

**THE RIGHT TO EQUALITY IN THE WORK PLACE FOR PERSONS WITH  
PHYSICAL DISABILITIES IN MALAWI: DOES THE CONVENTION ON THE  
RIGHTS OF PERSONS WITH DISABILITIES OFFER ANY HOPE?**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE  
MASTER OF LAWS DEGREE (LLM)**

**(HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

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**REPUBLIC OF SOUTH AFRICA**

**3 NOVEMBER 2008**

## **DEDICATION**

This dissertation is dedicated to the memory of my dear mother, Alice Margaret Jere. Thank you and dad for giving me and my four siblings the gift of love and education. You shall always be our source of inspiration and tower of strength. Keep on watching over us. Rest in Peace

And to all persons with disabilities and the generation of professionals and advocates who have taught me that there is always more that can be done and that it can always be done better.

**DECLARATIONS**

I, **VICTOR MAKHUBALO JERE**, do hereby declare, certify and affirm that this research is my own work and that to the best of my knowledge, has not been submitted nor is it currently being considered either in whole or in part, in fulfilment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof.

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## ACKNOWLEDGEMENTS

First and foremost my profound gratitude goes to God for the gift of life, wonderful parents, brothers and an amazing sister that he gave me. If it was not for God's will none of my achievements would have been possible. Secondly to my family for your guidance, unwavering love and support in all my endeavours. Even though I may not always show it, and at times take you for granted, know that I am always thankful for your troubles. Siblings by chance but definitely friends by choice. May the good Lord hear your prayers and richly bless you.

The support I got from my supervisor Professor Michelo Hansungule requires a specific mention. I always got thorough comments on my work as promptly as possible, which usually was in less than twenty-four hours of the submission of drafts. The door to his office was always open to me and he always listened to my ideas even when I was wrong, before humbly and respectfully showing me light. Thank you for your invaluable comments, advice and guidance.

My gratitude also goes to Professor Charles Ngwena for his support and contribution which included reading and commenting on my first draft. I also wish to thank Martha Chizuma, Mariam Mapila and Rhoda Igweta for the immeasurable support in making this research a reality. Without your support, which you freely gave without expecting anything in return, this exercise would have been extremely unbearable.

To my colleagues, the LLM 2008 Class, I wish to extend my gratitude for working together as a family and encouraging each other when the going was getting tough. It was such an honour and at the same time a humbling experience to be a part of you. I started this course with 30 strangers from all over Africa and one from the United States of America. Today I am proud to say that I am finishing the course with 31 special friends. Meru, I shall forever be greatly indebted to you. Thanks guys for the company, invaluable friendship and the wonderful memories.

To the occupants of 1230 back flat (Charles, Azubike, Samuel and Japhet), thank you guys for making the back flat my home away from home and for not killing me with the 'concoctions' you made in an attempt to cook. Holler to my boys in 1214 for always welcoming my hungry self to their dinner table whenever famine struck 1230 back flat.

Special thanks also go to my little man, Vukilethu who has greatly borne the sacrifice. You will never know how much joy, pride, happiness and inspiration you give me. In a very big way my doing this course was inspired by you and I pray that posterity will vindicate me.

Remember, God did not give us the ability to dream without also giving us the power of realising those dreams. Keep on dreaming my boy.

My concluding words of thanks go to Waruguru for helping me with the numbering and to all those who made a contribution directly, or otherwise. May the merciful God hear your prayers and deliver you from life's troubles, which tend to be many.

## **ABBREVIATIONS**

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	International Convention on Economic, Social and Cultural Rights
CRPWD	Convention on the Rights of Persons with Disabilities
ILO	International Labour Organisation
MACOHA	Malawi Council for the Handicapped
PWDs	Persons with Disabilities
PWPDs	Persons with Physical Disabilities
SADC	Southern Africa Development Community
TEVETA	Technical, Entrepreneurial and Vocational Education and Training Authority Act
UDHR	Universal Declaration of Human Rights.
UN	United Nations
UNGA	United Nations General Assembly

## TABLE OF CONTENTS

DEDICATION .....	i
DECLARATIONS.....	ii
ACKNOWLEDGEMENTS .....	iii
ABBREVIATIONS .....	v
TABLE OF CONTENTS .....	vi
CHAPTER ONE: BACKGROUND AND INTRODUCTION.....	1
1.1    Introduction .....	1
1.2    The problem statement .....	3
1.3    Objectives of the study .....	6
1.4    Significance of the study.....	6
1.5    Research questions .....	6
1.6    Literature Review .....	7
1.7    Methodology.....	8
1.8    Limitation of the study.....	8
1.9    Overview of the chapters .....	8
CHAPTER TWO: INTERNATIONAL STANDARDS ON THE RIGHT TO WORK FOR PWDs.....	9
2.1    Introduction .....	9
2.2    Disability defined.....	9
2.2.1    Terminology .....	9
2.2.2    What is disability? .....	11
2.3    The right to work .....	14
2.3.1    Global level .....	15
2.3.1.1    The CЕСSCR and the right to work.....	15
2.3.1.2    The International Labour Organisation and the right to work.....	15
2.3.1.3    The Convention on the Rights of Persons with Disabilities and the right to work.....	16
2.3.2    African Regional level .....	18
2.3.2.1    The African Charter and the right to work .....	18
2.3.2.2    The Protocol to the African Charter on the Rights of Women in Africa and the right to work .....	19
2.4    Quality of work and equal pay for equal work .....	19
2.5    Conclusion .....	20
CHAPTER THREE: MALAWI’S LEGAL AND POLICY FRAMEWORK REGARDING PWDs .....	21

3.1	Introduction .....	21
3.2	Constitutional framework.....	21
3.3	Legislation.....	22
3.3.1	The Handicapped Persons Act of 1971.....	22
3.3.2	The Employment Act No 6 of 2000 .....	23
3.3.3	Technical, Entrepreneurial and Vocational Education and Training Authority Act of 1999.....	24
3.4	Policy .....	24
3.4.1	National policy on equalisation of opportunities for PWDs .....	24
3.4.2	Equalisation of Opportunities for Persons with Disabilities Bill 2008.....	25
3.5	Conclusion .....	29
CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS.....		31
4.1	Conclusion .....	31
4.2	Recommendations .....	32
5.0	Bibliography.....	34



## CHAPTER ONE: BACKGROUND AND INTRODUCTION

### 1.1 Introduction

Throughout the ages, the treatment of people with disabilities has brought out some of the worst aspects of human nature. Too often, those living with disabilities have been seen as objects of embarrassment, and at best, of condescending pity and charity.<sup>1</sup>

As in many developing countries, people with disabilities (PWDs) in Malawi are among the poorest and most disadvantaged.<sup>2</sup> Only 20% of PWDs have access to schools and only 26% to workplace, with welfare and vocational training available to only 5% of those who need it.<sup>3</sup> PWDs have historically endured exclusion and marginalisation and have frequently been excluded from jobs and denied access to opportunities for social interaction.<sup>4</sup>

In 1994 Malawi adopted a new Constitution which amongst others, is premised on the recognition of the inherent dignity and worth of each human being,<sup>5</sup> non-discrimination and equality before the law.<sup>6</sup> Section 20 of the Constitution provides:

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

Furthermore, section 29 of the Constitution guarantees to every person the right to work, engage in economic activity and pursue a livelihood anywhere in Malawi. With particular reference to PWDs, section 13(g) of the Constitution charges the state to support PWDs through greater access to public places, fair opportunities in employment and the fullest possible participation in all spheres of Malawian society. Other than the Constitution, and a cursory provision in the Technical, Entrepreneurial and Vocational Education and Training Authority Act (TEVETA) of 1999 and the Employment Act of 2000,<sup>7</sup> the Handicapped Act of 1971 is the only law that attempts to deal specifically with the issue of PWDs. The Act establishes the Malawi Council for the Handicapped (MACOHA) whose responsibility is to promote the welfare of PWDs by amongst others, advising the minister on matters relating to PWDs and administering vocational schools, special training and rehabilitation centres for

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<sup>1</sup> The then United Nations Secretary General, Kofi Annan, welcoming the adoption of the Convention of the Rights of Persons with Disabilities, 13 December 2006.

<sup>2</sup> 'Promoting the employability and employment of people with disabilities through effective legislation in Southern Africa' ILO Malawi country report (2006) 8.

<sup>3</sup> 'Living Conditions of People with activity limitations in Malawi: A national representative study' SINTEF Health research report (2004) 17 and 111, available at <http://www.sintef.no/helse> (accessed 20 August 2008).

<sup>4</sup> *Eldridge v British Columbia (Attorney General)* 1977 151 DLR (4<sup>th</sup>) 577, 612 (SCC).

<sup>5</sup> Sec 12(iv) of the Constitution.

<sup>6</sup> Sec 20 of the Constitution; Sec 31(3) also guarantees to every person the right to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on basis of gender, disability or race.

<sup>7</sup> Sec 5.

PWDs. Under the said Act PWDs, though the Act uses the term 'handicapped persons,' are defined as

persons who by reason of any defect or impairment of the mind, senses or body, congenital or acquired, are unable to take part in normal education, occupation and recreation, or who, by reason of any such defect or impairment, require special assistance or treatment to enable them to take part in normal education, occupation or recreation.

In 1998 Malawi launched a policy known as Vision 2020 which set out the development progress which is to be achieved by the year 2020. One of the challenges Vision 2020 highlights is the issue of PWDs for which the policy recommends the enactment of a Disability Act, a policy for empowering PWDs and a review of the institutional framework. In the same year a ministry for social development and persons with disabilities was established with a mission amongst others, of formulating and providing policy direction aimed at ensuring that PWDs have equal access to essentials of life and participate fully in all areas of social economic development so as to make Malawi an inclusive society for all. Subsequent thereto a National Policy on Equalisation of Opportunities for Persons with Disabilities was adopted. Its main objective was to integrate fully PWDs in all aspects of life, thereby equalising their opportunities and enhancing their dignity and well being.

An Equalisation of Opportunities for Persons with Disabilities Bill has been drafted by the government with a view of replacing the Handicapped Act of 1971 which is clearly outdated.<sup>8</sup> It is aimed at better protecting the rights of PWDs by amongst others eliminating discrimination and better promoting the rights of PWDs especially in the work place. It widens the scope of discrimination by making it to include the failure to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship on its operations.<sup>9</sup> This is apart from the extensive provisions it has on employment,<sup>10</sup> education<sup>11</sup> and also on accessibility and transportation requirements.<sup>12</sup> As the 2006 International Labour Organisation country profile of Malawi<sup>13</sup> notes, Malawi is moving towards a right-based approach to disability and anti-discrimination legislation.

On 13 December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPWD) which was opened for signature on 30<sup>th</sup> March

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<sup>8</sup> According to the Ministry of Justice, the Bill has been submitted to cabinet for its consideration before it is taken to parliament for debate and passing into law.

<sup>9</sup> Sec 30(2)(d).

<sup>10</sup> Sec 30.

<sup>11</sup> Sec 29.

<sup>12</sup> Secs 26 & 27.

<sup>13</sup> (n2 above) 20.

2007. Malawi signed the CRPWD on 27 September 2007.<sup>14</sup> On 3<sup>rd</sup> April 2008 the CRPWD received its 20<sup>th</sup> ratification triggering its entry into force 30 days later.<sup>15</sup> It marks a paradigm shift in attitudes and approaches to PWDs. It takes to a new height the movement from viewing PWDs as ‘objects’ of charity, medical treatment and social protection towards viewing them as ‘subjects’ with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society. The main purpose of the CRPWD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by PWDs and to promote respect for their inherent dignity.<sup>16</sup> In its preamble the CRPWD recognises that disability is an evolving concept and that it results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.

The CRPWD is intended as a human rights instrument with an explicit, social development dimension.<sup>17</sup> The CRPWD aims at filling the gap that was there in other human rights instruments which despite their existence PWDs continue to face barriers in their participation as equal members of society. It adopts a broad categorisation of PWDs and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to PWDs and identifies areas where adaptations have to be made for PWDs to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

## **1.2 The problem statement**

Whilst the Constitution guarantees the right to equality and non-discrimination as well as the right to work to all individuals, the reality of it is that these rights are more of paper rights than real rights to people with physical disabilities (PWPDs). These rights have not yet translated into reality in society. One of the major reasons for this is that apart from the constitutional guarantee to equality there is no legislative framework that gives effect to this constitutional guarantee of equality. The Handicapped Persons Act, which is the only piece of legislation that is supposed to specifically deal with the issue of promoting the rights of PWDs is clearly out dated and inadequate.<sup>18</sup> Arguably the inadequate legislative framework giving

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<sup>14</sup> However, Malawi is yet to pass legislation domesticating the CRPWDs so as for the CRPWDs to become part of the law of Malawi as per sec 211(1) of the Constitution.

<sup>15</sup> Art 45(1) provides that the Convention is to enter into force after the 30<sup>th</sup> day of the deposit of the 20<sup>th</sup> instrument of its ratification or accession.

<sup>16</sup> Art 1 of the CRPWD.

<sup>17</sup> Para y of the preamble to the CRPWD.

<sup>18</sup> The Handicapped Persons Act which pre-dates the Constitution was enacted in 1971 whereas the Constitution was only adopted in 1994.

effect to the constitutional guarantee to equality, has contributed to the existence of socially created obstacles which prevent full respect for the dignity and equal rights of PWPDs. The work environment, just as many other aspects of society, is by default designed to cater for or accommodate the needs of a 'person with no disabilities' which poses a major impediment for PWPDs to access it. Discrimination against PWPDs has been perpetrated by a failure to adopt positive measures to allow them achieve a level playing field with people who do not have disabilities. As was correctly noted, in respect of the Americans with Disabilities Act of 1990, by the United States Commission on Civil Rights:

A key component of non-discrimination toward people with disabilities is the requirement of reasonable accommodation. The non-discrimination mandate and its reasonable accommodation component address acts, policies, and barriers that currently operate to exclude, segregate, or impede people with disabilities.<sup>19</sup>

Reasonable accommodation has been defined as 'reasonable positive measures to meet the special needs of those who by reason of disability...cannot be adequately served by accommodations or arrangements suitable for the majority.'<sup>20</sup> Thus in achieving equality, even in the work place, accommodation of individual differences is indispensable. This is so because equal application of needs or rules or policies without considering their differing effect on certain individuals or groups may result in discrimination against them. 'The accommodation of differences is the essence of true equality.'<sup>21</sup> It is thus argued that, in Malawi, for PWDs to enjoy their right to equality in the work place there is need for their reasonable accommodation as formal equality serves merely to maintain the status quo and perpetuate structural inequality. Malawi's approach to issues concerning PWPDs, just like all other issues concerning PWDs, has been needs based instead of rights based. The approach has been narrow focussed aimed at addressing short-term needs of PWDs instead of addressing the vast array of limitations created and imposed by unemployment, discrimination, exclusion, and ignorance.<sup>22</sup> This has resulted in the further marginalisation of PWPDs.

The right to equality and non-discrimination in so far as it affects PWPDs in the work place and their right to work, just like many other aspects of PWDs, has rarely received any meaningful attention if not completely overlooked. This has been the case notwithstanding the existence of several international instruments providing for the right to work without any

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<sup>19</sup> As quoted in C Ngwena 'Interpreting aspects of the intersection between disability, discrimination and equality: Lessons for the Employment Equity Act from comparative law' (2005) *Stell LR* 542.

<sup>20</sup> Gibson, 'The law of the charter' as quoted by Ngwena, C in Interpreting aspects of the intersection between disability, discrimination and equality: Lessons for the employment equity act from comparative law

<sup>21</sup> Per McIntyre J in *Andrews v Law Society* 1989 1 SCR 143, 169.

<sup>22</sup> Metts, R.L., 'Disability Issues, Trends and Recommendations for the World Bank,' Discussion Paper No. 0007 (2000) 29.

distinction or discrimination of any kind.<sup>23</sup> The International Labour Organization (ILO) has also tried to intervene on the issue through various projects such as the one on Promoting the employability and employment of PWDs through effective legislation. Apart from ratifying the ILO convention concerning vocational rehabilitation and employment (disabled persons) of 1983,<sup>24</sup> Malawi is a party to 29 ILO conventions which commit it to observing principles of equality, equal treatment in laws, policies and programmes, including those concerning PWDs.<sup>25</sup>

On the regional level, the African Charter on Human and Peoples' Rights (the Charter), to which Malawi is a state party,<sup>26</sup> guarantees to every individual the right to dignity and the enjoyment of the rights and freedoms recognised in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>27</sup> Furthermore, article 15 of the Charter affords to every individual the right to amongst others, work under equitable and satisfactory conditions. In particular the Charter also guarantees to PWDs the right to special measures of protection in keeping with their physical or moral needs,<sup>28</sup> although Malawi as a state party has not yet complied with its obligation of fulfilling these special measures of protection. In addition Malawi is also a party to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol on the Rights of Women)<sup>29</sup> which also calls upon state parties to ensure the protection of women with disabilities and to take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment.<sup>30</sup> Though the Protocol only applies to women. It is an excellent example of normative developments towards special measures of protection for PWDs although these are yet to be given effect in the national legislation of state parties, including Malawi.

The right to work is essential for realising other rights and forms an inseparable and inherent part of human dignity.<sup>31</sup> Work of decent quality is the most effective means of escaping the vicious circle of marginalisation, poverty and social exclusion in which most of the times PWDs are trapped. Barriers which PWDs in general and in particular PWPDs face in realising and enjoying their right to work and take their proper place in society need to be overcome through a variety of policy measures, regulations, programmes and services.<sup>32</sup>

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<sup>23</sup> Arts 1(3), 55, 56 of the United Nations Charter: arts 2(2), 3 and 6 of the International Covenant on Economic, Social and Cultural Rights.

<sup>24</sup> ILO Convention no 159.

<sup>25</sup> (n 2 above)7.

<sup>26</sup> Malawi acceded to the Charter on 17 November 1989.

<sup>27</sup> Arts 2 & 5.

<sup>28</sup> Art 18(4).

<sup>29</sup> Malawi became a party to the Protocol on the Rights of Women on 20 May 2005.

<sup>30</sup> Art 23.

<sup>31</sup> Committee on ESCR General Comment no 18 para 1.

<sup>32</sup> <http://www.ilo.org/public/english/employment/skills/disability/index> (accessed 18 August 2008).

### **1.3 Objectives of the study**

The study is aimed at critically analysing the current legal framework in Malawi in so far as the right to equality and non-discrimination in relation to the work place and the right to work for PWPDs is concerned. The paper will assess whether Malawi's legal framework effectively protects the right to equality and non- discrimination in the work place for PWPDs in conformity with international standards. Finally, the paper will, in the event that Malawi's legal framework does not conform to international standards, offer suggestions on how it can be reformed to comply with international standards, especially the CRPWDs.

### **1.4 Significance of the study**

Central to the notion of human rights is the concept of human dignity, that is, all people have equal rights, notably the right to live a full and decent life. Usually corresponding to the rights of individuals is the state's have the duty to protect, respect and fulfil these human rights. The adoption of the CRPWD is a manifestation of the global need of a comprehensive and integral international convention to promote and protect the rights and dignity of PWDs which hopefully will make a significant contribution to redressing the profound social disadvantage of PWDs. This the CRPWD can only achieve with the cooperation of States through the implementation of policies and legislation giving effect to the CRPWD.

This paper, in looking at the extent to which Malawi's legal framework conforms to international standards, is important in highlighting the current shortfalls in Malawi's legal framework and charting the way forward on the effective implementation of the CRPWD. The paper is even more relevant due to the fact that Malawi is in the process of enacting a new disability law hence the need that it should be in line with the current international standards.

### **1.5 Research questions**

The paper will seek to address the following questions:

- Does the current national legal framework in Malawi effectively protect the right to equality and non-discrimination in the work place for PWPDs?
- Does the current national legal framework conform to international standards on the protection of the rights of PWDs?

- What kind of legal reform, if any, needs to be undertaken in order to conform the legal framework to international standards?

## 1.6 Literature Review

There are several studies on human rights of PWDs generally. However, very few studies have specifically dealt with the issue of what the right to equality in the work place entails in so far as PWPDs are concerned. The majority of the studies in this area have been by UN bodies and experts and have mainly sought to examine the relationship between the right to work and the protection of PWDs in an effort to ensure equalization of opportunities.<sup>33</sup> Furthermore, the studies are in a general context as they look at issues of all PWDs generally and do not speak specifically to a particular system, for instance the African human rights system.

For instance, whilst O'Reilley looks at the right to work in dignity for PWDs, Quinn and Degener deal with the various concepts used in the international conventions relating to human rights and disability. Similarly Degener and Dreesel address the issue of human rights and disabled persons generally. Though O'Reilley grapples with the issue of human rights of PWDs in the work place, he hardly engages deeply in the issue of equality and non-discrimination for PWDs generally or PWPDs specifically in relation to the work place and the right to work. Miller and Sammons in a general sense look at the issue of understanding and changing peoples' reactions to disabilities.<sup>34</sup> Shearer tackles the issue of defining disability, the creation of handicap and the various environmental and societal barriers that contribute in the construction of disability. She argues that everyone has a personal share of ability and disability and that the line between 'able' and 'disable' can be constantly redrawn. On the other hand, Swain et al present a new approach to the understanding of disability based on the experience of injustice and the growing collective identity of disabled people.<sup>35</sup> They challenge the notion that disability is either a medical condition or a personal tragedy, arguing that disability is caused by the way society is organised.

In so far as Malawi is concerned very little relevant disability research has been conducted.<sup>36</sup> This study therefore, contributes in giving more focus to the question of equality and the right to work for PWPDs with reference to Malawi in the light of the CRPWD and other relevant international instruments such as the Charter. It also addresses practical implications that arise in the consideration of human rights standards of right to work in the context of Africa.

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<sup>33</sup> Quinn, G. & Degener, T. *Human rights and disability* UN HR/PUB/02/1 New York and Geneva (2002).

<sup>34</sup> NB Miller *Everybody's different: Understanding and changing our reactions to disabilities* (1999)

<sup>35</sup> J Swain et al *Disabling barriers-enabling environments* (1993).

<sup>36</sup> (n 3 above) 61.

## **1.7 Methodology**

This paper is essentially based on library research whereby the Malawian legal framework regarding PWDs is analysed in the light of applicable international conventions and other applicable international instruments.

## **1.8 Limitation of the study**

The major limitation of this research is that due to time and physical constraints it only concentrates on the legal aspect of equality and non-discrimination in the work place for PWPDs. As such the paper hardly discusses social, attitudinal and other non-legal factors that also impact on equality and non-discrimination for PWPDs in the work place. Thus the research tends to be more of a legalistic analysis. Furthermore, it will be noted that whereas international normative standards talk of PWDs generally, this paper because of its focus on PWPDs only tries to apply the general international standards to PWPDs.

## **1.9 Overview of the chapters**

Chapter one provides the context in which the study is set, the focus and objectives of the study, its significance and other preliminary issues and the literature review. Chapter two addresses the international standards on the right to work for PWDs in light of the CRPWD and the protection mechanisms giving effect to the set standards.

Chapter three discusses Malawi's legal framework in so far as PWDs in general and PWPDs in particular are concerned. It analyses the extent to which Malawi has complied with international standards regarding equality in the work place and in so far as the right to work for PWPDs is concerned. While the fourth and final chapter contains the conclusion and recommendations.



## CHAPTER TWO: INTERNATIONAL STANDARDS ON THE RIGHT TO WORK FOR PWPDS

### 2.1 Introduction

The poverty levels which persons with disabilities face are far higher relative to the rest of society. The opportunities for livelihood available to a disabled person are less obvious since disability undermines the actual or perceived ability of a person to interact in educational, economic, social or indeed political arenas. Poverty itself breeds disability and disability is a harbinger for more poverty.<sup>37</sup>

The breaking of this poverty trap calls for a conscious and concerted effort by society to ensure and effect the rights of PWDs.<sup>38</sup> PWDs in general and PWPDS in particular are human beings, endowed with human rights. PWPDS should be guaranteed equal opportunity through the elimination of all socially determined barriers which exclude or restrict full participation in society.<sup>39</sup> This chapter discusses the international standards pertaining to the right to work for PWPDS and the obligations these standards place on states in ensuring the realisation of this right.

### 2.2 Disability defined

#### 2.2.1 Terminology

Terms that describe people that are regarded or seen by others as different are not a mere matter of semantics as they are seldom neutral and tend to be sensitive political categories. Words have socially charged meanings,<sup>40</sup> with the potential of respecting or demeaning, as well as that of representing or misrepresenting. PWDs are rarely regarded as able in other situations and only unable in other respects. Instead a blanket description, 'the disabled', is thrown over them.<sup>41</sup> Usually the language used to describe PWDs is a reflection of what society thinks about PWDs and at the same time an indicator of normative responses.<sup>42</sup>

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<sup>37</sup> 'Objects of pity or individuals with rights: The right to education for children with disabilities' (2007) v, report by the Kenya National Human Rights Commission.

<sup>38</sup> (n 32 above).

<sup>39</sup> Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights of 1993, para 64.

<sup>40</sup> ML Murphy 'Defining People: Race and Ethnicity in South African English Dictionaries' (1998) 11(1) *International Journal of Lexicography* 1.

<sup>41</sup> A Shearer *Disability: Whose handicap?* (1981) 3.

<sup>42</sup> L Clark & S Marsh 'Patriarchy in the UK: The Language of Disability' (2002) available at <http://www.leeds.ac.uk/disability-studies/archiveuk/Clark,%20Laurence/language.pdf> (accessed on 24 August 2008).

Descriptions of PWDs that locate disability as solely residing in the individual can consciously or unconsciously serve to reinforce structural inequality by perpetuating attitudes, systems and practices that maintain or create social and economic barriers. This is so because by turning a description of a condition into a description of the individual, we are saying that this is all we need to know about the individual and we are simply confirming them as abnormal.<sup>43</sup>

Traditionally PWDs have been the object of disdainful and derogatory terms. People with mental disabilities have normally been referred to as ‘idiots’, ‘the retarded’ or ‘the feeble-minded,’ whilst those with physical disabilities have been subjected to such terms as ‘cripples’, ‘handicapped’ and ‘disabled.’<sup>44</sup> Such terms have been assigned to rather than appropriated by PWDs and have usually constituted social labelling, connoting a negative and socially tainted status. The sense conveyed by such terms is one that PWDs are not part of human diversity but are abnormally different from the norm, incapable of doing things and at the mercy of social benevolence, without any claim to enforceable rights.

Discarding derogatory and condescending terms in favour of descriptions more representative of, and acceptable by, PWDs has been an essential element in reclaiming the human dignity of PWDs. Respect for human dignity in so far as terms that describe a social group, especially one that has historically endured stigma and a social marginalisation like PWDs, are concerned is more likely to be achieved when they emanate from, or approximate as much as possible, self-descriptions rather than when they are assigned or imposed by a dominant group.<sup>45</sup> The current popular use of the term ‘Persons With Disabilities’ is largely a product of self-ascription, resulting from a desire by disability rights advocates and organisations to free themselves of negative labels for appropriate language that reflects the idea of disability as an ordinary variation of humanity that is entitled to equal worth.<sup>46</sup> Persons With Disabilities is a language that promotes the idea of disability as an ordinary part of human diversity, with the emphasis being on persons rather than the disabilities. The CRPWD also uses this term which, though not commanding universal acceptance yet, is the most popular term.<sup>47</sup>

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<sup>43</sup> Shearer (n 41 above).

<sup>44</sup> C Ngwena ‘Convention on the Rights of Persons with Disabilities: Implications for African domestic law with a particular focus on eliminating discrimination and achieving equality’ (2008) unpublished p 3, a paper presented to the LLM (HRDA) 2008 class on 11 April 2008.

<sup>45</sup> C Ngwena ‘Deconstructing the definition of disability under the Employment Equity Act: Social deconstruction’ (2006) 22 *SAJHR* 616.

<sup>46</sup> Ngwena (n 44 above).

<sup>47</sup> For example, the SINTEF report uses the term people with activity limitations.

### 2.2.2 What is disability?

What disability is and who may or may not be a person with disability are fairly contested matters as there is no universally accepted definition of disability.<sup>48</sup> This arises from the fact that PWDs do not form a homogeneous group, and there are different kinds of barriers, which have to be overcome in different ways.<sup>49</sup> Thus disability is a concept that is not susceptible to a rigid, incontestable definition, and much depends on the context. It is capable of a very fluid and encompassing construction so as to include virtually everyone at some stage in their lives.<sup>50</sup> Considering that to a great extent defining disability also depends on the context, it may well be argued depending on the context all human beings are disabled in one way or another. 'Each and every one of us knows moments of inability, moments when the body and mind that we take for granted let us down, refuse to work for us.'<sup>51</sup> The line between this and finding ourselves categorised as disabled is only one of degree, a matter which is as dependent upon the demands which society makes upon us as is the intrinsic quality of our inability.<sup>52</sup> However, most of the times, society only recognises certain obvious deviations from what is regarded as normal as disability. According to the Kenya National Commission on Human Rights, unlike other social distinctions like gender, age or colour, disability has no singularly overarching trait which is obvious in all people who either are categorised or regard themselves as disabled.<sup>53</sup> This is also the view of the Canadian Supreme Court which repeatedly said:

Unlike gender or ethnic origin which generally stamp each member of the class with a singular characteristic, disabilities vary in type, intensity and duration across a full range of personal physical or mental characteristics.<sup>54</sup>

The World Health Organisation's International Classification of Impairments, Disabilities and Handicaps of 1980, defined disability as a term which, in relation to an individual, describes a functional limitation (for performing tasks, skills and behaviour) which he or she may have arising from physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature. The above definition is founded on the "medical" model of disability which is

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<sup>48</sup> BM Altman 'Disability Definitions, Models, Classification Schemes and Applications' in GL Albrecht, KD Seelman & M Bury (eds) *Handbook of Disability Studies* (2001); S Briesenden 'Independent living and the medical model of disability' (1986) 1(2) *Disability, handicap and society* 173.

<sup>49</sup> World Programme of Action (WPA) Paragraph 22, adopted by the Vienna World Conference on Human Rights A/CONF.157/23 12 July 1993.

<sup>50</sup> S Wendell *The rejected body: Feminist philosophical reflections on disability* (1996) 13.

<sup>51</sup> Shearer (n 41 above) 1.

<sup>52</sup> Shearer (n 41 above) ix.

<sup>53</sup> (n 37 above) 7.

<sup>54</sup> *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703, 27; *Eaton v Brant County Board of Education* [1997] 1 SCR 241 para 61.

preoccupied with the medical aspects of disability. Crossley describes the medical model in the following terms:

The defining characteristic of the medical model is its view of disability as a personal trait of the person in whom it inheres. The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remedying the disability. Under this view, while the cause of impairments may vary, the disabled individual is viewed as innately, biologically different and inferior. The physical difference of the individual is often apparent, and the nondisabled see the individual's inferiority and resulting social disadvantage as flowing from that physical difference. Thus, according to the medical model of disability, the disabled individual's problem lies in her impairment.<sup>55</sup>

The medical model has been criticised for accentuating the stigma attached to disability because of its binary divide between normality and abnormality with no continuum of human abilities representing human diversity.<sup>56</sup> Failure to conform to the norm, results in one being labelled as a deviant both in a biological and social sense.

On the other hand the social model conceives disability in a more holistic manner that takes into account extrinsic factors in the creation of disability. It seeks to rebut the assumption of organic inferiority so as to affirm the equal worth and human dignity of PWDs and implicate society in the creation of disability.<sup>57</sup> The social model involves a switch away from focusing on physical limitations of particular individuals to the way physical and social environments impose limitations upon certain groups or categories of people.<sup>58</sup>

Subsequently the World Health Organisation's International Classification of Functioning adopted the social model and defined disability as follows:

...A disability is the *social* outcome of a physical or mental *impairment*. Impairment only becomes a handicap in the context of a given society, often because this society does not respect the needs and the rights of its citizens living with impairment. Disability, therefore, is not a natural, but a social fact. Furthermore, disability is not only an individual destiny, but also the outcome of situations and decisions for which the disabled person is no more responsible than any other citizen, like bad sanitary and health conditions, war, etc. The disabled person carries the consequences of collective situations and decisions. Society, in turn, has a special collective responsibility to eliminate the exclusions that turn impairment into a disability.<sup>59</sup>

The CRPWD, after recognising that 'disability is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers

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<sup>55</sup> M Crossley 'The disability kaleidoscope' (1999) 74 *Notre Dame LR* 621,649-650; NB Miller *Everybody's different: Understanding and changing our reactions to disabilities* (1999) 34.

<sup>56</sup> Ngwena (n 45 above) 626.

<sup>57</sup> H Hahn 'Accommodation and the ADA: Unreasonable bias or biased reasoning' (2000) 21 *Berkeley Journal of Employment and Labour Law* 171.

<sup>58</sup> M Oliver *Social work with disabled people* (1983) 23.

<sup>59</sup> World Health Organisation *International Classification of Functioning, Disability and Health* Assembly (2001).

that hinders their full and effective participation in society on an equal basis with others'<sup>60</sup>, defines persons with disabilities to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Thus, the Preamble reflects the 'social model of disability,' and leaves room for those interpreting and implementing the CRPWD to utilize differing conceptualizations of disability as they evolve over time.<sup>61</sup> The social model of disability understands disability as a social construct, not an inherent quality. Rather than seeking to change or alter the disabled person, the social model instead emphasizes the removal of societal barriers that exclude people with disabilities, including environmental, institutional and attitudinal barriers. Furthermore, the Preamble recognises the "diversity of persons with disabilities," thus reminding those implementing the CRPWD that disabled persons are a heterogeneous group encompassing people with a range of impairments/functional capacities from a wide variety of social, ethnic and religious contexts.

Initially the discourse and practice in the matter of disability, was founded on the inter-linked paradigms of the charity model of disability and the medical model of disability. The charity model of disability regarded PWDs as helpless individuals who required care and protection and thus called upon the good-will of society to pity and support PWDs. This model was based on charity and benevolence rather than on justice and equality.<sup>62</sup> Related to the above, was the medical model of disability that assumed that medical interventions could bring PWDs to a state of 'normalcy' similar with non-disabled people. This model strived to understand the biological origin of the disabling condition so as to correct or prevent it.<sup>63</sup> These models of disability situated the problem of disability within the person and thereby viewed the person as an object for clinical intervention.<sup>64</sup>

Nowadays as demonstrated by the CRPWD, a human rights model towards issues of disability has been adopted. At the core of this model is the notion that all human beings regardless of their disabilities are equal and have rights that are inalienable.<sup>65</sup> Firstly, it focuses on the inherent dignity of the human being and, subsequent to that and only where necessary, on the person's medical characteristics. The practical consideration for policy-makers arising from this perspective is the imperative of focusing on a person's abilities rather than his or her disability. Secondly, it places the individual at the centre of all

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<sup>60</sup> Para e of the preamble.

<sup>61</sup> The social model of disability understands disability as a social construct, not an inherent quality. Rather than seeking to change or alter the disabled person, the social model instead emphasizes the removal of societal barriers that exclude people with disabilities, including environmental, institutional and attitudinal barriers.

<sup>62</sup> National Human Rights Commission (India), *Disability Manual 2005* 17-18.

<sup>63</sup> Oliver (n 58 above).

<sup>64</sup> G Quinn & T Degener 'The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in, G Quinn & T Degeener (eds) *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002).

<sup>65</sup> (n 57 above) 10.

decisions affecting that person. Finally, it locates the problem of disability upon society rather than inside the person. This third aspect of the “human rights” model of disability roots the “problem” of disability to the absence of action by state and non-state actors for mitigating the difference represented by disability. These institutions have responsibilities for tackling socially created obstacles to ensure full respect of the dignity and equal rights of all persons.<sup>66</sup>

In this paper the term PWPDs refers to persons whose disability arises due to impairment of the limbs.

### **2.3 The right to work**

Recognition of the inherent dignity and of the equal and inalienable rights of all human beings is the foundation of freedom, justice and peace in the world.<sup>67</sup> The Universal Declaration of Human Rights (UDHR) guarantees to every person the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.<sup>68</sup> Furthermore, the UDHR guarantees to every individual the right to a standard of living adequate for the health and well-being of himself and of his family.<sup>69</sup> All human beings are entitled to the enjoyment of the rights in the UDHR without distinction of any kind.<sup>70</sup> Section 11(1)(a) of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) further affirms the right to work as an inalienable right of all human beings.

The Charter also provides for the right to work under equitable and satisfactory conditions as well as guarantees right to dignity and the enjoyment of the rights and freedoms recognised in the Charter without distinction of any kind.<sup>71</sup> Similar guarantees are also provided for in the International Covenant for Economic, Social and Cultural Rights (CESCR).<sup>72</sup>

The right to work is essential for the realisation of all other human rights and forms an inseparable and inherent part of human dignity.<sup>73</sup> All human beings, including PWPDs, have the right to be able to work and thereby live in dignity. The right to work contributes to the survival of the individual and to that of his/her family and also to the individual’s development and recognition within the community, provided the work is freely chosen or

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<sup>66</sup> (n 58 above).

<sup>67</sup> Preamble to the Universal Declaration of human Rights 1948, para 1.

<sup>68</sup> Art 23(1).

<sup>69</sup> Art 25(1).

<sup>70</sup> Art 2.

<sup>71</sup> Arts 2, 5 & 15.

<sup>72</sup> Para 1 of the preamble, arts 2, 6, 7 & 11.

<sup>73</sup> General Comment no 18 of the Committee on Economic, Social and Cultural Rights, para 1.

accepted.<sup>74</sup> Work is a defining feature of human existence, a means of sustaining life and of meeting basic needs.<sup>75</sup> PWDs in the SADC Region and indeed in the whole of Africa experience problems and difficulties in carrying out their daily activities and in their ability to fully participate in society. They experience physical and social barriers in the form of reduced accessibility to local services such as schools, hospitals and the workplace, discrimination and negative attitudes in society at large.<sup>76</sup> Disabled people are often marginalised and belong to the poorest segments of society.<sup>77</sup> Though no official unemployment statistics could be found, unemployment in Malawi is generally high with the percentage of PWDs unemployed being higher than that of non-disabled people.<sup>78</sup> The major contributing factor to this state of affairs is the failure to adopt positive measures that would allow PWDs to achieve a level playing field with nondisabled people.

### **2.3.1 Global level**

#### **2.3.1.1 The CESCER and the right to work**

Article 6 of the CESCER recognises the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and calls upon states to take steps to ensure the full realisation of this right. This right just like all the other rights in the CESCER are guaranteed to be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>79</sup>

#### **2.3.1.2 The International Labour Organisation and the right to work**

The general depiction of PWDs as objects of health, welfare and charity programmes, often resulting in their marginalisation and exclusion from mainstream activities, including employment, began to be seriously questioned. A growing recognition that PWDs had not only the motivation to work but also the capacity to do so, led to the early development of policies and programmes to enable PWDs to secure, retain and advance in suitable

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<sup>74</sup> (n 73 above); The preamble to the International Labour Organisation Convention no 168 of 1988

<sup>75</sup> KQ Hall 'Feminism, Disability and Embodiment' (2002) *NWSA Journal* - Volume 14, No.3, Fall vii.

<sup>76</sup> (n 3 above)4.

<sup>77</sup> (n 37 above) 46.

<sup>78</sup> According to the SINTEF report 58% of disabled people are unemployed as compared to 53% of non-disabled people.

<sup>79</sup> Art 2(2).

employment, and to return to work after an absence due to illness or injury. In 1944 this resulted in the ILO acknowledging the right of PWDs to work. This was in response to high unemployment levels of Second World War veterans and the general failure of a voluntary approach by employers to take them.<sup>80</sup>The ILO Employment (Transition from War to Peace) Recommendation No. 71, 1944, unequivocally stated that disabled workers, whatever the origin of their disability, should be provided with full opportunities for rehabilitation, specialised vocational guidance, training and retraining, and employment on useful work. The introduction of ILO Vocational Rehabilitation (Disabled) Recommendation No. 99 in 1955 was another milestone in respect of the right to work of PWDs. Almost thirty years later, ILO Convention No. 159 and Recommendation No. 168 were adopted.<sup>81</sup>

The ILO has issued numerous publications focused on the objective of decent work and the socio-economic integration of PWDs. For example, in 2002, ILO published *Disability and Poverty Reduction Strategies*<sup>82</sup> to contribute to the economic empowerment of persons with disabilities. The ILO promoted the mainstreaming of vocational training, equality of opportunity, non discrimination in pay for work,<sup>83</sup> and promotion of research in respect of PWDs. Methods of widening employment opportunities for workers with disabilities, in close cooperation with employers' and workers' organizations, included quotas, reserved occupations, creation of cooperatives and the establishment of sheltered workshops. The ILO undertook the role of providing technical advisory assistance, organising international exchanges of experience, and other forms of international cooperation including the training of rehabilitation staff with special regard to PWDs.<sup>84</sup>

### **2.3.1.3 The Convention on the Rights of Persons with Disabilities and the right to work**

The drafting process of the Convention on the Rights of Persons with Disabilities (the CRPWD) began in December 2001, with Mexico sponsoring a General Assembly resolution calling for the establishment of an Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account

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<sup>80</sup>L Waddington 'Reassessing the Employment of People with Disabilities in Europe: from Quotas to Antidiscrimination Laws' *Comparative Labour Law Journal*, 18, 62, (1996) 62-101.

<sup>81</sup> MM Wanjiru 'Disabled women and the right to work: The case study of Kenya' unpublished LLM thesis, University of Pretoria, 2005 17.

<sup>82</sup> <http://www.ilo.org/public/english/employment/skills/disability/download/discpaper.pdf>.

<sup>83</sup> Discrimination (Employment and Occupation) Convention (No. 111), 1958.

<sup>84</sup> An example is the ILO, Vocational Rehabilitation and Employment of Disabled Persons, 1998.



the recommendations of the Commission on Human Rights and the Commission for Social Development.<sup>85</sup> Previous attempts to secure an international convention only resulted in the adoption of non-binding documents. Thus, Mexico's initiative marked the first process to successfully result in a *legally binding* standards-setting instrument. Prior to the adoption of the CRPWD, the United Nations Standard Rules on the Equalization of Opportunities for Disabled Persons, adopted by General Assembly resolution 48/96 of 20 December 1993, were arguably the most progressive non-binding international standards-setting document.

The then United Nations Secretary General, Kofi Annan described the CRPWD as the most rapidly negotiated treaty of its type in the history of international law.<sup>86</sup> The international community had begun to see disability as a necessary component in successful development and to realise that PWDs have essentially been excluded, even within the international law system.<sup>87</sup> Even though an extensive body of non-binding international documents addressing PWDs was already in existence when the CRPWD was being contemplated, the philosophical approach of many of these documents (particularly the older Declarations) was inconsistent with the principle of equality and full societal inclusion of PWDs, and their non-binding nature meant that they were infrequently implemented by governments. There was also a lack of a monitoring mechanism to gauge the implementation of these documents, with only the United Nations Standard Rules on the Equalization of Opportunities for PWDs having a Special Rapporteur to monitor its implementation. Furthermore, despite the fact that binding international law has always been equally applicable to PWDs, governments and treaty monitoring bodies have not historically been attentive to the situation of PWDs and the barriers they face to fully enjoy their human rights. This was clearly revealed by an in-depth study commissioned by the Office of the High Commissioner for Human Rights, which concluded that PWDs had been "invisible" in, for example, the international human rights system.<sup>88</sup> The report recommended the adoption of a specific Convention dealing with PWDs which would amongst others, encourage mainstreaming of disability throughout international law. Many developing countries realised that they would not be able to reach their Millennium Development Goals as long as PWDs continued to be discriminated against and marginalised from society. Thus the international community came to see a convention such as the CRPWD as an important tool to utilise in both ensuring full equality and inclusion of PWDs, and in achieving a wide variety of development goals.<sup>89</sup>

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<sup>85</sup> UNGA Res 56/168.

<sup>86</sup> 'Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities,' Official Statement of the UN Secretary General, SG/SM/10797, 13 December, 2006. Available at <http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm>

<sup>87</sup> Convention on the Rights of persons with Disabilities: its implementation and relevance for the world bank by Katherine Guernsey, Marco Nicoli and Alberto Ninio 2007 Sp discussion paper no 0712 3. Available at <http://www.worldbank.org/sp>

<sup>88</sup> See generally "Human Rights Are for All: A Study on the Current Use and Future Potential of the UN Human Rights Instruments in the Context of Disability," Gerard Quinn & Theresia Degener et al (study commissioned by the OHCHR), 2002. Available at: <http://www.ohchr.org/english/issues/disability/study.htm>

<sup>89</sup> (n 87 above) 4.

The CRPWD does not seek to create new rights for PWDs, but rather elaborates and clarifies existing obligations for countries within the disability context. It establishes a committee of experts to monitor its implementation at the international level, and it also provides for the operation of independent national level monitoring mechanisms. The CRPWD also has an Optional Protocol that recognises the competence of the Committee on the Rights of PWDs to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention. The CRPWD is therefore comprehensive both in terms of its substantive content and monitoring and implementation mechanism.

It being the first comprehensive international legal instrument specifically dealing with PWDs, the CRPWD provisions reflect global consensus and are an authoritative commentary on the manner in which countries should fulfil their obligations towards PWDs.<sup>90</sup> As noted by Secretary General, Kofi Annan, ‘We have already learnt from experience, in countries that have implemented legislation related to disability, that change comes more rapidly when laws are in place.’<sup>91</sup> It is therefore anticipated that the CRPWD will both prompt as well as guide the passage and reform of domestic legislation ensuring substantive equality and non-discrimination for PWDs.

Article 27 of the CRPWD obliges states to recognise the right of PWDs to work, on an equal basis with others and that this right includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to PWDs. States are to safeguard and promote the realisation of the right to work by taking appropriate steps, including through legislation to, *inter alia*, prohibits discrimination on the basis of disability in all matters of employment. States are to ensure the provision of reasonable accommodation to PWDs in the workplace.<sup>92</sup> In this regard article 5(3) calls upon states to take all appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination.

### **2.3.2 African Regional level**

#### **2.3.2.1 The African Charter and the right to work**

Article 15 of the Charter provides for every individual’s right to work under equitable and satisfactory conditions and for equal pay for equal work. Article 2 of the Charter proscribes

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<sup>90</sup> (n 87 above).

<sup>91</sup> (n 86 above).

<sup>92</sup> As defined in CRPWD Article 2, ‘Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’

discrimination of any kind in the enjoyment of the rights and freedoms guaranteed in the Charter. Furthermore, in article 18(4) the Charter stipulates that PWDs shall also have special measures of protection in keeping with their physical or moral needs.

### **2.3.2.2 The Protocol to the African Charter on the Rights of Women in Africa and the right to work**

Article 3(1) of the Protocol reaffirms women's right to dignity inherent in all human beings. Article 13(a) obliges states to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career by amongst others, promoting equality of access to employment. Furthermore, states are obliged to ensure protection of women with disabilities by amongst others, taking specific measures commensurate with their physical, economic and social needs to facilitate their access to employment.

## **2.4 Quality of work and equal pay for equal work**

Equal pay for equal work can only be meaningfully achieved where structures have been put in place to facilitate an equal level playing ground. Strict equal or even-handed application of rules or policies without due regard to their effects on certain individuals or groups causes or perpetrates discrimination instead of ensuring equality of opportunity.<sup>93</sup> Thus standardising criteria for job selection or measuring job performance without taking disability into account, adversely impacts on those who do not conform to the norm of able 'bodiedness'. This is so because even with equality of opportunities, an enabling environment at the workplace dictates the quality of work for PWDs. Existing workplace structures are built around the norm of persons without disabilities.<sup>94</sup> 'The accommodation of differences is the essence of true equality'<sup>95</sup> as formal equality serves merely to maintain the status quo and perpetuate structural inequality. For PWDs, the principle of equality entails the adoption of provisions on the protection on health and safety at work or measures aimed at creating or maintaining facilities for safeguarding or promoting their access and integration into the working environment.

The Copenhagen Declaration and Programme of Action, adopted by the World Summit for Social Development in March 1995, acknowledged that PWDs form one of the world's largest minorities, are too often forced into poverty, unemployment and social isolation.

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<sup>93</sup> Ngwena (n 19 above) 547.

<sup>94</sup> Hahn (n 57 above) 189-90.

<sup>95</sup> Per McIntyre J in *Andrews v Law Society* [1989] 1SCR 143, 169.

Government policies should target the creation of employment, the reduction of unemployment and the promotion of appropriate and adequately remunerated employment, in full respect for workers' rights, and giving special attention to disadvantaged groups and individuals including PWDs. The elimination of all forms of discrimination, especially against PWDs, is emphasised throughout the Declaration.<sup>96</sup>

## **2.5 Conclusion**

This chapter defined disability and looked at the various terminology of describing PWDs, even though it was noted that it is a highly contested concept on which there is no universal consensus. It was observed that disability depends on the context and is capable of a fluid and encompassing construction that may virtually include everyone at some point of their lives. The chapter also discussed how the right to work is essential for the realisation of all other rights and forms an inseparable and inherent part of human dignity. In this it looked at how PWDs also have the right to work and live in dignity.

Finally the chapter closed by a discussion of the various applicable international human rights standards regarding the right to work and equality for PWDs and how true equality in the work place for PWDs entails. The next chapter will look at Malawi's current legal framework on disability in the light of the applicable international standards.

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<sup>96</sup> Programme of Action, paragraph 15 (i).

## **CHAPTER THREE: MALAWI'S LEGAL AND POLICY FRAMEWORK REGARDING PWDs**

### **3.1 Introduction**

Lack of a comprehensive legislation on disability, unclear sector agendas and weak coordination between civil society, local and national government have posed particular challenges in ensuring an enabling environment for the inclusion of people with disabilities.<sup>97</sup>

As already noted, history has shown that positive change regarding the rights of PWDs occurs more rapidly in countries that have implemented disability related legislation.<sup>98</sup> This chapter will thus analyse Malawi's legal framework relating to PWDs and see whether it is in line with international standards.

### **3.2 Constitutional framework**

The constitution of Malawi, which amongst others, seeks to guarantee the welfare and development of all Malawians<sup>99</sup> is premised on the principle of equality and non-discrimination. Section 20 of the Constitution provides as follows:

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

Section 29 guarantees to every person the right to freely engage in economic activity, to work and pursue a livelihood anywhere in Malawi. Furthermore, the rights to fair and safe labour practices, fair remuneration and equal remuneration for equal work are provided for in section 31. Recognising the vulnerable position of PWDs, section 13(g)(i) charges the state with the duty of actively promoting the welfare and development of PWDs by adopting and implementing policies and legislation aimed at ensuring that PWDs have fair employment opportunities and the fullest possible participation in all spheres of the Malawian society.

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<sup>97</sup> 'Examining inclusion: Disability and Community Driven Development' *World Bank Social development notes: Community driven development*, No 100/May 2005 3.

<sup>98</sup> (n 86 above).

<sup>99</sup> Preamble to the Constitution.

### **3.3 Legislation**

#### **3.3.1 The Handicapped Persons Act of 1971**

This is the main piece of legislation specifically dealing with issues of PWDs, though the Act uses the term ‘handicapped,’ in Malawi. The Handicapped Persons Act was intended to make provision for the improvement of the care, assistance and education of the handicapped persons.<sup>100</sup> Right from the name of the Act itself, the term handicapped is one which is no longer considered appropriate in referring to PWDs as it is one of those that are ascribed to them, and locates disability in the person as a way of social labelling connoting a negative status. This is in contrast to the recently used terms which tend to be self-descriptions by PWDs themselves. Even the objectives of the Act reveal an outdated approach of treating PWDs as objects of charity and social protection as opposed to the recent trend of viewing them as ‘subjects’ with rights. For instance, as already noted, the main objective of the recently adopted CRPWDs is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by PWDs and to promote respect for their inherent dignity. Section 2 of the Act defines a handicapped person as one who by reason of any defect or impairment of the mind, senses or body, congenital or acquired, is unable to take part in normal education, occupation and recreation, or who by reason of any such defect or impairment, requires special assistance or training to enable him to take part in normal education, occupation or recreation. This definition espouses the medical model of disability which as we have already seen views disability as a personal trait lying in the individual who by virtue of the disability is regarded as in need of assistance to remedy the disability. However, as already noted nowadays the social model of disability is preferred over the medical model. The social model conceptualises disability in a holistic manner that takes into account extrinsic factors such as social and environmental factors in the creation of disability. This social model is reflected in the definition of disability adopted by the CRPWD which defines PWDs as including those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>101</sup>

The Act contains no substantive provision regarding the rights of PWDs. The main thing it does is to establish the Malawi Council for the Handicapped (MACOHA) which is to act as an agent of the government in promoting the welfare of the handicapped.<sup>102</sup> MACOHA’s core functions are to; (i) advise the Minister in regard to all matters affecting the welfare,

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<sup>100</sup> Preamble to the Act.

<sup>101</sup> Art 1.

<sup>102</sup> Secs 3 and 10 of the Act.

education, training and employment of the handicapped; (ii) promote public interest in the welfare and care of the handicapped; (iii) administer vocational and special training centres for the handicapped; (iv) to administer rehabilitation service for the handicapped; and to raise and receive funds and donations for the welfare of the handicapped.<sup>103</sup>

### **3.3.2 The Employment Act No 6 of 2000**

The Employment Act touches on the issue of disability in its provisions which deal with the prohibition of discrimination. Section 5 provides as follows:

(1) No person shall discriminate against any employee or prospective employee on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

(2) subsection (1) does not preclude any provision, programme or activity that has as its object the improvement of conditions of disadvantaged persons, including those who are disadvantaged on the grounds enumerated in subsection (1).

(3) any person who contravenes this action shall be guilty of an offence and liable to a fine of K10,000 and to imprisonment for two years.

Other than the above provision, it is only section 6(1) which also mentions the issue of disability. It provides as follows:

Every employer shall pay employees equal remuneration for work of equal value without distinction or discrimination of any kind, in particular, on basis of race, colour, sex language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth marital or other status or family responsibilities.

This Act simply concentrates on formal equality in total disregard of the fact that equal application of needs or rules or policies without considering their differing effect on certain individuals or groups may result in discrimination against them and perpetuate inequality. The act should have had provisions dealing with reasonable accommodation for PWDs, as this is indispensable for the achievement of equality in the work place.

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<sup>103</sup> Sec 10.

### **3.3.3 Technical, Entrepreneurial and Vocational Education and Training Authority Act of 1999**

This Act establishes the Technical, Entrepreneurial and Vocational Education and Training Authority (TEVETA) as well as its board whose composition must include one member representing PWDs. That is the only mention of PWDs in the entire Act as the Act does not have a single provision dealing substantively with PWDs. This is also a shortfall in the Act as considering the fact that its main function is to provide for training of employees, it was essential to have substantive provisions on employees with disabilities.

## **3.4 Policy**

### **3.4.1 National policy on equalisation of opportunities for PWDs**

In June 2006 Malawi developed a comprehensive National Policy on Equalisation of Opportunities for Persons with Disabilities that notably deals with employment and education.<sup>104</sup> This policy was developed in order to promote the rights of PWDs by providing them equal opportunities, adapting the environment to their needs and encouraging society to positively change its attitude towards PWDs and assist them in assuming full responsibility as active members of society.<sup>105</sup> The policy aims at ensuring that concrete steps are taken for PWDs to access the same fundamental rights and responsibilities as any other Malawian.<sup>106</sup>

The policy came about after the realisation that PWDs in Malawi face numerous challenges that have resulted in their exclusion from mainstream society, making it difficult for them to access their fundamental social, political and economic rights.<sup>107</sup> The challenges include environmental barriers such as inaccessible public and private buildings; institutional barriers such as expulsion, exclusion and segregation from key social institutions; attitudinal barriers ranging from various kinds of prejudices and economic barriers such as access to credit facilities and employment. In so far as employment is concerned, PWDs have restricted employment opportunities mainly due to discrimination, inadequate education or training, job and experience. This has resulted in high rates of poverty among PWDs as many of them depend on welfare or beg for a living. Whereas poverty in Malawi is widespread, there is a

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<sup>104</sup> Before 2006 Malawi did not have any written and clearly spelt out policy on disability.

<sup>105</sup> 'Malawi Government National policy on equalisation of opportunities for persons with disabilities' (2006) iv & v.

<sup>106</sup> On page 7 the policy affirms that PWDs are entitled to the same human rights as all other citizens as enshrined in the UDHR, the Malawi constitution and other international instruments.

<sup>107</sup> (n 105 above) 1.



close link between poverty and disability with poverty often causing disability and disability increasing poverty.<sup>108</sup>

The policy identifies the failure to adopt international commitments in national policies and law as one of the challenges to the successful implementation of the policy. In this vein the policy notes that despite Malawi being a signatory to a number of international instruments dealing with PWDs, these instruments are meaningless unless the principles enshrined in these instruments are reflected in domestic law.<sup>109</sup> In many respects the policy is in line with current international approach towards disability. It correctly identifies the reasons why PWDs have been excluded and marginalised in every aspect of the Malawian society and the steps that need to be taken to ensure that their rights to equality and dignity are respected. It marks a shift away from the approach of regarding PWDs as objects of charity and pity in favour of a holistic human rights based approach.

### **3.4.2 Equalisation of Opportunities for Persons with Disabilities Bill 2008**

The Equalisation of Opportunities for Persons with Disabilities Bill (the Bill) is an offspring of the National Policy on the Equalisation of Opportunities for Persons with Disabilities which was adopted with a view of ensuring that concrete steps are taken to ensure promotion of the rights of PWDs as equal members of the society. The Malawi Law Commission noted in its Constitutional Review Report of 2007 that although it had received valid submissions relating to the protection and promotion of the rights of PWDs, the issues could better be addressed in an Act of Parliament which the Ministry of Justice had already been approached to draft so as to replace the Handicapped Persons Act.<sup>110</sup> Considering the fact that the Policy recognises the failure to implement the principles enshrined in the various international instruments dealing with disability to which Malawi is a party as one of the major challenges of its successful implementation, at the very least one would expect the Bill to embody the principles enunciated in the recently adopted CRPWD.

The Bill proposes to enact new legislation to promote the rights of PWDs to enable them play a full and participatory role in society. It provides for equalisation of opportunities which it defines as a process by which the various systems of society are made available and accessible to all, including PWDs.<sup>111</sup> The Bill recognises the cross-cutting nature of disability and the need to mainstream disability in all in all policies, plans, programmes and services of all

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<sup>108</sup> (n 105above) 4.

<sup>109</sup> (n 105 above) 25.

<sup>110</sup> Constitutional Review Final Report 44.

<sup>111</sup> Sec 2.

public, private and civil society organisations.<sup>112</sup> Furthermore, it obliges government to adopt policies on equalisation of opportunities for PWDs whose aim shall be to fully integrate PWDs in all aspects of life in order to enhance their dignity and well-being so that they have essentials of life. In this regard the government is to ensure the attainment of a barrier-free environment that will enable PWDs to have access into public and private buildings and establishments as well as make guidelines for the provision of architectural facilities or structural features for PWDs to be enforced in public buildings and facilities.<sup>113</sup> This also includes access to public transport facilities.<sup>114</sup> This in a way echoes the CRPWD which aims at promoting and protecting the human rights of all PWDs by removing the various barriers that they face in their participation as equal members of their society. For instance in terms of article 9(2)(a) of the CRPWD the government is to take appropriate measures to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public.

The Bill seems to draw a distinction between disability, handicap and impairment. Section 2 of the Bill defines disability as ‘any restriction or lack, resulting from impairment, of ability to perform an activity in the manner or within the range considered normal for a human being’. On the other hand it defines handicap as a disadvantage in a given individual resulting from an impairment or disability that limits or prevents the fulfillment of a role that is normal depending on age, sex, social and cultural factors for that individual. Whilst impairment is defined as any loss or limitations of psychological, physiological or anatomical structure or function.

A person with disability is defined as:

any person who, by reason of any impairment of the mind, senses or body, congenital or acquired, is unable to participate fully in regular education, occupation and recreation, or who, by reason of such impairment, requires special assistance or training to enable him to participate in regular, mainstream or inclusive education, occupation or recreation and other spheres of life.<sup>115</sup>

The distinction sought to be made by the Bill between disability, handicap and impairment is nowadays illusory. The definition of disability suggests that that disability amongst others results from impairment and at the same time the definition of handicap suggests that handicap may result from an impairment or disability. On the other hand impairment may well encompass disability and handicap. It would appear that it is just a matter of semantics as what one may refer to as a handicap may well be referred to as a disability or impairment. Of course in the past others would define impairment as an individual limitation and

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<sup>112</sup> Sec 34.

<sup>113</sup> Sec 26.

<sup>114</sup> Sec 27.

<sup>115</sup> Sec 2 of the Bill.

disability as a socially imposed restriction.<sup>116</sup> If anything, as earlier on noted in chapter 2 the term handicapped is one of the terms that was used to refer to PWDs but which is no longer deemed appropriate for being demeaning and tantamount to negative social labelling. Furthermore, the definitions of disability and handicap, just like the definition of a person with disability are inadequate as they all seem to locate the disability in the individual and disregard the role of the environment or society in the creation of disability. In a way it can be said that the Bill sticks to the outdated medical model of disability instead of the conventional sociological approach. The inadequacy of the above definitions is apparent when you consider them in the light of the definition of PWDs under the CRPWD which under article 1 defines them to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In so far as education is concerned, section 29 obliges government ensure that PWDs are provided with adequate access to quality education and ample opportunities to develop their skills. At the same time government should require learning institutions to take into account the special needs of PWDs with respect to the use of school facilities, class schedules, physical education requirements, and other pertinent considerations. At the same time it specifically reserves at least five (5) per cent of the allocation for students' financial assistance programme as created by the local government for students with disabilities.

In the employment sector, one of the significant developments the Bill brings about is the concept of reasonable accommodation. Whilst it does not define what exactly the term reasonable accommodation means, section 2 of the Bill stipulates that reasonable accommodation includes amongst others, making existing facilities used by employees readily accessible to and usable by individuals with disabilities. Thus in appropriate cases it will entail acquisition or modification of equipment or devices, making appropriate adjustments or modifications for PWDs. Thus, according to section 30 of the Bill failure to reasonably accommodate the needs of PWDs without a proper justification would be tantamount to discrimination which is prohibited both under the Bill and the Constitution. The pertinent part of section 30 is subsection (2)(d) which provides that failure by any person or employer to provide reasonable accommodation to the known physical or mental limitations of otherwise qualified applicants or employees who are PWDs unless such commits an offence (discrimination) unless it can be demonstrated that the accommodation would impose an undue hardship on the operation of the business of the person or employer. Section 2 of the Bill defines undue hardship as:

an action requiring significant difficulty or expense, when considered in light of-

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<sup>116</sup> S French 'Disability, impairment or something in between?' in J Swain et al (eds) *Disabling barriers-enabling environments* (1993) 17: Oliver (n 58 above).

- (a) the nature and cost of the accommodation needed under this Act;
- (b) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facilities, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.
- (c) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and
- (d) the type of operation or operations of the covered entity including the composition, structure and functions of the workforce of such entity, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

The requirement of reasonable accommodation is complemented by section 30(8)(a) which amongst others, calls upon the government to formulate schemes for the employment of PWDs, which should ensure the creation of a non-handicapping environment in the work place for PWDs. Furthermore, section 35 obliges government to endeavour to ensure economic empowerment for PWDs.

The requirement of reasonable accommodation in the work place is a huge step in the right direction if true equality is ever to be achieved in the Malawian employment sector because past experiences have shown that equal application of rules or policies without considering their differing effect on certain individuals or groups may result in discrimination against them, a thing which accounts for the high rate of unemployment amongst the population of PWDs in Malawi.<sup>117</sup> However, whilst provisions on reasonable accommodation in the Bill should be commended, it may have been prudent for the Bill to include a definition of what reasonable accommodation is just as the CRPWD does. As matters currently stand, one cannot be faulted for getting the impression that reasonable accommodation is a phenomenon for the work place only. Hopefully a definition will clarify the fact that reasonable accommodation covers all spheres of life.

Apart from the above substantive provisions, the Bill establishes a National Coordinating Committee on Disability issues whose main task amongst others, is to advise government on formulation of policies, programmes, legislation and projects with respect to disability.<sup>118</sup> It also establishes the Malawi Agency for Persons with Disabilities which is to be an agent of the Government in promoting the equalisation of opportunities for PWDs<sup>119</sup> and keeping a register of PWDs as well as organisations for PWDs.<sup>120</sup> Effectively the Agency will become the

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<sup>117</sup> (n 3 above).

<sup>118</sup> Sec 6.

<sup>119</sup> Sec 10.

<sup>120</sup> Secs 20 & 21.

successor in title of the Malawi Council for the Handicapped<sup>121</sup> which will cease to exist as the Handicapped Persons Act under which it was established will get repealed as soon as this Bill comes into effect.<sup>122</sup>

However, one of the things that is very conspicuous through its omission in the Bill is the absence of any provision dealing with women with disabilities. Whereas it is generally accepted that PWDs face various challenges and barriers to access the workplace, it has also been noted that the situation is even worse for women with disabilities.

While men with disabilities have serious employment problems, Women with disabilities are significantly worse off and this seems to be true for all types and levels of disabilities. Men with disabilities are almost twice as likely to have jobs as Women with disabilities... Women with disabilities are also significantly poorer than men with disabilities, partly due to the fact that they are more likely to be unemployed and partly due to the fact that when they work they receive considerably lower wages than men with disabilities.<sup>123</sup>

Probably it is in recognition of this fact that the CRPWD calls upon states to recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.<sup>124</sup>

### **3.5 Conclusion**

In this chapter we looked at Malawi's current legal framework starting with the Handicapped Act of 1971 which in many respects was found to be outdated. The chapter also analysed the Employment Act and the Technical, Entrepreneurial and Vocational Education and Training Authority Act both of which were also found to be inadequate in their provisions dealing with PWDs. On the other hand an analysis of the policy framework in particular the National Policy on the Equalisation of Opportunities for Persons with Disabilities revealed that it is in line with current international standards on the issue of disability.

However, an analysis of the Equalisation of Opportunities for Persons with Disabilities Bill which is supposed to flow from the National Policy and will become the main disability legislation, replacing the Handicapped Act once passed by Parliament revealed that it is way out of line with current international standards. The next chapter will offer suggestions and recommendations on how Malawi's legal framework especially the Equalisation of

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<sup>121</sup> Sec 50.

<sup>122</sup> Sec 52.

<sup>123</sup> Bowe, F. *Disabled women in America: A statistical report drawn from census data (1984)* 40

<sup>124</sup> Art 6(1).

Opportunities for Persons with Disabilities Bill as the proposed new disability legislation can be conformed to international standards on disability.

## CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

### 4.1 Conclusion

The effectiveness and adequacy of laws promoting the rights and welfare of PWDs in general and those of PWPDs in particular is essential for the achievement of true equality in the work place for PWPDs. We have noted that experience has shown that positive change in so far as the promotion and protection of rights of PWDs is concerned has been rapidly achieved in countries which have disability-related legislation in place. In recent years, a lot of countries around the world have adopted policies aimed at promoting the rights of PWDs to full and equal participation in society. Usually this has been in response to ILO Convention No. 159 concerning Vocational Rehabilitation and Employment of Disabled persons of 1983. Policy on employment opportunities for PWDs is frequently supported by legislation and implementation strategies as essential tools to promote integration and social inclusion. Malawi is one of such countries that adopted a national equalisation policy and is now in the process of enacting a comprehensive disability-related legislation.

Currently it has come up with the Equalisation of opportunities Bill which is awaiting parliament's endorsement before it can become effective as a law. This Bill apart from flowing from the national policy also comes at a time when the CRPWD, a comprehensive and integral international convention to promote and protect the rights and dignity of PWDs has been adopted and entered into force.<sup>125</sup> One of the CRPWD's main objectives is to ensure the protection of the rights and dignity of PWDs by ensuring their equality and eliminating all kinds of discrimination against PWDs in promoting and ensuring their full inclusion and participation in all spheres of society. The right to work for PWPDs goes hand in hand with their right to equality and dignity. At the same time true equality can only be achieved by recognising their differences and providing them with reasonable accommodation. If PWPDs are to enjoy full equality in the work place and fully realise their right to work, the legal and policy framework must set an enabling environment, reflecting the social model of disability in which the barriers to participation are recognised to lie in barriers in the social and physical environment.<sup>126</sup>

Thus, in line with the principle of reasonable accommodation the work place has to be adjusted so as to reasonably cater for the needs of PWPDs as well. The whole infrastructure, starting with the roads, transportation, buildings to the office equipment itself has to cater for the needs of PWPDs by making them reasonably accessible. However, as already noted in

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<sup>125</sup> Para y of the preamble to the CRPWD.

<sup>126</sup> 'People with Disabilities: Pathways to decent work' International Labour Organisation tripartite workshop, Malawi (2006) 9.

chapter 3, the Handicapped Persons Act which is Malawi's main disability legislation is highly outdated and inadequate. Even though other laws like the Employment Act and the Technical Entrepreneurial and Vocational Education and Training Authority Act contain some provisions relating to disability, they do not adequately protect nor promote the rights of PWDs. Nevertheless, on a positive note it was observed that the National policy on equalisation opportunities for PWDs is in line with the current international standards on PWDs as it correctly recognises the reasons why in the past PWDs have been excluded and marginalised from society and provides for a framework of the remedial steps that need to be undertaken to redress the situation and ensure the protection of their right to equality, dignity and other rights.

Nonetheless, it was further observed that the Equalisation of Opportunities for Persons with Disabilities Bill, which is the proposed new disability-legislation, fails in some material respect to comply with the current international standards as espoused by the CRPWD. In this regard the major shortfalls noted were the fact that some of the terminology used in referring to PWDs is outdated and no longer deemed appropriate and the omission of any provision dealing with women with disabilities.

## **4.2 Recommendations**

The Equalisation of Opportunities for Persons with Disabilities Bill should define *disability* based on how the CRPWD defines it, which is based on the social model. As much as possible, the CRPWD, which represents the universal model, should inform Malawi's disability legislation.

It would also be beneficial if the Malawian government was to ensure that it submits its periodic reports to the various treaty bodies to which it is under an obligation to do so, especially the Committee on the Rights of Persons with Disabilities<sup>127</sup> from the interaction with these treaty bodies Malawi stands to gain a lot on how it can improve its disability legislation and keep it up to date.<sup>128</sup> In this regard as a starting point, Malawi ought to ratify the CRPWD as a matter of urgency and ensure that it starts complying with its obligations under it as well as under the various applicable instruments such as the African Charter and the Protocol to the African Charter on the Rights of Women in Africa.

The issue of protecting and promoting the rights of PWDs needs to be mainstreamed. However, this task should not only be left to the ministry responsible for PWDs, rather it

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<sup>127</sup> Established under art 34 of the CRPWD.

<sup>128</sup> Article 35 of the CRPWD obliges every state party to submit a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned. Thereafter reports are to be submitted after every four years.



should be a multi-sectoral approach involving all ministries, government departments, the private sector as well as society as a whole.

A lot of sensitisation on the need for equalisation of opportunities also needs to be done as part of combating stereotypes and prejudices attached to PWDs.<sup>129</sup> On this aspect, the focus should not be on disability awareness but rather on diversity awareness since disability differences are just part of the wide array of human differences such as ethnicity, race, age, culture and religion.<sup>130</sup>

As one way of accelerating the inclusion of PWPDs in the work place whereby their equality is guaranteed by means of an enabling environmental which reasonably accommodates their means, government should provide incentives to employers who employ a certain percentage of PWPDs.

It will also be important to empower the organisations representing PWDs, referred to as Disabled Persons Organisations (DPOs) under the Equalisation of Opportunities for Persons with Disabilities Bill, to monitor implementation of policy and law in accordance with international standards. This amongst others will require the DPOs to realise that they are not simply a channel through which donations or other assistance for PWDs is received as has been the case with MACOHA.

At the end of the day it mainly comes down to political will. Good legislation on disability does not necessarily translate to better protection and promotion of the rights of PWDs on the ground if the legislation is not implemented and enforced. It is only through effective implementation of the law that societal attitudes can be positively influenced to enhance the promotion and protection of the rights and welfare of PWPDs and PWDs in general.

**(Word count: 13 596)**

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<sup>129</sup> For instance it will be easier for society, for example in the work place to accept and strive for the inclusion of PWDs if this inclusion starts right from the education sector.

<sup>130</sup> Miller (n 34 above) 316.

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