

THE EFFECTIVENESS OF THE LAWS ON PERSONS WITH PHYSICAL DISABILITIES AT WORK IN TANZANIA

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ABSTRACT

Disability is often perceived negatively perhaps due to ignorance and some prevailing socio-cultural beliefs as well as economic factors. The challenges facing persons with physical disabilities (PWPDs), therefore, are varied and could be in the form of violation of human rights, poverty, stigma, discrimination and exclusion. Disability is closely associated with poverty and is also a barrier to education, employment, access to public services and social protection. In most cases, disability has been addressed through charitable approaches without the recognition of the rights and participation of persons with disabilities, like other citizens.

To reduce stigmatization and discrimination against persons with physical disabilities (PWPDs), as a signatory to several regional and international Human Rights Instruments, the government of Tanzania has gone some way in its Constitution and other domestic laws to protect and promote the right to work for every person including persons with physical disabilities. This dissertation reveals, however, that the government has largely failed to translate this *de jure* (formal or legal equality) into a *de facto* (actual equality) to the discriminated ones.

INTRODUCTION

The general public image of persons with physical disabilities is that they have a low quality of life. There is a general consensus that their quality of life should be improved and many countries have adopted this view as an official policy, passing laws in order to offer persons with disabilities the same rights to public services as non-disabled citizens. Governments facilitate better access for persons with disabilities to jobs, market, education and transport in order to stimulate the societal participation of this group. The target of policymakers is to normalize the lives of persons with disabilities, i.e., raise the level of their quality of life to bring it closer to that of non-disabled personsⁱ. The implicit assumption of this policy is that more participation by persons with disabilities not only improves their standard of living, but also their subjective well-being.

Although in 2010, it was observed that the principles and promises made in policy documents are not reflected in direct action for the intended beneficiaries. Indeed, the policy impact on employment levels of people with disabilities has been minimal and people with disabilities around the world continue to be under represented in the paid workforce.”ⁱⁱ

THEORIES ON DISABILITIES

According to Stanford Encyclopaedia of Philosophy, experiences show that philosophers have always lived among people who could not see, walk, or hear; who had limited mobility, comprehension or longevity, or chronic illnesses of various sorts, and yet philosophical interest in these conditions was piecemeal and occasional until the past hundred or so years. Some of these conditions were cited in litanies of life's hardships or evils; some were the vehicle for inquiries into the relationship between human faculties and human knowledgeⁱⁱⁱ.

Liberalism's approach to disability is constrained by limiting normative assumptions. The starting point for liberalism is that disability is about misfortune or bad luck. As MacPherson describes that tort law conceives of a pre-existing condition of disability as a subtraction from

the norm.^{iv} Conceptualizing disability as a misfortune has very specific implications, and forms the basis of the approaches referred to earlier, ranging from charity to welfarism.

Ronald Myles Dworkin thus confirms his own assumption that each individual in a liberal democratic society has the 'right to equal treatment' in terms of the equal distribution of opportunities, goods and burden, and also the 'right to be treated as equal' in the sense of equal concern and respect. We can call it 'delayed justice'. It corrects the injustice subsequently even though it is a result of principle of equality.^v For the disabled persons the right for the equal treatment is actually a kind of mockery. A disabled person and a non-disabled person are not equal, but when you treat them as unequal, you have already fallen into the trap of injustice.

Like liberal, paternalistic attitudes tend to create dependency and an incapacitating learned helplessness in people with disabilities. It erodes the self-esteem of the recipient of charity. Modern practices recognize and respect the disabled person as a person first and as a disabled second. They perceive person with physical disabilities as not inferior or second class citizens but capable of communicating and participating, entering into dialogue with other people. These are empowering practices, the very basis of people-centered development which recognizes disabled people or any other group of human being in society need to be responsible for their own affairs.^{vi}

From a disability perspective, physical or cognitive limitations are not absences of talent, but instead are constraints upon the ways in which talents are exercised. Social arrangements that offer equivalent prospects of success to people of similar talent and ambition provide fair equality of opportunity. Fair equality of opportunity requires that people with similar talents should enjoy equitable access to the necessary social conditions for realizing their talents, regardless of whether their functional modes are normal or anomalous.^{vii}

Woman and men with physical disabilities want to be productive members of the society. In both developed and developing countries, promoting more inclusive societies and employment opportunities for people with disabilities requires improved access to basic education, vocational training relevant to labour market needs and jobs suited to their skills, interests and abilities with adaptations as needed. Many societies are also recognizing the need to dismantle

other barriers making the physical environment more accessible, providing information in a variety of formats and challenging attitudes and mistaken assumptions about people with physical disabilities. Women with physical disabilities may be particularly at risk due to stigmas associated with both disability and gender inequality.

THE HISTORICAL PERSPECTIVE TOWARDS THE ENACTMENT OF LAWS SAFEGUARDING DISABLED PERSONS IN TANZANIA

In the last two decades prior to 1981 service provision to persons with disabilities had no clear policy. General government pronouncements, for example, the Arusha Declaration of 1967, provided the direction for services to disabled persons.^{viii} The year 1981 was proclaimed by International Community to be the International Year of Disabled Persons; this gave the necessary impetus to the government which took the necessary step like preparing the Cabinet paper^{ix} which had two parts. Part one discusses problem of services provision to disabled persons in the absence of the clear policy. Part two delineated responsibilities of caring for disabled persons to government institutions, families, relatives, local government, and Non-Governmental Organizations.^x The Cabinet paper emphasized the objective of the service provision as the protection of disabled persons' dignity. In the same year the Ministry of Social Welfare in mainland Tanzania carried out a census of Disabled Persons which identifies 193,599 disabled persons in 20 regions, representing approximately 1 per cent of the population at the time. The three following facts were observed in this census; a majority of the discriminated ones were of the age of working, so they were illiterate and unemployed.

The Cabinet Paper together with the operation of census resulted on the enactment of the Disabled Persons Employment Act^{xi} in 1982 in mainland Tanzania, which aimed at enabling disabled persons to secure employment through quarter scheme and reservation of posts and strengthening good environmental condition of disabled persons at the work places. This law succeeded to ensure that two percent of disabled are employed in areas involving 50 employees^{xii} while previously the situation was silent. This led to the establishment of the National Advisory Council which advises the minister on matters relating to services for

disabled persons. Furthermore, the Disabled Act Care and Maintenance Act^{xiii} was enacted in 1982 which provides and designated responsibilities of caring for disabled persons to families, relatives, local government, central government and Non-Governmental Organizations. This Act was also a result of the Cabinet Paper. In 1981 the government recognized Disabled People Organisations operating in the country and be a representative forums for people with disabilities.^{xiv}

In 2004, the National Policy on Disability for the first time was adopted in Tanzania. Since independence there was no comprehensive policy for disabled persons, and only a few policies, at least, mentioned disability.^{xv} Under this policy it is provided that persons with disability find it difficult to access work, so the government enacted laws for their better protection to enable disabled persons live independently. Within the same year, with regards to that policy another census was held in which a total number of disabled persons increased to almost two times compared to the former census. As a result another Act was enacted in 2010 known as Persons with Disabilities Act, 2010 which aimed at improving condition of disabled ones for improving employment opportunities, and those who are employed to make friendly environments like providing proper tools to them according to each and every disabled person's need such as wheel chairs, white sticks and book signs. This Act was also a legislative response to her obligation under the United Nations Convention on the Rights of Persons with Disabilities (CRPD) of 2006 which was signed and ratified on 30 March 2007 and 10 November 2009 respectively. Despite the enactment of laws and adoption of policy to safeguard the betterment of that vulnerable group, the life dependency of persons with physical disabilities is still a pipedream for the laws are not practicable.

STATUTES TO PROTECT PHYSICAL DISABLED PERSONS IN TANZANIA AND THEIR EFFECTIVENESS

Tanzania has adopted and implemented a number of laws, policies and standards pertaining to persons with disabilities. The laws provide for equality to all human being and prohibit

discrimination, also provide for the right to productive and decent work, vocational training and basic services to disabled persons.

THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977

The Constitution of the United Republic of Tanzania which is the supreme law of the land recognizes the right to work as a fundamental right. It also sets the standards of equality and non-discrimination at the work places. The constitution under Article 11(1) does expressly mention disability. But this Article does not fall within the Bill of Rights of the Constitution. It is enshrined under the part that cannot be enforced in courts of law.^{xvi} Therefore the court has no power in entertaining constitutional matters that follow under part II of the Constitution of the United Republic of Tanzania. The word disabilities under Article 13(5) does not refer to persons with disabilities as a specific category of people subjected to discrimination, but refers to affirmative action to counter oppressive tendencies in general. Therefore this law is, according to my view, not effective.

EMPLOYMENT AND LABOUR RELATIONS ACT NO. 6 OF 2004

This is the major law governing employment issues in Tanzania. The Act under section 7 and section 8 requires employers to ensure that they promote an equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. It prohibits direct and indirect discrimination on several grounds including disability.^{xvii} The Act does not provide the specific provision relating to disabled ones as far as physical disabled is concerned. However the provision provided in this Act are too narrow to deter the needs of disabled persons since there are many kind of discrimination which are experienced in working places.

PERSONS WITH DISABILITIES ACT NO. 9 OF 2010

Specifically this is a comprehensive piece of law that directly provides for disability related matters in Tanzania. This is different from Act No. 6 of 2004 which was enacted to safeguard the rights of all employees regardless of their ability status. , Article 31 requires employers to hire and maintain the employment of people with disabilities and establishes a work force quota under which every employer with a work force of 20 or more individuals must employ persons with disabilities at a rate of at least 3% of the employer's total workforce.

The Act was enacted particularly to make provisions for the health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment or work protection and promotion of basic rights for persons with disabilities.^{xviii} The Act provides amongst other things for: (i) principles and obligations for realization of the rights of persons with disabilities;^{xix} and (ii) it sets out a broad institutional arrangement operating at National level, that is the National Advisory Council for Persons with Disabilities down to grass-root level, that is village and street Committees all with mandates to amongst others, protect and promote all matters relating to the welfare and development of persons with disabilities.^{xx} It further stops discrimination against disabilities in all aspects in the society. Section 30 to 34 cover employment issues for disabled persons. Section 30 of the Act covers industrial rehabilitation courses for people with disabilities at or above the age of 16 years in order to render them fit for employment or for making use of vocational training courses. Facilities and equipment must be available to enable them to acquire working skills and to obtain full benefit of the training courses. This is the only Act that has made a duty upon employers to provide working tools and to ensure safe and healthy working conditions for all employees with disabilities.^{xxi}

Under section 57 of the Persons with Disabilities Act,^{xxii} a mechanism was established for a National Fund for Persons with Disabilities. It is foreseeable that when the fund is established, some form of the grant/funds will be allocated particularly to finance education and vocational training, a rehabilitation programme on disability, issuing grants to associations of persons with disabilities and financing researches on disabilities.^{xxiii} Yet the fund has not been established

until today. Although this law is well established but the reality on the ground is totally different, this is due to the fact that employers are still discriminating disabled persons.

This Act has been contradicting itself; it gives the right to persons with disabilities by one hand and took it by the other hand. Section 31^{xxiv} gave an obligation for every employer to employ a person with a disability who at least meets the minimum qualification for such work. Surprisingly, the same section has given a loophole to employers that an employer cannot employ persons with disabilities basing in quota system if he proves that he either failed to find a qualified person with a disability for the post, or that they are having no experience required, and that due to the nature of the work or circumstance of the working place it may not be possible to employ the person with a disability.^{xxv}

This law requires a person having a minimum qualification for a certain employment to be employed by either public or private employer, yet the same law provides exception that an employer can refuse to employ such a person if he has failed to get a person with experience required. The problem that arises here is how the law term minimum qualification *vis a vis* the amount of qualification that is needed for a person with a disability so as to be employed.

The circumstance of the working places that may cause a disabled person to get no employment is another issue to be addressed here. In this Act under section 34^{xxvi} it is provided that an employer shall ensure safe and healthy working condition for all employees with disabilities alongside with providing job working tools. It is an obligation to prepare friendly environment for disabled persons at work place and failure to adhere to this is an offence under section 62 of the same Act. For this reason, the law has failed to assist people with disabilities for it provides obligations and put exceptional circumstances that favour employers not to employ persons with disabilities that at the end of the time it is just like no obligation that is placed by the law, it is like work done is equal to zero.

Under section 62 of the Act no. 9 of 2010 among other offences makes it an offence for the employer who has failed to employ a person with a disability. The right to work under the Constitution is enshrined in the party that is not enforceable before the court of law. The main issue here is how can employer become guilt of an offence of failing to hire a person with physical disabilities as a matter of right whereas such right is enshrined under the part that

cannot be enforceable before the court of law? Which court or tribunal will entertain that constitution matter in case a person has not employed by a certain employer?

The quota system has been further criticized on other grounds as well: (a) labeling people with disabilities; (b) company preference for paying a penalty rather than employing people with disabilities; (c) difficulty to set effective sanctions to force/strengthen the system; (d) low wages and underemployment of people with disabilities; (e) difficulty in meeting the multiple and diverse needs of people with disabilities in the workplace; and (f), effects of economic recession on full employment goals.^{xxvii}

RECOMMENDATIONS

The Persons with Disabilities Act of 2010 indeed had brought significant changes in the protection of disabled persons for it was enacted to curb the challenges which impede the right of to work to persons with disabilities; however, the same has not been effective as expected. Thus been the case, the study confined to examine other objectives which concerns the measures to be taken to curb these challenges been identified by the study.

TO THE GOVERNMENT

This thesis is finally suggesting and recommending that the government should go beyond enactment of legislations on employment of Persons with Physical Disabilities through intensifying awareness raising efforts towards disability policies and legislations to public and private sector's employers as an attempt to encourage them employ people with physical disabilities. Again it must ensure that essential services, such as housing, health, transport and justice, meet the particular needs of disabled people and support their independence and wellbeing. Strengthen disabled people's choice, autonomy and control over decisions and services. The government must also improve existing legislation, policies, frameworks and action plans to better protect and promote the rights of disabled people. Improve the evidence

base on the experiences and outcomes of disabled people and the ability to assess how fair Tanzania is for all people. The fund that has been established under section 57 of the 2010 Act must be seen to exist and be used for the purposes intended by the Act so as to protect the wellbeing of this vulnerable group.

TO THE PARLIAMENT

The Persons with Disabilities Act only affords a minimum assurance that they will in the future be given wider platforms for their rights; and such rights being fully included. These concerns are due to the very broad institutional framework set-out in the Act, which do not address the inclusion of Persons with Physical Disabilities and Disabled Peoples Organisations in their composition. This will minimize their influence in future processes. With this regard, the parliament has to amend the 2010 Act with the purpose of including PWDs in general and DPOs in their composition.

TO THE EMPLOYERS

All working barriers such as lack of lifts and ramps in office buildings, equipments, and reliable transport to and from the office should be removed and companies should be sensitized to have disability policies and legislations in workplaces that oversee the employment of Persons with Physical Disabilities and penalties for those who do not comply with them must be formed. Employers must reduce educational attainment and employment gaps for disabled people.

TO THE SOCIETY

The laws are there and so are numerous regulations that seek to ensure that Persons with Physical Disabilities are always given due recognition and equal right in accessing public

facilities, but the most important thing is how the society perceives them and caters to their needs. This is about setting in process a turnaround in mindsets, so that the people with disability in our midst do not feel left out or held down by their disabilities.

The society too should realize that Persons with Physical Disabilities are part of the society; they also can contribute the same or even more in the society development if given opportunity to education and empowered to work. Persons with Physical Disabilities should be encouraged to apply for formal employment opportunities and that there should be gender equality. Media should be in a frontline on this.

TO PERSONS WITH PHYSICAL DISABILITIES

Persons with Physical Disabilities should demand their educational right so that at the end of the day they got to demand the right to work and be in the position of owning property, have a welfare life, and can even contribute in developing the society and state at large.

ENDNOTES

ⁱ Office for Disability Issues, Social Development Canada. (2005). *Advancing the inclusion of persons with disabilities 2005*. Ottawa: Social Development Canada.

ⁱⁱ FUJIMOTO, Yuni (et al) (2010) School of Management and Marketing, Deaken University, Burwood East, VIC 3125, Australia, and UQ Business School, university of Queensland, St Lucia, QLD 4072, Australia.

ⁱⁱⁱ <https://plato.stanford.edu/entries/disability> retrieved on February 26, 2019.

^{iv} *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, edited by Dianne Pothier and Richard Devlin, 2006, UBC Press.

^v https://bib.irb.hr/datoteka/720568.Disabled_persons_69.pdf retrieved on February 26, 2009.

^{vi} Ibid

^{vii} *Philosophy and Disability: an Overview*

^{viii} The Arusha Declaration aimed at removing dependence by all citizens of Tanzania. It involved the creation of economic strategies which shall put the nation at independent level. Inter alia persons with disabilities were considered as part of a community which needed the direction for services from the community itself.

^{ix} No 19 Of 1981

^x National Policy on Disability (2004), Ministry of Labour, Youth Development and Sports, p. 1

^{xi} Act No. 2 of 1982

^{xii} Sera ya Taifa ya maendeleo na huduma kwa watu wenye ulemavu, Idara ya Ustawi wa jamii (Wizara ya kazi Maendeleo ya vijana na michezo), Dar Es Salaam, Julai 2004, pg. 10.

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- xiii Act No. 3 of 1982
- xiv National Policy on Disability (2004), Ministry of labour, Youth Development and Sports, p. 4.
- xv Example the Arusha Declaration that identifies persons with disability as a group entitled to free care.
- xvi Cap 2 of the Laws of Tanzania, Article 7(2) provides that the provisions of this Part of this Chapter are not enforceable by any court.
- xvii Section 7(1) of the Employment and Labour Relations Act, 2004
- xviii Preamble to Act No. 9 of 2010
- xix Section 4 – 7 of Act No. 9 of 2010
- xx Ibid, section 8 – 14 together with 1st, 2nd, 3rd and 4th schedule to the Act.
- xxi Section 34(1) of Act No. 9 of 2010
- xxii Act No. 9 of 2010
- xxiii Ibid, section 57(3)
- xxiv The Persons with Disabilities Act, no. 9 of 2010
- xxv Ibid
- xxvi Ibid
- xxvii KUDO, T. (2010). Japan's employment rate of persons with disabilities and outcome of employment quota system, *Japan Labor Review* 7(2), 5-25.
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