ‘any’<sup>338</sup> used in defining an employer clearly depicts that the legislature has opted for none of the office and undertaking in the country to remain out of the ambit of the Proclamation. Hence, appointment offices are also covered -since no other legislation is enacted for that purpose.

Secondly, cannon of statutory interpretation of the special law prevails over the general law ( *Generalia Specialibus Non Derogant*) dictates that when there are two statutes on the same

---

<sup>333</sup> Governed by Federal Attorney General Establishment Proclamation No. 943/2016

<sup>334</sup> Governed by Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010.

<sup>335</sup> Governed by Federal Police Proclamation No. 207/2000

<sup>336</sup> Governed by Higher Education Proclamation No. 650/2009.

<sup>337</sup> Mekonnen Teklu V Addis Ababa City Administration Justice Bureau (N 335)

<sup>338</sup> Proc. 568/2008 Art. 2.3.

subject matter, special laws must be given priority of application over the general ones. Therefore, Proc. 568/2008 is special law since it is enacted particularly to tackle discrimination in almost all areas of employment for PWDs. However, Proc. 515/2007 and Proc. 377/2003 which have been taken into account by the cassation bench to analyze the case regulate employment in the public-private sector in general including PWDs. Furthermore, the cassation bench seems to neglect appreciating the case from human right perspective while the issue had direct linkage with discrimination.

The third and last surprising element is, that while Proc. 568/2008 is designed to be applicable even at regional level, the argument of cassation bench that appointed with disabilities cannot take their case to the courts authorized by proclamation does not seem tenable and sets aside the intent of the legislature as well. It is unquestionably believed that the cassation bench knows that the federal government cannot legislate regional civil service since this power falls under the competence of state power. The author sees no reason why appointment offices can be excluded by the interpretation of cassation bench if offices at regional level are within the scope of Proc. 568/2008 by virtue of article 2.3 of the proclamation.<sup>339</sup>

Secondly, there was also another case from 2010 regarding the similar issue to foregoing but with different context. In the case of *Nigist Seman v Addis Ababa Administration Civil Service Commission Bureau*, Nigist Seman a visually impaired plaintiff instituted court action before the Federal first instance (Menagesha Circuit) court. She claimed that the defendant (Addis Ababa Civil Service Commission Bureau) discriminated her on the basis of her disability during the recruitment of mobilization officer. The defendant included in the advertisement of the vacancy that applicants with disabilities should indicate their type of disability in the application for

---

<sup>339</sup> Ibid Art. 2.3.

preferential treatment. Although the plaintiff mentioned her disability, she did not get the position while other disabled and non-disabled applicants including those who scored less than the plaintiff were selected.<sup>340</sup> The defendant admitted that plaintiff's type of disability was missed by unfortunate mistake. However, the defendant was not willing to correct the mistake and to hire the plaintiff.

The defendant in the first place objected that the institution cannot be sued in the regular court other than its special tribunal established by another law. In fact, Proc. 568/2008 Article 2.7<sup>341</sup> includes administrative tribunals. However, the court in this case reasoned that the issue involved a new employment relationship rather than an existing ones and the court can assume jurisdiction.<sup>342</sup> The analysis of the court seems more logical and tenable considering the possible bias of the administrative tribunal towards the defendant which has the potential to influence the outcome of the case . If this case had been brought or petitioned before the cassation bench, it would have been reversed depending on strict scope analysis of Proc. 568/2008 as usual. A very broader interpretation of article 7.1<sup>343</sup> and article 10.1<sup>344</sup> of Proc. 568/2008 conveys that plaintiffs with disabilities are free to choose the court that they institute their case. Such interpretation can be inferred from comparing the Amharic and English version of article 7.1 and article 10.1<sup>345</sup> of the same proclamation. The Amharic version seems to entitle plaintiffs with disabilities to take their case to concerned courts. On the other hand, also, the English version requires PWDs to take their cases to a competent court. The usage of these two words i.e. Concerned and competent are not one and the same in terms of their magnitude. The word

---

<sup>340</sup> Nigist Seman v Addis Ababa administration civil service commission Federal First instance court Menagesha File no 32831 June 8 2010 (Sene 1 2002 (EC)

<sup>341</sup> Proc. 5682008 Art. 2.7.

<sup>342</sup> Nigist Seman v Addis Ababa administration civil service commission (N 344)

<sup>343</sup> Proc. 568/2008 Art. 7.1.

<sup>344</sup> Ibid Art.10.1

<sup>345</sup> Ibid Art.7.1

concerned is more lenient while competent is more demanding. Therefore, it can be argued that Amharic version prevailing over the English version may entitle PWDs to take their case to any court stated under the proclamation.

Thirdly, in the latest case, *Wesen Alemu and Dawit Oticho v Amhara Regional State Justice Organs Professionals Training Center and Amhara Regional State Judicial Administration Council*, Wesen and Dawit who were trainees of justice organ professionals training center at Amhara region were discriminated by the training center not to assume judgeship appointment. Even though all trainees with and without disabilities received the same professional training, during appointment time, trainees without disabilities determined their chance to be a prosecutor and judge by drawing lottery. Trainees with visual impairment were simply assigned to prosecutorial position without drawing lottery. The applicants of this petition requested the center and the judge administration council to draw lottery and determine their chance like those without disabilities. However, the respondents rejected the applicants claim and replied that there is no practice to appoint blind trainees to be a judge. The applicants however did not take the matter to regular court since they know that their claim would not be successful as a result of the cassation's decision in *Mekonnen Teklu V Addis Ababa Justice Bureau*.<sup>346</sup> Therefore, they took their petition to the Federal House of Federation, which is mandated to interpret the FDRE constitution.<sup>347</sup> Applicants W. Alemu and D. Oticho submitted their petition that their right to engage in the profession they choose enshrined under article 41.2 of the FDRE constitution<sup>348</sup> and their right to be equal before the law guaranteed under article 25<sup>349</sup> of the FDRE constitution

---

<sup>346</sup> Mekonnen Teklu v Addis Ababa City Administration, Federal Supreme Court Decision Vol 13 Cassation File no 75034 November 11 2013 (Hidar 3 2005 EC)

<sup>347</sup> FDRE Constitution Art.62.1.

<sup>348</sup> IbidArt. 41.2.

<sup>349</sup> Ibid Art. 25.



is violated by the respondents' customarily developed practices.<sup>350</sup> They also further requested that such customary practice to have no any legal effect as provided under article 9.1 of the FDRE constitution.<sup>351</sup> Respondents submitted their response upon the request the House of Federation and defended that trainees with visual impairment had never been assigned to a judgeship appointment since the nature of such appointment requires eye contacts with the witnesses and seeing evidences which it is difficult without sight.<sup>352</sup> They also added that no trend is available both at international and national level.<sup>353</sup> However, the House of Federation decided that a work is deemed to be difficult for a disabled person if the work cannot be performed even if reasonable accommodation is provided as stated under proclamation 568/2008.<sup>354</sup> The house also analyzed the case in light of Proclamation 676/2010, which ratified CRPD and obliges state parties to ensure work and employment to PWDS as provided under article 27. Moreover, the House concluded that applicants have the right to engage in the profession they need to engage and they are also entitled to such protection as per article 25 of the FDRE constitution. It also decided that the decision and practice of respondents is unconstitutional and applicants upon their choice have the right to engage in judgeship profession.<sup>355</sup>

The decision of the House of Federation has significant implications. In the first place, acknowledging and putting international human rights instrument particularly CRPD into a

---

<sup>350</sup> Wesen Alemu and Dawit Oticho v Amhara Regional State Justice Organs Professionals Training Center and Amhara Regional State Judicial Administration Council Federal Democratic Republic of Ethiopia, House of Federation HOF File No. 019/08 October 11 2016 (tikimt 2 2009 Ethiopian Calendar)

<sup>351</sup> FDRE Constitution Art. 9.1.

<sup>352</sup> Wesen Alemu and Dawit Oticho v Amhara Regional State Justice Organs Professionals Training Center and Amhara Regional State Judicial Administration Council Federal Democratic Republic of Ethiopia, House of Federation HOF File No. 019/08 October 11 2016 (tikimt 2 2009 EC)

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

domestic decision reveals the country's will and commitment to practically take over and implement such legal documents. More specifically, it contributes to nowadays legal development of Ethiopia with respect to PWDs. In the second place, the way it applied proclamation 568/2008 to analyze the case will have some positive implication to those who claim the proclamation is not applicable to appointment offices. Despite these implications, the author has concern with respect to the analysis of the House particularly on article 25 of the FDRE constitution. The House mentioned that choosing one's profession is equally guaranteed to all citizens and cited the full article from the constitution. In this regard, it is clear that disability is not stated in the equality clause of the constitution as a protected ground of discrimination. However, I suggest that it would have been more sensible if the House had interpreted the term other status to include PWDs since the main cause for the exclusion of the applicants from being a judge was their disability.

The second category of employers to which proc. 568/2008 can be applicable as provided under Article 2.3 of the Proc. 568/2008 is any regional government office. This scope of the proclamation may be a little bit confusing since regional governments have their own mandate to pass laws regarding their respective civil service offices in the region. Article 52 of the FDRE constitution, which outlines the power of regional states, clearly provides that states have power to issue civil service laws in their region.<sup>356</sup> Moreover, if the power has not been given clearly in the constitution, regional states will still have a mandate to issue law regarding matters provided in the proclamation 568/2008 by virtue of their reserved power under article 52.2.1 of FDRE constitution.<sup>357</sup> On the other hand, if there is also a request by the House of Federation to issue a

---

<sup>356</sup> FDRE constitution Art. 52.2.F.

<sup>357</sup> Ibid Art. 52.1.

civil law helping to create one economic unity,<sup>358</sup> the federal government can legislate a law though it is not provided clearly in the constitution. However, there is no any indication whether such submission was made by the House of Federation regarding proc. 568/2008. Albeit it is possible to argue that the federal government passed proc. 568/2008 beyond the scope of its constitutional power, it is still appropriate that the federal government has to guarantee the equal protection of its citizens at large recognized under article 25 of the FDRE constitution. Moreover, Ethiopia has ratified CRPD and promulgated proclamation 676/2010 to implement it. In this respect, the convention under its article 4.5 states that: ‘The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions’. Therefore, the federal government has to realize the rights stated in the convention and the applicability of proc. 568/2008 at the level of regional offices is also logically acceptable.

The third category over which Proc. 568/2008 applies is consisted of undertakings governed by Proc. 377/2003. it is not arguable that the federal government can pass law with respect to such establishments as provided under article 55.3<sup>359</sup> of the FDRE constitution. Nevertheless, it is questionable whether disabled persons can sue those that are excluded under article 3.2 of the proclamation. This article contains a very long list of exclusion and all those organs like state administration prosecutor judge and the like have already been included by Proc. 568/2008 since they are federal or regional offices. According to the view of the author, though Managerial employees, contractual services and others which are enumerated as exclusion, it does not mean that PWDs should suffer discrimination in such employment relationships. They can claim equal

---

<sup>358</sup> Ibid Art. 55.6.

<sup>359</sup> Ibid Art. 55.3.

protection as a result of article 25 of the FDRE constitution and by virtue of CRPD ratifying proclamation 676/2010.<sup>360</sup>

#### 4.2.2. Scope of SAEAA

The SAEAA also set a scope upon whom the act is applicable. According to Section one of the SAEAA, designated employers are obliged to comply with SAEAA and are defined as:

An employer who employs 50 or more employees; an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act; a municipality, as referred to in Chapter 7 of the Constitution; an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defense Force, the National Intelligence Agency and the South African Secret Service; an employer bound by a collective agreement in terms of section 23 or 31 of 20 the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement;<sup>361</sup> application of this act is limited to a certain extent.

So that PWDs are not able to claim rights provided in the act against local sphere governments, national intelligence agency, national defense, South African secret service, courts as well as judicial officers. Although courts and judicial officers are not expressly mentioned in the act, the expression ‘organ of state as defined under section 239 of the constitution’ excludes such institutions since the cross-referenced section of the constitution does not count courts and judicial officers as organ of state. However, it does not mean that PWDs are helpless for the unfair discrimination they suffer beyond the scope of SAEAA. The solution to tackle unfair

---

<sup>360</sup> Seyum Yohannes (53)110.

<sup>361</sup> SAEAA Section 1.

discrimination is ensured by the application of PEPUDA. PEPUDA applies to any person and subject matters that are not covered by SAEAA.<sup>362</sup> The scope of PEPUDA is so broad and it governs all institutions except those on which SAEAA applies in respect of employment but not in other respects. Equality courts handle those claims of unfair discrimination prohibited under PEPUDA.<sup>363</sup>

Let me raise one important case, which might be similar to that analyzed in discussing appointees with disabilities of Ethiopia. *Parvathi Singh* a visually impaired woman applied for the position of magistracy. Her application was not successful since having driving license for that position was required by the magistrate commission and the commission does not have also disability preference policy like those of race and gender. She complained to equality court that she was unfairly discriminated on the basis of her disability and commission's failure to have disability policy preference. The issue with respect to requirement of driving license was already dealt by interim relief order and the council on the behalf of the complainant did not pursue.

Regarding policy preference of PWDs, respondent argued that Section 174.2 of the Constitution ordering that allows preference to be given only for race and gender and that was why it did not mention disability in the advertisement like race and gender.<sup>364</sup> The equality court did not accept the argument of the respondent and analyzed section 174.2 of the constitution in light of other provisions. In doing so, the court came up with its conclusion that specific mention of race and gender does not exclude disability and other factors stated under section 9.3 of the same constitution from consideration during short listing magistrates. The court eventually ruled in favor of the complainant by affirming that 'Magistracy will not be diverse nor legitimate if it

---

<sup>362</sup> Ibid section 5.

<sup>363</sup> PEPUDA Act No. 4 2000 Sec. 16.

<sup>364</sup> *Parvathi Singh v Minister of Justice and another* 1 ZAGPHC (2013) Para 22.

only represents the racial and composition of the country without proper and proportionate representation of people with disability.<sup>365</sup>

#### 4.2.3 Scope of the EUEED

Art. 3 of the EUEED states that the directive is applicable in all forms of employment relationships, both public and private and to all conditions of employment.<sup>366</sup> Preamble 18 permits derogation in general in respect of employment at armed forces, police, prison services, or emergency services, such as firefighters for example. This general authorization makes possible not to employ persons covered by the EUEED, if their employment would impact on the operational capacity of those employers. A further exemption is permitted under Preamble 19, specifically with regard to disability and effectiveness of the armed forces, even if it would not endanger the operational capacity of the armed forces in general. Article 3.4 of the therefore permits, that, Member States make exceptions from the prohibition of discrimination on the grounds of disability (and also age), for the armed forces.<sup>367</sup>

Compared to the Ethiopian Proc. 568/32008, the EUEED does not exclude appointment offices like judgeship and high government offices from the ambit of its application.

Compared to the SAEAA it is also limited to employment. It does not contain any regulation to areas outside employment. The European Charter of Fundamental Rights<sup>368</sup> prohibits discrimination in all areas of life among others with regard to disability, too, and in its Article 26 recognises the right of persons with disability to have an independent life, to participate and to be integrated in the life of the community. Even if the Charter is declared to have the same

---

<sup>365</sup> Ibid Para 53.

<sup>366</sup> See Art. 3 Para 1 A, B, C and D.

<sup>367</sup> EUEED art. 3.4.

<sup>368</sup> Adopted on 14 December 2007, as a part of the Lisbon Treaty of the European Union (2007/C 303/01)

mandatory force as the Lisbon Treaty itself, it can only be applied when EU law is applied and there is no primary or secondary EU law yet on the protection of the equality of the PWDs for the time being.

Whether the same protection is relevant for public servants and private employers was raised in the *Milkova* case<sup>369</sup> that concerns a public servant, employed by the Bulgarian Privatization Agency, with a mental illness that qualified her 50% disabled was dismissed in a reorganization process at the employer. Under Bulgarian law private employers before dismissing PWDs had to ask for permission from the labour inspectorate and in the case of *Milkova* no permission was asked. The issue for the ECJ was whether public servants might be excluded from this protection. The Court decided that the Bulgarian law may not deprive civil servants from the protection under the EUDEE.<sup>370</sup> Protection of the rights of the PDWs may not depend, beyond the exceptions laid down in Article 4, on the type of the employer.

Conclusion: In summary it might be concluded that, while in principle, the relevant laws provide a broad scope of protection, Proc. 568/2008 is designed to include broader application, its narrow interpretation with regard to available judicial procedure, excludes a number of job applicants from the effective protection. The protection is broader under the SAEAA, permitting claims to the South African Courts, and similarly, the EUEEA does not restrict the protection with regard to the type of employer, besides the legislative exceptions, justified by their objectives and proportionality.

---

<sup>369</sup> Case 406/15 *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia*

<sup>370</sup> Ibid 62.

### 4.3 Enforcement Bodies and sanctions or remedies

As it could be seen already in the previous sub-section, availability of procedures and access to judicial bodies are decisive issues with regard to the practical determination of the scope of the protection under the existing regulations protecting PWDS from discrimination.

Enforcement is central to any legislation or any right to achieve its objective. Enforcement models or regimes depend on the type of the legal area (public, private, criminal law) therefore there is no uniform system of enforcement. From a general point of view the concepts of justice and the rule of law center around the various enforcement systems, producing a great amount of literature of legal philosophy. Human rights enforcement systems are also somewhat different when it is about international or national systems, and a broad area of philosophy and legal theory are dealing with the idea of enforcement. The purpose of this sub-chapter is a practical approach, narrowed down to the issue of enforcement of non-discrimination laws in practice, primarily in employment under the three main documents analysed for the three compared legal regimes.

According to Pound's view cited in Holness and Rules, "laws will not enforce themselves"<sup>371</sup>. There must be institutions and human beings who put them into practice. Furthermore, "there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest".<sup>372</sup> It is indeed unquestionably true that the enactment of laws requires execution of such legislation practically in an effective manner. The enforcement of anti-discrimination laws has to also be sought through various ways in addition to traditional complainant-court driven mechanisms.

---

<sup>371</sup> W Holness, and S Rule, 'Barriers to Advocacy and Litigation in the Equality Courts for Persons with Disabilities' (2014) 17(5) Potchefstroom Electronic Law Journal 1906,1918.

<sup>372</sup> *Idem*.



Therefore, the main purpose of this sub-chapter is to present enforcement bodies which have role in the implementation of anti-discrimination laws and possible sanctions-remedies provided in the laws of the comparator jurisdictions. In terms of enforcement or implementing bodies, states may assign one or more governmental institutions to follow up and implement anti-discrimination. Civil societies may also be given a part to play in the enforcement process of rights.

In regards to sanctions-remedies also, the discussion focuses on the forms and types of sanctions-remedies that would be imposed on the employer.

Anti-discrimination laws can be enforced in three ways.<sup>373</sup> These include: individual justice, group justice and equality as participation justice model.

The first 'individual justice model' involves an aggrieved party and perpetrator of discrimination and opens the way for the aggrieved party to bring the case to an independent, neutral body. In such model, the judgment is aimed at correcting and remedying the given violation, it does not necessarily concentrate on multifaceted socio-economic realities. This model comprises three ways in which an individual may employ to challenge breaches or violations. These are the criminal justice model in which the complaint is treated under the criminal law, the civil justice model which is dealt under civil law and civil procedure and third, the enforcement agency model when a public or, exceptionally a private body (e.g. a labour inspectorate or an equality body) initiates the procedure either assists the individual to get remedy.

These simplified models can be observed in the different jurisdictions with some variations.

---

<sup>373</sup> C McCrudden, 'National Legal Remedies for Racial Inequality' in S Fredman and P Alston *Discrimination and Human Rights: The Case of Racism* eds (OUP, 2001) 253-259.

Regarding civil criminal which are categorized as individual justice model, See sub chapter 4.3.3 and see Sub chapter 4.3.1 about enforcement agency model respectively.

The second, ‘group justice model’ seeks group-oriented remedy including affirmative action through governmental action, legislative or administrative steps. This model is more concerned in the social or long term outcome of the decision and it is undertaken by class or representation actions. Such model has a potential of creating an egalitarian and inclusive society since actions against discrimination are taken through a collective strategy. See sub chapter 4.3.2 how the compared jurisdictions of the thesis have incorporated this model of justice.

The third, ‘equality as participation’ model also puts an emphasis on the involvement of disadvantaged groups to take part in government decision-making processes to ensure such groups are mainstreamed. For the purpose of the paper, the first and the second models would be discussed in detail throughout the paper. While in Ethiopia and South Africa there is a dominance of the third version of the individual enforcement model, namely, the enforcement agency model, supplemented by group-measures and individual litigation, in the EU the individual complaint or litigation model is the primary model, supplemented by the second (group-enforcement) and the third, enforcement agency model.

#### 4.3.1. The Enforcement agency models/bodies

##### 4.3.1.1 Proclamation No 568/2008

Being one of the “wings” of government, MOLSA is mandated to implement Proc. 568/2008. Additionally, it is also entrusted to take a case to the court representing disabled workers whose right is infringed.<sup>374</sup>

---

<sup>374</sup> Proc. 568/2008 11.

The directive issued by MOLSA specifies that the labor inspector is responsible to initiate cases on behalf of the disabled workers discriminated at work. The responsibility of the labor inspector is not something new that is created by Proc. 568/2008 and it has been also mandated to bring cases to the court regarding the non-observance of article 14 of the Proc. 377/2003.<sup>375</sup> Article 14 of Proc. 377/2003 is about discriminatory practices. Disability is not stated among the prohibited grounds of discrimination, such cases may fall within the open-ended phrase of other status of the article. No case has ever been instituted by this structure regarding disability discrimination. Moreover, in today's set up of the MOLSA, while there are three subdivisions within the ministry, the issue of disabled people is under the structure of the social and welfare development department.

In an interview made with one disabled worker within the MOLSA, the worker states that 'the disability issue is under the social welfare department while the labor inspector is under the harmonious industrial relation department, so the labor inspector did not see or consider that they have duty to file a case regarding disabled employees.'<sup>376</sup> Another interviewee from Addis Ababa Administration Bureau of Social and Labor Affair also speaks the same and this worker confirms 'it is not by law but the labor inspector has forgotten their responsibility.'<sup>377</sup>

From these interviews and reading Dagnachew's thesis in which the director of MOLSA responded that the ministry is mostly committed toward expanding rehabilitation services,<sup>378</sup> it can be understood that there are pervasive structural and institutional biases that limit even responsible bodies to think beyond provision of rehabilitation services. Moreover, Lewis's claim

---

<sup>375</sup> Proc. 377/2003 Art. 186.

<sup>376</sup> Interview with Alenew Wuletaw, Ministry of Labor and Social Affair legal drafting Department (Addis Ababa Ethiopia 18) 2016. September

<sup>377</sup> Interview with Dawit Oticho, Labor inspector (Addis Ababa Administration Bureau of labor and social affair, Kolfe Ethiopia 13 September) 2016

<sup>378</sup> Dagnachew Bogale, *the Role of Disability Rights Movements in the Ethiopian Development Agenda* (MA Thesis University of Stellenbosch 2011) 56-57.

in which he disputes that assigning ministries of social and employment affairs as focal point of government structure to implement CRPD is virtually promoting the myth that issues of PWDs are soft social matters<sup>379</sup> becomes quite convincing in this respect.

#### *4.3.1.2. Employment Equity ACT SAEAA*

In the South African system similarly, there is a governmental body, the Department of Labor (corresponding to a Ministry of Labour) charged with the responsibility to implement the SAEAA.

The Labor inspector has also a power to request written reports whether designated employers observe that obligation as stated under section 36<sup>380</sup> In case the labor inspector finds employers fail to comply with their obligation, he/she can issue a compliance order.<sup>381</sup> Director General of the department of labor has a power to request and review the compliance with SAEAA examining the reports submitted and draws recommendation if designated employers found to be non-compliant with the act.<sup>382</sup>

When a designated employer refuses to submit to the requests and comply with the recommendation of the director general, the director general has a power to refer the matter to labor court.<sup>383</sup> The director has also a power to refer to the labor court against those designated employers who fail to execute the compliance order of labor inspector. Basically, the referral of the director to the labor court is not to start a litigation against the designated employer. Rather, the labor court considers and adopts the compliance order and the recommendation of the

---

<sup>379</sup> O Lewis, 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities' in McSherry and Weller (eds), *rethinking Rights-Based Mental Health Laws* (Hart Publishing 2010) 125.

<sup>380</sup> SAEAA No. 55 1998 Section 36.

<sup>381</sup> Ibid Section 37.

<sup>382</sup> Ibid Section 43 and 45.

<sup>383</sup> Ibid Section 45.

director as it has been the compliance order of the labor court.<sup>384</sup> Thus, the designated employer that does not comply with the compliance order of the labor inspector and recommendation of the director must appeal to the labor court within twenty-one days.<sup>385</sup> However, once after the designated employer take an appeal to the labor court, the employer and the Department of labor/director may litigate on the appellate level and the compliance order also will be suspended.<sup>386</sup>

Hence, The Commission for Employment Equity (CCMA) is established under the SAEAA assuming an advisory role to assist the labor department regarding employment equity issues.<sup>387</sup> Parties to unfair discrimination dispute may submit for conciliation with the help of CCMA.<sup>388</sup> CCMA helps to maintain peace between parties by quick and flexible mode of resolution of the dispute. In fact, one thing which needs mentioning is that, the party who alleges the existence of unfair discrimination must first communicate to CCMA by writing within six months. In case the discriminator could appear before the CCMA, The CCMA tries to resolve the dispute between the parties. However, if the complainant party could satisfy the CCMA that other party has been communicated the claim and reasonable attempt has been made to resolve the dispute, the CCMA can allow the complainant to take the case to the labor court. Moreover, the complainant also can take the case to the labor court or arbitration if (upon the consent of both disputant parties) the conciliation through the CCMA does not result in fruition.<sup>389</sup> Therefore, the role of the CCMA according to the EEA is as limited to long as the parties are able to agree through conciliation.

---

<sup>384</sup> Ibid Section 50 Para 1 (A) and (F) respectively.

<sup>385</sup> Ibid Section 40 Para 1.

<sup>386</sup> Ibid Section 40 Para 3.

<sup>387</sup> Ibid Section 28.

<sup>388</sup> Ibid Section 10.

<sup>389</sup> Ibid Section 10 Para 6.

CCMA's function to conciliate unfair discrimination cases has been subject to critiques. In the first place, the CCMA lacks sufficient resource and trained man power;<sup>390</sup> and in the second place, CCMA reduces the chance of cases to be heard by the labor court, which in consequence hampers the crafting and shaping of social norm.<sup>391</sup>

#### 4.3.1.3. *Equal Employment Directive EUEED*

The EUEED sets up the individual enforcement model based on individual complaint or litigation. It requires Member States to ensure that judicial or administrative procedures (or both) are available for those who feel their right under the EUEED violated<sup>392</sup>. This means primarily judicial procedure, however, also conciliation procedures might be available.

It also requires, that various associations and organizations be available to ensure the compliance with the EUEED<sup>393</sup>. However, this law does not require in the first place the establishment or designation of governmental enforcement agency with regard to the implementation of the rights contained in the directive like that of its comparator jurisdictions as well as the EU's race directive of 2000/43 and gender equality directive. Both of these directives require national member states to designate equality bodies within the system of the government structure to enforce the race and gender equality.<sup>394</sup>

It can be hoped however, if the commission's proposal for an overall equal treatment directive will be adopted, such gap may be adjusted since the proposal has included

---

<sup>390</sup> C Twyman, 'Finding Justice in South African Labor Law: The Use of Arbitration to Evaluate Affirmative Action' (2001) 33(3) Case Western Reserve Journal of International Law 307.

<sup>391</sup> *Ibid.*

<sup>392</sup> EUEED Article 9 (1).

<sup>393</sup> *Ibid.* Art. 9 (2)

<sup>394</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180 , 19/07/2000 22 Art. 13 and Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20.

establishment of such bodies.<sup>395</sup> This in turn promotes the individual enforcement of the right to non-discrimination of PWDs.

Conclusion: this section has discussed that while MOLSA plays a limited role to enforce Proc. 568/2008, the labor department established to enforce the EEA has strong and broad to take measure against those employers who do not comply with the EEA. The EUEED nonetheless oblige establishment of enforcing bodies within the government framework of member states. Hence, the first sub question of the second main question of the thesis that asks whether MOLSA could be an effective and strong body to enforce rights mentioned under Proc. 568/2008 seems to be answered negatively. This is because compared to the south African labor department, MOLSA does not structural adjustment and the understanding or awareness held by the ministry does not look like progressive and committed to advance right -based approach to disability.

#### 4.3.2. Group justice Model/Enforcement through Representation

In order to ensure enforcement of rights in anti-discrimination laws, trade unions to which employees with disabilities are a member or associations to which disabled persons belong may appear before a court if discrimination happens in employment.

Anti-discrimination laws or constitutions may provide a mandate for associations or non-profit organizations, which are generally termed as civil associations to have a representative action on others' behalf. The next sections deal with issues relating to representation of civil societies on behalf of discriminated workers with disabilities in employment within the comparator jurisdictions of this thesis.

---

<sup>395</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final Art. 12.

#### *4.3.2.1. Proclamation No 568/2008*

Associations of PWDs or other bodies, which are recognized to represent disabled workers as far as the disabled worker is a member of that particular association.<sup>396</sup> However, this shield seems to be defended as a result of Proclamation No. 621/2009.

Article 14.5 clearly stipulates that those activities mentioned under article 14.2 (I), (J), (K), (L) (M) and (N): the advancement of human and democratic rights; the promotion of equality of nations, nationalities and peoples and that of gender and religion; the promotion of the rights of the disabled and children's rights; the promotion of conflict resolution or reconciliation; the promotion of the efficiency of the justice and law enforcement services,<sup>397</sup> are only exercised or engaged by Ethiopian charities or societies.

Ethiopian charities and societies are also defined as: 'those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources'.<sup>398</sup> As it can be understood from the combined reading of article 14 and article 2 of the proclamation, there is excessive fund restriction on human right advocacy including the right of PWDs. Because of this restriction, almost all associations of PWDs have shifted their area of operation in which restriction of fund is lenient or unrestricted. For example, Federation of Ethiopian Persons with Disabilities (FENAPD) that is an umbrella of all associations in Ethiopia re-registered to Ethiopian resident association to engage in

---

<sup>396</sup> Proc. 568.2008 Art. 11.

<sup>397</sup> Charities and Societies Proclamation No.621/2009Art. 14.5 and 14.2.

<sup>398</sup> Ibid Art. 2.2.



developmental activities.<sup>399</sup> Ethiopian resident's charities or societies are not restricted to draw as much foreign fund. In this regard, Sisay argues that despite the government justification to restrict NGOs is to ensure citizens right to freedom of association, which is only recognized for Ethiopians, to avoid foreign dependency and ensuring accountability, the weight of each of justification is not logically convincing.<sup>400</sup> In general, the effectiveness of associations of PWDs have become extremely debilitated to assist their members in the court litigation of disabled workers since operating as an Ethiopian charity or society puts fund restriction and foreign charities are completely prohibited to engage in human right advocacy. One participant in Dagnachew's research indicated that the Ethiopian society is helpful for 'causes it believes' so NGOs have to solicit from the society rather than waiting for foreign aid.<sup>401</sup> Nevertheless, the author has reservation to this assertion because, the society may be actually cooperative in making charity but not in right oriented movements.

#### *4.3.2.2. Employment Equity Act SAEAA*

Unlike the Ethiopian civil society regime, South Africa has a less restrictive NGO law<sup>402</sup> and strong and effective regime of civil society involvement. This is because of the fact that the SAC recognizes participation of such institution in an effective manner. Section 38 of the SAC in addition to associations that represent their members, it entitles any person acting in the interest of the public interest to take a case before a court of law. Hence, if unfair discrimination happens

---

<sup>399</sup> <http://www.fenapd.org/about.php>

<sup>400</sup> Sisay Alemahu, 'CSO Law in Ethiopia: Considering its Constraints and Consequences' (2012) 8(4) Journal of Civil Society 369-384.

<sup>401</sup> Dagnachew Bogale (N 382) 86. the Role of Disability Rights Movements in the Ethiopian Development Agenda (MA Thesis University of Stellenbosch 2011) 86.

<sup>402</sup> Y Bekele, C Hopkins, and L Noble 'Sounding the Horn: Ethiopia's civil society threatens human right defenders' (Report 2009) Center for International Human Rights, Northwestern University School of Law report 8.

against workers with disabilities in other areas, which PEPUDA applies, associations of PWDs or any other person having public interest can approach the court to seek remedy.

#### *4.3.2.3. Equal Employment Directive EUEED*

Article 9.2 of the EUEED with regard to enforcement of the rights contained in the directive obliges member states to ensure that ‘associations, organizations’ or other legal entities which have, ... a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure.’<sup>403</sup> Transposition of the directive in member states shows various ways to meet the obligation of representation.

While some states in the Union permit NGOs to represent without identifiable party or interest in the form of *actio Popularis*, others also enable NGOs and equality bodies to represent victims of discrimination before the court of law. In general, different modes exist in the Union in terms of the bodies that are permitted, type of the representation either by *actio popularis* or class action as well as the nature of the proceeding. See Farkas for more detail on this issue in EU.<sup>404</sup>

To sum up the points in this section, the South African and EU legal framework offer a better enforcement of rights through representation of associations or organizations. Civil societies in South Africa do most frequently operate in smooth environment and the law imposes no stringent requirements. In Ethiopian case however, civil societies particularly those interested to engage in human right litigation and advocacy are toughly restricted to function by the

---

<sup>403</sup> EUEED Art. 9.2.

<sup>404</sup> LillaL Farkas, ‘Collective actions under European anti-discrimination law’ (2014) 1(19) European Anti-Discrimination Law Review, The European Network of Legal Experts in the Non-discrimination Field 25,29-30.

promulgation of proc. 621/2009. Owing to such constraint, associations working for the right of PWDs could not represent their members before the court of law as they have been mandated by proclamation 568/2008 since required amount of fund cannot be derived from local sources. Hence, it can be argued that part of Proc. 568/2008 that allows associations to represent their members in employment discrimination cases has already been repealed not by clear act of the parliament but by practical implementation of Proc. 621/2009. The restrictive recognition to *actio popularis* or public interest litigation in Ethiopia,<sup>405</sup> unnecessary restriction to access fund devastates the operation of associations of PWDs exposing their members to remain unremedied as well as exacerbates perpetuation of structural, institutional and other forms of discrimination. Access to justice ensured by FDRE constitution and CRPD also remain on paper.

Conclusion: this section has provided that while associations with PWDs or non-governmental organizations have a limited role to enforce the anti-discrimination law or proc. 568/2008 of Ethiopia, the EEA and EUEED on the other hand have pivotal role to enforce the right of employees with disabilities in employment. Proc. 621/2009 is one of the restrictive laws which could hamper the involvement of association of PWDs by putting restriction on funds. Therefore, it can be concluded that associations of PWDs are no longer effective to operate due to the promulgation of Proc. 621/2009 which substantially dysfunctions human right advocacy NGOs including those organizations working on disability rights.

#### 4.3.3. Effectiveness of Sanctions or Remedies

As it has been stated above at the introduction of this sub-chapter, sanctions- remedies for the breach of provisions in anti-discrimination can be provided in various ways despite their level of

---

<sup>405</sup> A Kasye, 'Towards More Liberal Standing rules to Enforce Constitutional Rights in Ethiopia' (2010) 10(2) African Human Rights Law Journal 407,431.

effectiveness are varied. Civil, administrative or criminal remedies are some of the common forms.

Civil remedies in most cases involve financial and moral damages under general tort law and reinstatement of victims to earlier position or compensation for the loss of that position. Some states recognize the order of damages in specific anti-discrimination laws. Such sanctions and remedies are backward looking in nature and individual oriented.

Administrative and criminal sanctions and remedies aim at punishing the perpetrator or in the employment context the employer and educating the society at large. An individual who alleges that the employer committed discrimination on the basis of disability would not get any monetary gain for oneself even the employer is found to be in violation of the law. This is because, in criminal law, it is presumed that the offence or the violation is to have been committed against the general public. Administrative and criminal sanctions and remedies are backward-looking like the civil ones and repressive in nature.

In addition to civil and criminal or administrative sanction-and-remedies, forward-looking and non-pecuniary ways are identified to tackle discrimination. Such forms are proactive, positive and constructive in character. Unique feature of such mechanism is systematic prevention of discrimination prospectively in addition to reactions of criminal and administrative as well as civil law reliefs.<sup>406</sup>

The next sections will explain type of sanctions or remedies and their effectiveness incorporated in the antidiscrimination laws of the comparator jurisdictions.

---

<sup>406</sup> L Ionescu and R Iordache, 'Discrimination and its Sanctions Symbolic vs. Effective Remedies in European Anti-discrimination Law' (2014) 1(19) European Anti-Discrimination Law Review, The European Network of Legal Experts in the Non-discrimination Field 11-18.

#### *4.3.3.1. Sanctions or remedies under Proc. 568/2008*

Proclamation no. 568/2008 imposes a penalty against those who contravene the provision subsumed in the proclamation. Punitive sanction or remedy is featured in the proclamation to punish employers by a penalty of not less than two thousand and not more than five thousand<sup>407</sup> Ethiopian Birr which is about one to two hundred USD. This sanction in form of fine however does not seem to ensure observance of the proclamation due to the fact that the amount of the punishment is very insignificant.

bove all, punishment is supposed to be deterrent though it is not always necessary to involve pecuniary measures for its effectiveness.<sup>408</sup> Most importantly, ‘the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him.’<sup>409</sup> Scholars in economics analysis of law including Cooter and Ulen also assert that ‘Punishment’s extent should be proportional to the seriousness of the crime, or to how morally wrong it is.’<sup>410</sup> Besides, one of the purposes of FDRE Criminal Code as stated under article one is that:

The prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others.<sup>411</sup> [Repetition]

However, the sanction in the proclamation does have no role to deter the perpetrators themselves. It has also been submitted that legislation is unlikely to serve as regulatory mechanism and to mold companies’ ‘response to employment equity or equal employment

---

<sup>407</sup> Proc. 568/2008 Art. 11.

<sup>408</sup> Case C-81/12 Asociația Accept V Consiliul National pentru Combaterea Discriminării (2013) ECLI:EU:275 Para 68.

<sup>409</sup> S Lowenstein, materials for the study of the penal law of Ethiopia (1st HSU Publishing 1965) 19-20

<sup>410</sup> R Cooter and T Ulen, Law and Economics ( 6th edn. Pearson Education Inc. 2012) 454.

<sup>411</sup> The FDRE Criminal code 2004 Art. 1 Para 2.

opportunity ‘without increased enforcement’.<sup>412</sup> Employers therefore may prefer to make economic analysis of punishment to discriminate applicants with disabilities during recruitment, promotion and other employment conditions because of the fact that the amount of punishment most frequently is lower compared to cost of reasonable accommodation. Research also shows that employers are not willing to make reasonable accommodation assuming costs that will be incurred to the adjustment whatsoever expenses to make reasonable accommodation are insignificant.<sup>413</sup> Therefore, employers would not fear discriminating employees on the basis of their disability.

#### *4.3.3.2. Sanctions or Remedies under the SAEEA*

The SAEEA provides a better sanction or remedy compared to Proc. 568/2008 since it comprises civil, criminal and forward-looking non-pecuniary sanctions and remedies. In terms of civil remedies, the act provides that when the labor court decides an employee has been unfairly discriminated, it may order payment of compensation and damages.<sup>414</sup> Moreover, the court may provide ‘an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees’;<sup>415</sup> Such orders may greatly impact tackling structural and systemic discrimination in the future. From criminal and administrative point of view, Schedule one attached to SAEEA<sup>416</sup> prescribes a total of R 500 thousand against those designated employers contravening the act which is close to USD 45 to 50 thousand. Even if the fine that might be imposed under SAEEA seems to be a lot, Thomas

---

<sup>412</sup> H Jain, F Horwitz & C Wilkin , ‘Employment equity in Canada and South Africa: a comparative review’ (2012) 23(1) International Journal of Human Resource Management 148.

<sup>413</sup> K Markel and L Barclay, ‘Addressing the Underemployment of Persons with Disabilities: Recommendations for Expanding Organizational Social Responsibility’ (2009) 21 Employee Responsibilities and Rights Journal 305.

<sup>414</sup> SAEEA Section 50.2.A.B.

<sup>415</sup> Ibid Section.50.2.C.

<sup>416</sup> Ibid Schedule 1.

and Harrish hold a view that the fine is not sufficient to deter employers from violating their obligation.<sup>417</sup> In fact, the level of economic capacity may play its role in determining the sanction of fine. If the fine sanctioned provided by SAEAA had been imposed on Ethiopian employers, they would have ceased their operation. However, this is not to advocate for Ethiopian employers to be fined less rather it is to indicate that scale of economy is one factor when determining fine.

#### *4.3.3.3. Sanctions and Remedies under EUEED*

Unlike Proc. 568/2008 and SAEAA, EUEED provides no specific sanction or remedy to the violation of rights contained in the directive. Determination of a specific sanctions and remedies is left to the discretion of member states. The typical way of right enforcement in the Member States is individual complaint or litigation procedure before an independent judiciary organ, a tribunal or court of justice, that decides about the enforceable compensation and sanction.

States are required to make sure that the chosen sanctions or remedies fulfill three requirements. These are: effectiveness, proportionate and dissuasiveness.<sup>418</sup> Although these requirements are not elaborated in the directive, judgment of ECJ in one case has outlined the content of them in a case when the violation of the EUEED was found. According to the court, ‘effectiveness ensures that the sanctioning measures may be effectively relied on before the national courts’<sup>419</sup> proportionate also implies that the severity of the taken measure should be fairly balanced to the gravity of the violation.<sup>420</sup> Dissuasiveness is also the result of how much the measure taken has a capability of eliminating the discrimination. Conclusion: Over viewing

---

<sup>417</sup> A Thomas, & H Jain, ‘Employment equity in Canada and South Africa: progress and propositions’ (2004) 15(1) International Journal of Human Resource Management 36,48.

<sup>418</sup> EUEED Preamble Para 35 and Art. 17.

<sup>419</sup> Asociația Accept V Consiliul National pentru Combaterea Discriminării (N 413) Para 62.

<sup>420</sup> *Ibid.*

the three jurisdictions, a clear difference, impacting on the effectiveness of enforcement can be detected. Proc. 568/2008 only provides crimination sanction on employers contravening rights included in the proclamation. Moreover, the punishment is very low which would not deter employers from disability based employment discrimination. The SAEAA imposes more severe punitive sanction and in addition the EEA recognizes civil remedies in form of compensation. The EUEED puts the emphasis of proportionate, compensatory and dissuasive private remedies from among the possible forms of sanctions-remedies.

But it sets underlying elements in the assessment of punishment. Hence, so long as the sanction involves dissuasiveness, proportionate and effectiveness, criminal, civil or any other forms of sanctions-remedies may be adopted. However, in the final outcome private remedies seem more effective than punitive sanctions in the form of pecuniary punishment. Thus, the type of sanctions and remedies under Proc. 568/2008 may seem to have the least effectiveness as forms of sanctions and remedies.



## CHAPTER FIVE

### Conclusions and Recommendations

#### 5.1 Conclusions

It has been almost thirty years since Anti-discrimination laws have become a legal tool to outlaw discrimination against marginalized groups including PWDs. The compared jurisdictions of this thesis have also taken a step to design such legal tool to enable PWDs to become beneficiaries of equal opportunity in major life activities including employment. The Ethiopian Proc. 568-2008, the South africa's EEA and EU's anti-discrimination laws protect the right of PWDs in employment. However, there is variation in the implementation or enforcement of such laws that could be attributed to different factors as it was discussed throughout the thesis.

In Ethiopia, it has only been a decade since Ethiopia begun to tackle discrimination against PWDs through anti-discrimination law. The EPRDF government ensuing the ratification of ILO Convention No. 159 1983 promulgated proclamation 101/1994 which can be taken as a legislative exercise to recognize PWDs in employment. Nonetheless, this proclamation had been repealed since it was crafted in light of medical model of disability and its effort to realize employment opportunity of PWDs was based on the application of quota. Quota scheme or reservation could not succeed even worse promoted the view that PWDs are incapable of competing in open labor market unless posts are reserved for them in particular. For this reason, the proclamation had been replaced by Proc. 568/2008. This proclamation brought much transformation among others the shifting of conception of disability, recognition of obligation of reasonable accommodation and the like.

This proclamation actually seems to be a better legislation compared to its predecessor although most of the provisions have become almost all inoperative due to ineffective enforcement.

Ineffective enforcement may arise from two angles. In the first place, rights provided in the legislation may not sufficiently be incorporated or create uncertainty. Secondly, sanctions in anti-discriminatory legislation may not deter the re-occurrence of discriminatory act as well as fail to assign strong enforcement bodies. The Ethiopian anti-discrimination legislation in employment Proc. 568/2008 does not also escape from these problems.

Therefore, this thesis has studied role and enforceability of Proc. 568/2008 in the promotion and protection of right to employment of PWDs in Ethiopia by comparing South African and EU anti-discriminatory laws. In doing so, chapter one has dealt with socio-economic, historical and legal background of the comparator jurisdictions. Chapter two has also discussed about disability models and alternative approaches of employment for PWDs. The next two chapters i.e. Chapter three and four have also discussed about obligations of employers and enforcement of anti-discriminatory laws in the comparator jurisdictions respectively.

In terms of insufficient incorporation of right or vague expression, Proc. 568 fails particularly to determine what a closer score includes to grant an applicant with disability in employment process. This uncertainty has resulted in the application of different standards in the country. Moreover, the provision of personal assistant as a reasonable accommodation which has been provided in the proclamation obliges employers to hire such person mandatorily. However, this obligation without providing incentives in particular for private employers does not seem enforceable. In fact, the same incentive or subsidy does not also exist in the South African EEA.

However, most of EU member states offer various forms of subsidy schemes for employers hiring PWDS.

The definition provided for PWD is also another source of uncertainty. Despite Proc. 568/2008 embraces a social model of disability, implementing directives reflect a medical approach to disability. Therefore, there is inconsistency of understanding or defining who a PWD is. The South African EEA however clearly provides who a PWD is and subsequent documents clarify the contents of the definition. Thus, there exists no confusion to identify the beneficiaries of the rights under the EEA as a PWD. Even if the EUEED does not provide who a PWD is, the CJEU has engaged in interpreting the directive and setting criteria to determine who a PWD is.

The scope of application has been also discussed as one challenge of effective enforcement. Despite Proc. 568/2008 has been intended to apply for all offices without any particular exemption, the interpretation of the federal cassation bench has narrowed the applicability of its scope. Particularly, the cassation bench in the case of *Mekonnen teklyu v Addis Ababa justice Bureau* has made clear that appointees with disabilities cannot submit complaint by virtue proc. 568/2008. However, in South Africa, although there is some office which are out of the ambit of EEA, all other offices that are not governed by EEA would be liable for unfair discrimination by means PEPUDA. Hence, all PWDs would have recourse to challenge unfair discrimination. The EUEED does not have limitation of scope like that of Ethiopia's proclamation. It may only limit the scope of the directive in the army if there is a compelling justification.

In terms of the second sources of ineffective enforcement which includes failure to assign strong responsible bodies and poor sanction, proc. 568/2008 does not provide or assign strong responsible bodies. MOLSA has been mandated to follow up implementation of the CRPD and

Proc. 568 2008. Even the proclamation allows such ministry to institute a case on behalf of the employees with disability before a court of law. However, due to long-held perception that MOLSA is committed to rehabilitation and other supportive role, the involvement this ministry has been limited. The South African Labor Department on the other hand has broader power of enforcement against those who are in violation of the EEA. The labor department can submit its compliance order to the labor court and if the employer fails to challenge, that order would be taken as if it has been made by the court. In fact, the EUEED does not oblige member states to assign government enforcement agencies in its provision. The role of civil societies particularly associations to which employees with disabilities are members have been recognized to enforce under proc. 568 2008. However, the coming into force of proc. 621 2009 which restricts the financial sources of right or advocacy oriented associations has hampered the operation of such associations to the interest of their members or employees with disabilities. On the contrary, the EEA and the EUEED have explicitly affirmed the participation of civil society to the interest of employees with disabilities. In South Africa, the country's constitution even permits public interest litigation. Thus, non-profit organization can take any employment discrimination against PWDs. In EU also, the directive recognize the involvement of non-governmental organizations. However, members states follow various approaches in permitting who may take or represent discriminated employees with disabilities.

Poor sanction against the employers is also another enforcement challenge of proc. 568 2008. The maximum fine imposed on employers for violating the provisions of the proclamation is 5.000 Ethiopian birr or close to 150 USD. This amount is so insignificant to deter employers from their discriminatory practices. The EEA on the other hand provides a sanction of fifty thousand USD. Compared to the Ethiopian sanction, the South African EEA's sanction seems

much better to discourage employers from disability based employment discrimination. Although the EUEED does not provide the specific type of sanction, it provides or puts principles which must be involved in determination of the sanction. Therefore, a punishment must be dissuasive, proportionate and effective. While Proc. 568 2008 provides criminal sanction alone, the EEA provide criminal civil and other sanction. Yet, the EUEED does not limit itself to specific kind of sanction. As long as dissuasiveness, proportionate and effectiveness are considered, any form of sanctions is permitted and it is up to the member states to adopt the mode of sanction as well.

## 5.2 Recommendations

The Ethiopian anti-discrimination law in employment Proc. 568/2008 seems almost unenforceable compared to South Africa and the EU. Moreover, as it has been in operation for a decade, it requires substantial amendment to ensure employability of PWDs. Therefore, I recommend the following points to make sure the role and enforceability of Ethiopia's proc. 2008 to meet the employability of PWDs.

1. Regarding the application of affirmative action, amendment should consider as to how create consistent application of providing additional marks and vague terms like closer score must be clearly stated or defined to avoid uncertainty.

2. Concerning reasonable accommodation and personal assistant in particular, legal modification should happen that will allow provision of incentive schemes to employers. Moreover, wide range of awareness raising campaigns must be conducted to raise the awareness level of employers and stakeholders regarding reasonable accommodation and PWDs.

3. With regard to the definition of PWDs, a uniform and consistent understanding should be developed and followed at least for the purpose of employment. For this, reconciling conflicting employment related legislations is very necessary to guarantee effective protection predictably.

4. In regards to scope of applicability, the Federal Cassation Division Bench decision that limited the scope of the proc. 568 2008 must be overruled or an amendment should consider the scope of anti-discriminatory legislation in all spheres of employment like that of EUEED. Alternatively, even there is a policy rationale to exclude some employment sectors out of the employment anti-discrimination laws, another framework must be designed like in the case of South Africa to claim unfair discrimination against those who are out of the employment anti-discrimination laws.

5. With respect to strong responsible bodies, MOLSA should be restructured to see disability issues from right based perspective rather than a soft social issue. Moreover, amendment should consider providing sufficient power and effective measures that would help MOLSA to punish employers who contravene the law. Moreover, MOLSA should be made strictly responsible to furnish report to the parliament in this regard.

6. Concerning the role of Association of PWDs and other non-organization, proclamation 621/2009 should be repealed to allow the right or advocacy oriented civil society groups to work on the right of PWDs including defending employment discrimination. Alternatively, the government should provide funds to those associations of PWDs which working disability right through annual budget allocation or by establishing grant scheme in which association of PWDs are only allowed to compete for the grant via open project call.

7. With regard to punishment, amendment should consider to increase the amount of the fine in proportion to the seriousness of discrimination. Since the current sanction is not deterrent and

insignificant, employers do not care to observe rights included in proc. 568 2008. Not only increasing the level of punishment, various forms of sanctions must be introduced like civil remedies in form of compensation as well as additional forward looking remedies that will order employers to prevent the happening of unfair employment discrimination in the future.

## Bibliography

### Books

1. Lawson A Disability and Equality Law in Britain (HART Publishing 2008)
2. Lowenstein S, Materials for the Study of the Penal Law of Ethiopia (1st HSU Publishing 1965)
3. Michael E, Civil Society (2nd ed polity press 2009)
4. Quinn G, Degener T and others The current use and future potential of United Nations human rights instruments in the context of disability (United Nations New York and Geneva 2002)
5. Kanter A The development of disability rights law Under International law: From Charity to Human Rights(OUP 2015)
6. Oliver M the politics of disablement (Palcrave Macmillan Publishing 1990)
7. O'Reilly a the Right to Decent Work of Persons with Disabilities (revised edn Geneva, International Labor Office 2007)
8. Lamichhane K Disability, Education and employment in Developing countries From Charity to Investment (Cambridge University Press 2015)
9. Shakespeare T Disability Rights and Wrongs Revisited (2nd edn, Routledge 2014)
10. Dagnachew Bogale, the Role of Disability Rights Movements in the Ethiopian Development Agenda (MA Thesis University of Stellenbosch 2011)
11. D Macleod, Pregnancy as a source of discrimination: A comparative study of antidiscrimination legislation in the European Union and the United States of America ( University of York PHD dissertation 2015)

### Cases

1. Case C-450/93 Eckhard Kalanke
2. V Freie Hansestadt Bremen (1995) ECR I-03051.
3. Case C-354/13 Karsten Kaltoft V Municipality of Billund (2014) ECLI:EU:C:2463.
4. Case C-354/13 Karsten Kaltoft v Municipality of Billund (2014) ECLI:EU:C2106 opinion of AG Jääskinen
5. Case C-13/05 Sonia Chacón Navas vEurest Colectividades SA (2006) ECLI:EU:C456.
6. Hk Danmark, joined cases C-335/11 and C-337/11 (2013) ECLI:EU:C:222.
7. Case 344/87 Bettray v Staatssecretaris van Justitie (1989) ECR 01621.
8. Case C-81/12 Asociația Accept V Consiliul National pentru Combaterea Discriminării (2013) ECLI:EU:275.
9. Case C-363/12 Z v A Department (2014) ECLI:EU:C159.
10. Wesen Alemu and Dawit Oticho v Amhara Regional State Justice Organs Professionals Training Center and Amhara Regional State Judicial Administration Council Federal Democratic Republic of Ethiopia, House of Federation HOF File No. 019/08 October 11 2016 (tikimt 2 2009 EC)



11. Mekonnen Teklu v Addis Ababa Justice Bureau, Federal First Instance Court FFIC File No 00746 July 16 2012 (Hamle 8 2003)
12. Addis Ababa Justice Bureau v Mekonnen Teklu, Federal High Court File No 111843 November 30 2012 (Hider 22 2004 EC)
13. Mekonnen Teklu v Addis Ababa City Administration, Federal Supreme Court Decision Vol 13 Cassation File no 75034 November 11 2013 (Hidar 3 2005 EC)
14. Nigist Seman v Addis Ababa administration civil service commission Federal First instance court Menagesha File no 32831 June 8 2010 (Sene 1 2002 (
15. Harksen v Laneis ZACC 9 (1997)
16. Parvathi Singh v Minister of Justice and another ZAGPHC (1) (2013)
17. Imatu and another v City of Cape town, BLLR (11) (2005)
18. Minister of Finance and Another v Van Heerden ZACC (6) (2004)

#### Journal Articles

1. Adem Kasye towards More Liberal Standing rules to Enforce Constitutional Rights in Ethiopia' (2010) 10(2) African Human Rights Law Journal 407.
2. Areheart B and stein M, 'The Disability-employability Divide: Bottlenecks to Equal Opportunity' (2015) 113 Michigan Law Review 877.
3. Burrows N and Robison M, 'positive action for Women in Employment: Time to Align with Europe?' (2006) 33(1) Journal of Law and Society 24.25.
4. Farkas L, 'Collective actions under European anti-discrimination law' (2014) 1(19) European Anti-Discrimination Law Review, The European Network of Legal Experts in the Non-discrimination Field 25.
5. Fredman S, 'Making Equality Effective: Proactive Measures and Substantive Equality for Men and Women in the EU' (2010)(2) European Gender Equality Law Review
6. Holness W, and Rule S, 'Barriers to Advocacy and Litigation in the Equality Courts for Persons with Disabilities' (2014) 17(5) Potchefstroom Electronic Law Journal 1906.
7. Howard E, 'EU Equality Law: Three Recent Developments' (2011) 17(6) European Law Journal 785,789.
8. Jain H, Horwitz F, & Wilkin C, 'Employment equity in Canada and South Africa: a comparative review' (2012) 23(1) International Journal of Human Resource Management 148.
9. KONIG A, and Shalockk R, 'Supported employment: Equal Opportunities for Severely Disabled Men and Women' (1991) 130(1) International Labor Review 21.
10. Lawson A, 'United Nations Convention on the Rights of People with Disabilities: New Era or False Dawn?' (2007) 34 Syracuse J INT L & Com 563.
11. Lonescu L, and lordache R, 'Discrimination and its Sanctions Symbolic vs. Effective Remedies in European Anti-discrimination Law' (2014) 1(19) European Anti-Discrimination Law Review, The European Network of Legal Experts in the Non-discrimination Field 11.
12. Markel K and Barclay L, 'Addressing the Underemployment of Persons with Disabilities: Recommendations for Expanding Organizational Social Responsibility' (2009) 21 Employee Responsibilities and Rights Journal 305.

13. Migliorea, A, Grossia T, Manka D and Roganb R, 'Why do Adults with Intellectual Disabilities Work in Sheltered Workshops?' (2008) 28(1) *Journal of Vocational Rehabilitation* 29.
14. Modise J, Olivier M and Miruka O 'Reasonable Accommodation for People with Disabilities in the Labour Market' (2014) 5(4) *Mediterranean Journal of Social Sciences* 578.
15. Portillo J, and Lock W, 'anti-discrimination laws: undermining our rights' (2012) 109(2) *Journal of Business ethics* 210.
16. Quinn G, 'the United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability' (2009) 15(1) *Texas Journal on Civil Liberties & Civil Rights* 34.
17. Quinn G, and Flynn IE 'Evolutions in Antidiscrimination Law in Europe and North America: Transatlantic Borrowings: The Past and Future of EU Non-discrimination Law and Policy on the Ground of Disability' (2012) 60 *American Journal of Comparative Law* 23.
18. Shimeles Ashagre, 'Appraising Employment Accommodation Rights for Visually Impaired Teachers in Ethiopia: Overview of Selected Cities' (2014) 8 (2) *Mizan Law Review* 406.
19. Siperstein G, Romano N, Mohler A, and others, 'A national survey of consumer attitudes towards companies that hire people with Disabilities'(2006) 24(3) *Journal of Vocational rehabilitation* 3.
20. Sisay Alemahu, 'CSO Law in Ethiopia: Considering its Constraints and Consequences' (2012) 8(4) *Journal of Civil Society* 369-384.
21. Seyum Yohannes, 'Towards Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/2008 on the Employment of Persons with Disabilities' (2010) 24(1) *Journal of Ethiopian Law* 90.
22. Thomas A, & Jain H, 'Employment equity in Canada and South Africa: progress and propositions' (2004) 15(1) *International Journal of Human Resource Management* 36.
23. Tourkochoriti I, 'Disparate Impact' and 'Indirect Discrimination': Assessing Responses to Systemic Discrimination in the U.S. and the E.U' (2015) 3(1) *European Journal of Human right*
24. Turner E, 'Finding the right Personal Assistant' (2003) 18 *Journal of Vocational Rehabilitation* 87.
25. Twyman C, 'Finding Justice in South African Labor Law: The Use of Arbitration to Evaluate Affirmative Action' (2001) 33(3) *Case Western Reserve Journal of International Law* 307.
26. Visier L, 'Sheltered employment for persons with disabilities' (1998) 137(3) *International Labor review* 348.
27. Waddington L, 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-discrimination Laws' (1996) 18 *Comparative Labor Law Journal* 62.

#### Chapters in books

1. Vernon A and Swain J, 'Theorizing Divisions and Hierarchies: Towards a Commonality or Diversity?'; Hahn H, 'Academic Debates and Political Advocacy: The US Disability Movement' in Barnes C, Oliver M and Barton L (eds), *Disability Studies Today* (Polity Press 2002)
2. Waddington L, 'Changing attitudes to the Rights of People with Persons with Disabilities in Europe' in J Cooper (ed), *Law, Rights and Persons with Disabilities* (Jessica kingsley 2000)
3. J Hayman, M stein and G Moreno, 'Employment and Inclusion Worldwide'; Lawson A, 'Disability employment in the European union: Collective Strategies and Tools'; Mont D, 'Employment policy

approaches an multi-sectoral implementation in low-and middle-income countries'; Sakuraba R, 'complementary Approaches: Japanese Disability and Employment law' in J Heymann, M Stein and G Moreno (eds), *Disability and equity At Work* ( OUP 2014)

4. McCrudden C, 'National Legal Remedies for Racial Inequality' in Fredman S and Alston P (eds), *Discrimination and Human Rights: The Case of Racism* (OUP, 2001)
5. Degener T, 'Disability Discrimination Law: A Global Comparative Approach' In Lawson A, and Gooding C (eds), *Disability Rights in Europe* (Hart Publishing 2005)
6. Lewis O, 'The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities' in McSherry B, and Weller P (eds), *rethinking Rights-Based Mental Health Laws* (Hart Publishing 2010)
7. Albrecht G, 'Rehabilitation' in Rachel Adams, Benjamin Reiss, and David Serlin (eds) *Keywords for Disability studies* (New York University Press 2015)
8. Alberta S 'The United States and the European Union: Comparing Two Sui Generis Systems' in Menon A, and Schain M (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (OUP 2006)

#### Laws

1. Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, 47. Imperial order No. 70/1971 of Ethiopia to provide for the establishment of the Rehabilitation Agency.
2. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180 , 19/07/2000 0022.
3. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation OJ L303/16.
4. Federal Democratic Republic of Ethiopia Labor Proclamation No. 377/2003; Federal Democratic Republic of Ethiopia Ministry of Labor and Social Affairs Directive to Implement Proclamation No. 568/2008; Federal Republic of Ethiopia Civil Servant Proclamation No. 515/2007; Federal Republic of Ethiopia Civil Service Minister Directive to Implement Proclamation No 568/2008 No. 1 2014; Federal courts Reamendment Proclamation No. 454/2005; Revised Amhara Regional State Civil Service Proclamation Implementing Directive No.1 2015; The Amhara National Regional State Civil Servants Revised Proclamation No. 171 /2010; The Federal Democratic Republic of Ethiopia Charities and Societies Proclamation No.621/2009; The Federal Democratic Republic of Ethiopia Right to Employment of Persons with Disability Proclamation No. 568/2008; The Federal Democratic Republic of Ethiopia Rights of Disabled Persons to Employment Proclamation No. 101/1994; Federal Attorney General Establishment Proclamation No. 943/2016; Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010; Federal Police Proclamation No. 207/2000; Higher Education Proclamation No. 650/2009.
5. South Africa Constitution Act No. 108 1996; South Africa Employment Equity Act No. 55 1998;10. South Africa Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 200009; South Africa Public Service Administration, Act NO. 103 1994.

#### Binding and Non-binding International instruments

1. ILO Recommendation 22 Workmen's Compensation Minimum Scale Adopted June 10 1925; ILO Recommendation 71 Employment Transition from War to Peace Adopted May 12 1944; ILO Vocational Rehabilitation Disabled Recommendation 99 June 22 1955; ILO Convention No. 102 Social Security

Minimum Standards Adopted June 28 1952; ILO Convention No. 11 concerning Discrimination in respect of Employment and Occupation Adopted on 25 June 1958 entry into force 15 June 1960; ILO Convention No. 128 invalidity, Old-Age and Survivors' Benefits Adopted June 29 1967.

2. Committee on Economic, social and Cultural Rights General Comment No. 5 December 9 1994.
3. Committee on the Right of Persons with Disabilities General Comment 2 2014.
4. Declaration of mentally Retarded Persons General Assembly Resolution 2856 (XXVI) December 20 1971

#### Reports and Discussion Papers

1. Achieving equal employment opportunities for people with PWDS through legislation: An education and training guide (Geneva 2011) International Labor Office.
2. Albert B, 'enabling Disabled People to reduce poverty briefing note: The Social Model of Disability, Human Rights and Development' Disability KAR research project 2004.
3. Backup S, 'the price of Exclusion' on ILO discussion paper 2009.
4. Bekele, Hopkins C and Noble L 'Sounding the Horn: Ethiopia's civil society threatens human right defenders' (2009) Center for International Human Rights, Northwestern University School of Law report 8.
5. Central Statistical Agency Population and Housing Census Report of Ethiopia 2007.
6. Country profile on Persons with Disabilities, Federal Democratic Republic of Ethiopia, Japan international cooperation agency plan and evaluation department 2000.
7. European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Report on Disability and non-discrimination law in the European Union 2009.
8. European Policy evaluation consortium Study on discrimination on grounds of religion and belief age disability and sexual orientation outside of employment Brussels 2008.
9. Federal Democratic Republic of Ethiopia, Ministry of Labor and Social Affairs (MOLSA) Report on Baseline Study on the Status of Persons with Disabilities and the Influence of the African Decade PRONOUNCEMENT in Ethiopia 2010.
10. ILO 'People with disabilities: Pathways to decent work: Report of a tripartite workshop Pretoria South Africa, 19-21 September 2006 ' (Geneva ILO Office 2007).
11. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM2008
12. .Sophie M, 'The recent decline in the employment of Persons with Disabilities in south Africa, 1998-2006' Discussion paper no. 12, (Fordham University, 2008.
13. South Africa White Paper on the Rights of Persons with Disabilities, December 2015
14. .World Health Organization and World bank, World Report on Disabilities 2011.

#### Internet sources

1. Budeli F, 'Employment Equity and Affirmative Action in South Africa: A Review of the Jurisprudence of the Courts since 1994' (2014) Conference on Twenty Years of South African Constitutionalism < <http://www.nyslawreview.com/south-africa-program/>> Accessed December 9 2016.

2. Degener T, and Quinn G, A Survey of International, Comparative and Regional Disability Law Reform <<https://dredf.org/news/publications/disability-rights-law-and-policy/a-survey-of-international-comparative-and-regional-disability-law-reform/>> Accessed October 30 2016.
3. European Union Anti-discrimination policy: From Equal Opportunities Between Women and Men to Combating Racism' Directorate-General for Research Working document Public Liberties Series <[http://www.europarl.europa.eu/workingpapers/libe/102/text1\\_en.htm](http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm)> Accessed November 20 2016.
4. Ferraina S,' Analysis of the Legal Meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Settings' <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/560/>> Accessed March 20 2016.
5. Kasahun Yibeltaal, 'Law and policy situation of Persons with disabilities in Ethiopia' Disability Risk Management Conference(2013)  
[https://www.dppc.gov.et/downloadable/reports/Early\\_warning/DRR%20DAY-2013/FENAPD%20Law%20and%20policy%20situation%20of%20persons%20with%20PWDS\\_Kassahun%20yibeltaal.pdf](https://www.dppc.gov.et/downloadable/reports/Early_warning/DRR%20DAY-2013/FENAPD%20Law%20and%20policy%20situation%20of%20persons%20with%20PWDS_Kassahun%20yibeltaal.pdf)> Accessed October 3 2016.
6. Kruger R, 'Small Steps to Equal Dignity: The Work of the South African Equality Courts' (2011) Equal Rights Review <[http://www.equalrightstrust.org/ertdocumentbank/ERR7\\_kruger.pdf](http://www.equalrightstrust.org/ertdocumentbank/ERR7_kruger.pdf)> Accessed 23 January 2015
7. . L Waddington and M Diller, 'tension and coherence between disability policy The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law' <http://dredf.org/news/publications/disability-rights-law-and-policy/tensions-and-coherence-in-disability-policy/> Accessed February 16 2016.
8. Statistics of South Africa 2011 s<http://www.statssa.gov.za/?p=3180> Accessed November 21 2016
9. . United Nations Convention on the Rights of Persons with Disabilities Some Facts about PWDS (2006), available at <http://www.un.org/PWDS/convention/pdfs/factsheet.pdf>.
10. White Paper integrated National strategy on disabilities <<http://www.info.gov.za/whitepapers/1997/disability.htm>> Accessed November 21 2015.
11. M Robert, Disability Issues, Trends And Recommendations For The WorldBank Social protection' 2000 <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172606907476/DisabilityIssuesMetts.pdf> Accessed June 24 2018.

#### Interviews

1. Interview with Alenew Wuletaw, Ministry of Labor and Social Affair legal drafting Department (Addis Ababa Ethiopia) September 2016.
2. Interview with Dawit Oticho, Labor inspector Addis Ababa Administration Bureau of labor and social affair, (Addis Ababa Kolfe Ethiopia) 13 September 2016.
3. Interview with Desse Seyum, Director of Amhara Regional State Justice and legal research office (Bahir Dar Ethiopia 12 September) 2016.
4. Shimeles Ashagre, Interview with Ato Kasahun Yibeltaal, the former President of the Ethiopian Federation of the Associations of Persons with Disability, 23 January 2008 as quoted in Shimeles Ashagre, 2009.

