

**THE EFFICACY OF THE LAW PROTECTING THE RIGHTS OF
PERSONS WITH AN INTELLECTUAL DISABILITY IN THE
EMPLOYMENT SECTOR IN ZAMBIA**

BY

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A paper presented in partial fulfilment of the requirements for the degree of Bachelor of
Laws of The University of Zambia.

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MISS M. LWATULA

DEDICATION

I dedicate this obligatory Essay to my dear husband and friend O'Jay Kelvin Mwenya and my two children Kangwa Chelsea Mwenya and Tafara Jamal Mwenya. Everyday, I thank God for the supportive, caring and loving family that you guys are. I pray for better days to comes. I love you all.

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Mayaneyi Marebesa

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ABSTRACT

A new era of persons with disabilities saw a new turn with the entry into force of the United Nations convention on the rights of persons with disabilities (UN CRPD) in May 2008. This convention requires states to move away from an approach that caters for people with disabilities in separate centres towards an inclusive approach. This means that the UN CRPD insists on a Rights Based approach rather than a charity based approach. These rights among others include the right to Employment in the open Labour market alongside non disabled persons. Persons with an intellectual disability have been for a long time been sidelined from mainstream employment compared to their physically disabled counterparts. Yet there has been proof that they are capable to learn and be trained to acquire real jobs. These persons are often not well placed to benefit from this changed emphasis, on inclusion emphasised by the UN CRPD.

The Zambian government having ratified all the relevant international instruments concerning the rights of persons with a disability it is expected that by now it would have domesticated these instruments. However this is not the case. This has left persons with an intellectual disability at a disadvantage of securing a place in mainstream employment and benefiting from the changed emphasis on inclusion by the UN CRPD. This paper has endeavoured to recommend to the Zambian legislature and the concerned stake holders on the way forward to facilitate the right to employment and employability of persons with an intellectual disability. The international community is making headway to achieving the rights based approach, Zambia should join.

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The Persons with Disabilities Act No. 33 of 1996

The Technical Education, Vocational and Entrepreneurship Training Act. No. 13 of 1998

LIST OF ABBREVIATIONS

CED	-	Community Economic Development
CRPD	-	United Nations Convention on Rights of Persons with Disabilities
DPO	-	Disabled Persons' Organisation
DSA	-	United Kingdom Downs' Syndrome Association
FAIDD	-	Finish Association on Intellectual and Development Disabilities
ILO	-	International Labour Organisation
NGOs	-	Non-governmental Organisation
SE	-	Supported Employment
TEVET	-	Technical and Vocational Education Training
UK	-	United Kingdom
UN	-	United Nations
UN CRPD	-	UN Convention on the Rights of Persons with Disabilities
ZACALD	-	Zambia Association of Children and Adults with Learning Disabilities
ZAEPD	-	Zambia Association for Employment of Persons with Disabilities
ZAPD	-	Zambia Agency for Persons with Disabilities

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CHAPTER ONE

INTRODUCTORY CHAPTER

1.0 Introduction

It has been observed the world over that persons with an intellectual disability have been sidelined with regards to their right to employment compared to their physically challenged counterparts. Therefore, there is a great need to shift from a social welfare, medical, or charity approach to a human rights approach as required by the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). People with intellectual disabilities are entitled to benefit from the provisions of the CRPD as people with other kinds of disabilities. Yet, they are frequently not well placed to gain from this changed emphasis on inclusion in mainstream employment.

The International Labour Organisation has also had a long involvement in promoting decent work for persons with disabilities based on the principle of equal opportunity, equal treatment, and mainstreaming and community involvement. The principle of non-discrimination is increasingly emphasised as disability issues have come to be seen as human rights issues. The key ILO instruments relating to the right to decent work for persons with disabilities are the ILO Convention No. 159 on Vocational Rehabilitation and employment (Disabled Persons) and its accompanying Recommendation No. 168 and the ILO Convention No. 111 on Discrimination (Employment and Occupation).¹ The UN CRPD which makes a “paradigm shift” in attitudes and approaches to persons with disabilities is the key instrument in enhancing the rights of persons with disabilities.

The status of these instruments is that the Zambian government has already ratified them as by 30th January 2010. Therefore, the time is ripe for the Zambian government to address the question of how employment opportunities can be effectively opened up for persons with intellectual disabilities.

¹ ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and Recommendation (No. 169); United Nations Convention on the Rights of persons with Disabilities, international labour office, Geneva: ILO 2008. Page 3 and 13

1.1 What is an Intellectual Disability?

Intellectual disability is characterised by significant limitations both in intellectual functioning and in adaptive behaviours as expressed in conceptual, social and practical adaptive skills, this disability originates before the Age of 18.² There has been a change in the way people with an intellectual disability have been named and categorised. In previous decades, examples of the terms that were formerly used such as idiot, imbecile, feeble-minded, mentally subnormal, moron, mentally deficient and retard. These have been now seen to be highly offensive, demeaning and stigmatizing; although at the time of their use they were acceptable terms in scientific literature. Nowadays terms such as person with a learning disability, learning difficult or development difficulty are used as well as persons with an intellectual disability.³

1.1.1 Characterization

“Intellectual disability is commonly identified through standardized intelligent tests, tested intelligence tests (IQ) of 70 being the usual upper borderline for those needing special care and training. It is classified according to categories that take into account an individual’s physical and social development. These categories correspond roughly to IQ scores. Those who have scores in the upper range of intellectual disability, roughly 53 to 70, comprise the majority of intellectually disabled persons; they are able to learn academic and prevocational skills with some special training. Those in the moderate range, roughly 36 to 52, are able to talk and care for their own basic needs, to learn functional academic skills, and to undertake semiskilled work under sheltered conditions. Those in the severe range, about 21 to 35, show slow motor development, limited communication skills, and possible physical handicaps but have the ability to talk and care for their basic needs, as well as to contribute to their own maintenance with supervision in work and living situations. Finally, those in the profound range, comprising the smallest number of intellectually disabled, demonstrate minimal responsiveness, secondary physical handicaps, poor motor development and communication skills, and the ability to perform only highly structured work activities. Institutionalization in this case is almost inevitable. Educators have coordinated IQ scores with potential learning capabilities: educable, 50–75; trainable, 25–50; and custodial, 0–25.”⁴

Intelligence quotient tests are used merely to detect the presence of the disability. But in terms of employment and other areas it’s preferred nowadays that the concept of levels of intensities of support required by a person to function satisfactorily in the community are used. This way it is more accommodative, rather than addressing a person’s particular cognitive impairment, this approach assumes that it may be more effective to make an accommodation to the person’s environment by the provision of a support that lessens the

² R. L. Schalock, *et al*, Intellectual disability: Definition, classifications and systems of support. Washington, DC: AAIDD. 2010. Page 289

³ T. Parmenter, Promoting training and employment opportunities for people with intellectual disabilities: international experience. ILO, 2010. Page 4

⁴ <http://www.britannia.com/checked/topic/3754000/intellectual-disability>. Accessed 11/02/2011

impact of the impairment. These supports are linked to difficulties faced by a person with intellectual impairment.⁵

1.1.2 Causes

“Moderate to severe intellectual disability can be caused by a number of mishaps that may occur before, during, or after birth, including: genetic disorders, such as Down Syndrome (leading to cretinism, for example); infectious diseases, such as meningitis; metabolic disorders; physical malformations; poisoning from radiation, lead, or other toxic agents; injuries to the head; and malnutrition. Milder cases of progressive intellectual disability can sometimes be traced to economic and environmental deprivation early in childhood—conditions that are associated with poverty or famine.”⁶

1.2 General Background

In recent years, people with intellectual disabilities have proved that they can be trained, learn and be valued employees, as long as they receive appropriate training and work in jobs that are manageable according to their skill and interest. With the support required, these opportunities have greatly contributed to their quality of life.⁷ Yet, in many countries like Zambia their employment is insignificant. Inclusion of persons with intellectual disabilities into mainstream society is needed to provide real jobs in open employment. This can be achieved when the necessary supports are in place and attitude change takes place within the community which would acknowledge the rights of people with disabilities to make choices including having independent relationships and marrying.⁸

The main obstacle for people with intellectual disabilities is the negative attitudes of the community, family and potential employers. That is, the view that any imperfection in intellect can almost be seen as sub-human. This stems from the high value placed upon intellect in all societies.⁹ Therefore, the solution to breaking these obstacles is through sensitisation of society by the various stake holders involved and through effective legislation that would enhance their right to employments.

⁵T Parmenter, Promoting training and employment opportunities. Page 5-6

⁶ <http://www.britannia.com/checked/topic/3754000/intellectual-disability>. Accessed 11/02/2011

⁷ M. W Gold, Stimulus factors in skill training of the retarded on a complex assembly task: Acquisition transfer of retention. In American Journal on mental deficiency. 1972. Vol.76. Page 517-520.

⁸ M.W Gold, Stimulus factors in skills training of the retarded on a complex assembly task.

⁹ T. Parmenter, People with Intellectual Disabilities-opening pathways to Training and Employment in the African Region. Lusaka, Zambia. 9-11 March 2010

1.3 Historical Background (The Zambian Experience)

A needs assessment of the current situation of persons with a disability conducted in 2002-2003 by the Zambia Federation of the disabled (ZAFOD) found that there is little awareness of the rights, needs and aspirations of persons with disabilities generally, who are still victims of stigma. This statement also applies to people with intellectual disabilities. According to a study carried out in 1987, this group makes up approximately 3.6 percent of the Zambian population.¹⁰ Little has been done to foster the rights of persons with an intellectual disability.

Stereotypes in society feel that these persons cannot work in mainstream of employment because their state of mind poses a danger to society. They assume that these persons are capable of losing their mind anytime and becoming violent. On the other hand parents with intellectually disabled children continue to keep such children under lock and chain for fear of stigmatisation by society.¹¹ This stigmatisation stems from the myth that when one has a child with an intellectual disability it means that there is a curse in that family.

However, the Zambian Association for Employment of persons with Disabilities (ZAEPD) in association with the Finish Association of Intellectual Developmental disabilities (FAIDD) did embark on an employment project for intellectually disabled persons and managed to place about 250 graduates working in various companies. However this project like all projects was for a limited time period.

Despite having dynamic groups of DPO's that are concerned with the welfare of intellectually disabled persons, more has to be done in terms of sensitisation and having legislation that is effective in enhancing the employment of persons with an intellectual disability.

1.4 Statement of the Problem

In Zambia people with intellectual disabilities are frequently excluded from employment opportunities by widespread stereotypes, mistaken assumptions and negative attitudes

¹⁰ See the speech delivered by Honourable Michael Kaingu Minister for Community Development and social services, Zambia 10th March, 2010. During the official opening of a workshop on People with Intellectual Disabilities-Opening pathways to training and employment in African region held in Lusaka – Zambia. pp.3 of the ILO report of this workshop

¹¹ See Appendix I

that focus on their disabilities rather than their abilities.¹² Therefore, there is need to embark on sensitisation and introduce effective legislation to redress the inequalities faced by people with intellectual disabilities regarding their employment opportunities. It seems easier for society to embrace their physically disabled counterparts, and this has led to them being easily included in the mainstream of employment. Intellectually disabled persons on the other hand have been sidelined because of the various misconceptions people have about them. There must be a deliberate effort to address these misconceptions and recognise that these persons can work in real jobs with appropriate support as evidenced by the research done by Dr. Marc Gold. Through this research Dr. Gold demonstrated that intellectually disabled persons were able to reach high standards of performs without error. He did this through a training technique called “Try another way”. The underlying psychology was that workers were being taught to learn how to learn with basic decision-making skills – it was the experience of learning that counted rather than the tasks which were not relevant.¹³

1.5 Rationale and Justification (Reasons for the Study)

“We also know what our needs are and we have feelings like anybody else”.¹⁴

The rationale of this study is to suggest ways in which the legislature with the participation of the various stake holders in Zambia can do in order to model a law that will facilitate the achievement of the right to employment for persons with an intellectual disability. With this human based approach the country will move at the same pace with the international community on the fundamental shift that has taken place at international policy level with the adoption and entry into force of the UN CRPD. This approach signals a move away from practices that segregate people with an intellectual disability to an approach that seeks to promote their inclusion in the employment sector of society as a respect for their human rights.

¹² ILO/Irish Aid, Lusaka Declaration: people with Intellectual disabilities: Achieving full participation in society”

¹³ M.W Gold, Vocational training: In J.Wortis (Ed) Mental retardation and developmental disabilities. An annual review, New York: Brunner/Mazel: vol.7, 1975. Page 224-264.

¹⁴ These are the words of Mr. Quincy Mwiya an intellectually disabled person during the ILO/Irish Aid sponsored workshop on people with intellectual disabilities: opening pathways to training and employment in the African region held in Lusaka- Zambia 9-11 march 2010.

The law is an instrument of social justice and engineering¹⁵ therefore it should be able to reflect the needs of society at a given time, the need of the society of intellectually disabled people in this regard is to facilitate their employment in the mainstream of the employment sector.

People with intellectual disabilities are frequently excluded from employment opportunities by wide spread stereotypes, mistaken assumptions and negative attitudes that focus on their disabilities rather than their abilities. These are the major reasons that have prompted this research.

1.6 Significance of the Study

The study is significant in that there is need to move away from a social, medical approach to a right based approach now that the government has ratified the UN CRPD. This human rights based approach is important to improve the quality of life for people with intellectual disabilities through their employment in the mainstream of the employment sector.

the appropriate strategies to achieve the employment of persons with an intellectual disability is to be expressed in national policies and law to be adopted by the government focusing on promoting employment opportunities with and explicit focus on persons with an intellectual disability. There should be emphasis placed on promoting access to mainstream employment.

All this can only be possible through effective legislation. However, it is important to note that good policies and legislation alone will not achieve the employment of the intellectually disabled persons. The Zambian government through the Ministry of Community Development and Social Welfare and the concerned DPO's should embark on a mass sensitisation program to inform society that these persons are capable of working. Effective legislation together with a well informed society will enhance the employment of intellectually disabled people.

¹⁵ A Chinhengo, Essential Jurisprudence, Cavendish Publishing Limited, Wharton Street, London. 2000. Page 112.

It has been observed that governments that have policies and laws which put in place mechanisms for the coordination of disability services have shown better achievement in the cause of disability issues with the help of an enabling legislation and active DPOs.

Thus, this study is aimed at suggesting ways in which the Zambian government and the concerned stake holders through mass sensitisation and effective legislation can achieve the employment of intellectually disabled persons.

1.7 Methodology

The methodology in this research paper included the following components:

Interviews were done with selected parents of children with an intellectual disability and a representative of the Zambia Association on Employment of persons with Disabilities, (ZAEPD). A survey questionnaire was designed and randomly given to members of the public to ascertain the level of stereotypes and at the same time it was aimed at examining what society thinks about the employability and employment of intellectually disabled people.

The international instruments and conventions that are relevant to the rights and employment of disabled persons were critically analysed in order to identify the significant issues that these instruments expect to be incorporated into the national laws of governments that have ratified these instruments.

The various pieces of legislation concerning the rights and the employment of disabled persons were critically analysed to ascertain whether or not they are effective in enhancing the employment of intellectually disabled people to the expectations of the international instruments that the Zambian government has ratified. This analysis was very important in that it helped to identify the possible areas of improvement and amendment in terms of legislation.

The scrutiny of the various employment models available on the international scene was significant to this paper in that it facilitated to identify an employment that is suitable for Zambia taking into consideration that the country is still developing economically, socially and politically.

The selected country experiences on how these employment models have worked was vital in helping ascertain what the government can copy and learn from these experiences.

The methodology is based on legal research.

1.8 Research Questions

- (a) What is expected to be included in the National Legislation of State parties to the applicable international instruments after ratification?
- (b) Is the Zambian law effective in addressing the issue of employment amongst persons with an intellectual disability?
- (c) What can the Zambian government learn from other country experiences in terms of workable employment models, policies and legislation to enhance the employment of persons with an intellectual disability?
- (d) What changes can be made to the existing laws and policies and what can the various stake holders contribute to facilitate this change in law and policy?

1.9 Preliminary Conclusion

The study was conducted in Lusaka one of the nine provinces of Zambia. The persons interviewed were strategically selected purposively by the researcher. While not representative of the population as a whole, the study provides an insight into the employment situation of persons with intellectual disabilities in Zambia. Lusaka being the capital city centre for policy formulation and location of the legislative body makes the findings valuable to Zambia as a whole. Therefore the sample was purposive and not representative of the Zambian population with intellectual disabilities.

Chapter two highlights expectations from States parties to the international instruments as to what significant issues are to be incorporated in their national law in order to enhance the employment of persons with an intellectual disability. The expectations also highlight what the various stake holders involved, should do in order to facilitate this changed emphasis of a human rights approach.

CHAPTER TWO

ISSUES TO BE REFLECTED AND INCORPORATED IN THE NATIONAL LEGISLATION OF COUNTRIES THAT HAVE RATIFIED INTERNATIONAL INSTRUMENTS CONCERNING THE RIGHTS AND EMPLOYMENT OF DISABLED PERSONS

2.0 Introduction

In this chapter the international instruments dealing with the rights and employment of disabled persons are critically analysed with a view of establishing the significant issues these instruments expect to be incorporated in the national legislation of governments after ratification.

The ILO convention No. 159 and ILO Recommendation No. 168, ILO Convention No. 111 and the UN CRPD are the key international instruments that are relevant to the employment and rights of disabled persons. For the purposes of this research paper, only the above mentioned conventions were analysed.

These instruments play a major role among others in fostering the right to employment for disabled persons by forming the legal basis for enactment of a strong Legislative base for individual countries that have ratified these international instruments. The above mentioned conventions will be used to provide a platform on which the Zambian legislature can model and modify its existing laws to facilitate the employment of disabled people and particularly intellectually disabled persons in the open labour market.

2.1 Issues Expected to be Incorporated in the National Legislation of State Parties to these International Instruments

2.1.1 The ILO Conventions

The ILO is an organisation that has a mandate for drawing up and generally overseeing International Labour Standards. The ILO aims to bring together representatives of governments, employers and workers to bring about workable policies and programmes

that enhance the rights of workers. When dealing with disability policies and programmes however, it values the participation and consultation of the disabled persons themselves.¹⁶

“Decent work is ILO’s primary goal for everyone, including people with disabilities. When we promote the rights and dignity of people with disabilities, we are empowering individuals, strengthening economics and enriching societies at large.”¹⁷

The ILO has had a long involvement in promoting decent work for persons with disabilities based on the principle of equal opportunity, equal treatment, mainstreaming and community involvement. The principle of non discrimination is increasingly emphasized as disability issues have come to be seen as human rights issues.¹⁸

2.1.2 ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), 1983

Zambia ratified this convention on 5th January 1989. According to Article 6 of this convention, it is expected that each member through laws or regulations or any method it deems fit which is consistent with the prevailing national conditions and practice shall take all the necessary steps to give effect to formulation, implementation and periodic review of its national policy on vocational rehabilitation and employment of disabled persons.¹⁹

Once the policies are formulated they should aim at ensuring that there are measures put in place for all the categories of disabled persons to access appropriate vocational rehabilitation and promoting their employment opportunities in mainstream employment.²⁰ Article 6 takes into consideration that the group of disabled persons is not homogenous. This means that there should be deliberate efforts on the part of governments to have a law or policy aimed at enhancing the employment of a particular category of disabled persons taking into account the specific characteristics of that disability. This will not be regarded to be discriminatory. For example this paper is concerned with having a law that will enhance the right to employment for persons with

¹⁶ [www.ilo.org / disability/role of ILO](http://www.ilo.org/disability/role%20of%20ILO) (accessed 17/02/2011)

¹⁷ ILO, ILO Vocational Rehabilitation and Employment (Disabled Persons): Convention (No. 159) and Recommendation (No. 168): United Nations Convention on the Rights of Persons with Disabilities/ International labour office – Geneva, 2008. Page V

¹⁸ ILO, ILO Vocational Rehabilitation and Employment (Disabled Persons): Convention (No. 159) and Recommendation (No. 168): United Nations Convention on the Rights of Persons with Disabilities/ International labour office – Geneva, 2008. Page V

¹⁹ Article 2 of ILO Convention No. 159

²⁰ Article 3 of ILO Convention No. 159

an intellectual disability this is because the characteristics of this disability contributes to their exclusion in the mainstream of the employment sector.

Government policies and the law are to reflect the principles of equal opportunities between disabled workers and workers generally. These policies and laws should be sensitive to the issues of equality of opportunities to be extended to both disabled men and women as well. These measures will not be viewed as discriminatory against other workers.²¹

The ratifying governments should take deliberate effort to co-operate and co-ordinate the representative organisations of employers, workers and representative organisations on the implementation of these policies²²

Article 3 of this convention also emphasises the issue of inclusion to be addressed in legislation other wise employment of disabled persons would be quite impossible to achieve. When Article 4 uses the words “equal opportunities” it means that legislation should adhere to non-discrimination. Non- discrimination and inclusion if well incorporated into National legislation concerning the rights and employment of disabled persons this definitely fosters the right to employment for intellectually disabled persons as well.

This convention uses the word ‘shall’ when it articulates the action to be taken by member states. This has a mandatory connotation to it meaning that it is not optional but mandatory for the governments that have ratified these instruments to take the action reflected in Articles 2, 3, 4 and 5 of this convention. One of the significant issues that is expected to reflect in the national legislation of a ratified government with regards to the right to employment of persons with intellectual disability is addressed in Article 3 which emphasises that there should be deliberate measures on part of the government to address the special needs of all categories of disabilities. This means therefore, that were a special need is required by a particular category of disability due to the characteristics of that disability then it is prudent for that state to take measures that are aimed at redressing that need. This may include for example policies and legislation that are effective in promoting the right to employment for persons with an intellectual disability.

²¹ Article 4 of ILO Convention No. 159

²² Article 5 of ILO Convention No. 159

Sections 7, 8 and 9 also have valuable expectations on the part of the member states. However it is important to note that:

“Convention No. 159 is a promotional convention in that it does not set forth specific provisions to be improved directly in national legislation, but is aimed at the adoption of provisions setting goals to be reached...” it leaves a fairly broad margin of appreciation to the ratifying states to make their choices on the methods of reaching the goals and the timetable of the proceedings.”²³

Convention No. 159 is based

“...on the view that vocational rehabilitation, freely chosen work and the opportunity to advance in employment are the essential prerequisites for the social integration of disabled persons.” Further, “... In pursuit of this objective, appropriate strategies and special programmes to enable disabled persons to find their place in society have to be developed.”²⁴

Regardless the significant issues in this convention are inclusion and non-discrimination.

2.1.3 ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No. 168.

Recommendation No. 168 provides guidance on inter alia specific direct and indirect measures to be taken to promote the rehabilitation and employment of persons with disabilities. This is the accompanying recommendation to Convention No. 159. It is in this protocol where it specifies what issues the state parties should incorporate in its legislation to achieve the right to employment for disabled persons.

The notable issue is in Part II which deals with vocational rehabilitation and employment opportunities; it highlights an important aspect eloquently in Article 7. This Article emphasises the fact that persons with disabilities should enjoy equality of opportunity and treatment in access to employment and that disabled persons should be able to make their own choices and choose the type of jobs they find suitable for themselves.

The freedom of choice on the type of job a disabled person intends to be engaged in is an important issue for persons with an intellectual disability this is because this determines the type of employment model and training they should be subjected to and this in turn reflects on their productivity which is a huge concern on the part of potential employers.

²³ ILO. Vocational Rehabilitation and Employment Disabled Persons. General survey. Geneva . 1998, Para 16, Page 5

²⁴ ILO. Vocational Rehabilitation....1998, Para 16, Page 5

2.1.4 ILO Convention Discrimination (Employment and Occupation) Conventions (No. 111), 1958.

Zambia ratified this convention on 23rd October 1979. This convention has its expectations laid out in Article 2 and 3. These are as follows:

Member states to the convention declare when they ratify this instrument that they would pursue national policy that is designed to promote equality of opportunity and treatment in respect of employment and occupation with the view of eliminating any form of discrimination using appropriate measures that are consistent with national practice and conditions.²⁵ This article emphasises non-discrimination this is an important aspect to be considered in legislation when it comes to fostering the right to employment for persons with an intellectual disability.

Other expectations are that the State party will seek co-operation of workers' and employers' organisations, and other bodies that are concerned with disability issues in the quest to ensure that employment law is non-discriminatory. That it will enact legislation and promote educational programs that lead to employment opportunities that are in line with the convention. The major expectation in this instrument is that government will repeal provisions in statute that do not foster non-discrimination including changes in administrative actions. Another expectation is that all measures on vocational training, guidance and placement activities will be under the direction of a national authority.²⁶

This convention brings out non-discrimination as the main issue, which is an important element of human rights law and particularly in the right to employment for intellectually disabled people. Although this convention is an old convention it comes in handy to complement the UN CRPD in terms of having a non-discriminatory law that is aimed at fostering a human rights approach and the changed emphasis in the CRPD.

²⁵ Article 2 of convention No. 111

²⁶ Article 3 Of Convention No. 111

2.2 United Nations Convention on the Rights of Persons with Disabilities (UN CRPD)

The Zambian government ratified the UN CRPD in January 2010. The UN CRPD articulates the change in focus in ILO Convention Nos. 111 and 159 by providing a universal recognition of the dignity of disabled persons. It is intended as a human rights instrument with an explicit, social development dimension by reaffirming that disabled persons should enjoy fundamental rights and freedoms.

Article 1 of the convention on the rights of persons with disabilities states that the purpose of this convention is:

“To promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

The UN CRPD makes a “paradigm shift” in attitudes and approaches to persons with disabilities. It changes the point of view from viewing persons with disabilities as objects of charity, medical treatment and social protection towards viewing them as people 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, including the full inclusion of persons with disabilities in education, vocational training and employment particularly.²⁷

The UN CRPD is modelled as a human rights instrument with an emphasis on social development. It emphasises that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It has the following expectations on States parties, that after ratification that government would incorporate in its legislation these issues in order to foster these rights. This will in turn foster the right to employment for intellectually disabled people.

According to Article 4 of the convention a state that has ratified this convention agrees that it will promote and ensure that all human rights and fundamental freedoms of

²⁷ <http://www.un.org/disabilities>, Accessed 12/01/2011

persons with disabilities are realised without discrimination whatsoever. The specific issues that the governments should incorporate into national legislation are as follows:

“Adopt legislation and administrative measures to promote the human rights of disabled persons, adopt legislation and other measures to abolish discrimination, protect and promote the rights of persons with disabilities in all policies and programmes, stop practices that breach the rights of persons with disabilities, ensure that the public and private sector respects the rights of persons with disabilities, undertake research and development of accessible goods, services and technology for persons with disabilities and encourage others to undertake such research, provide accessible information about assistive technology to persons with a disability, promote training and rights of the convention to professionals and staff who work with persons with disabilities and consult with and involve persons with disabilities in developing and implementing legislation and policies and decision making process that concern them.”²⁸

The rights emphasised by the UN CRPD carry weight if a country has domesticated third generation rights. For example it is almost impossible for a government to protect the right to employment for intellectually disabled people if this right is not protected in the first place by the constitution. Thus, each state must take measures to realise economic, social and cultural rights. Progressive realisation is a stance taken by most African Countries means that a state will take time to realise many of these rights fully and that it undertakes that it would use the greatest amount of available resources to do so.²⁹

Under this convention the state will assume three distinct duties. The obligation to respect, protect and fulfil the rights of disabled persons. These obligations are to the freedom from torture, the right to health, freedom of expression, right to education and the right to work. The obligation to respect means State parties should not at any cost interfere with the enjoyment of these rights by persons with disabilities. The obligation to protect means that the State should avoid the violations of these rights by third parties.

In terms of the right to employment for persons with an intellectual disability, measures to protect include requiring private employers to provide conducive and just working environments. The obligation to fulfil means that states should take the appropriate legislative, administrative, budgetary, judicial and other actions towards the full realisation of these rights.³⁰

Article 27 of the CRPD focuses on work and employment. It obliges the state parties to prohibit discrimination on the basis of disability with regards to all matters concerning all

²⁸ UN, From Exclusion to Equality: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, United Nations ,Geneva ,No. 14-2007. page 19

²⁹ UN, From Exclusion to Equality: Handbook for Parliamentarians, page 19

³⁰ UN, From Exclusion to Equality: Handbook for Parliamentarians, page 20

forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe healthy working conditions. This prohibition must be incorporated into national legislation in order to ensure the full realisation of the right to employment for disabled people and this should definitely have a trickle down effect to all categories or groups of disabled people.

In Article 27 the UN CRPD emphasises the issue of inclusion in the mainstream of the employment sector. Mainstream of employment sector means working alongside other people without a disability. This Article therefore, implies that there should be no law that segregates employment opportunities based on disabilities in the open labour market thus, persons with an intellectual disability should have the right to work in mainstream employment. A legislative framework that only prohibits discrimination and does not provide for inclusion is not worth much.

Article 29 of the CRPD is significant in that it emphasises the participation of disabled persons themselves and their organisations. This is particularly important when it comes to sensitisation and dealing with misconceptions and stereotypes who think that persons with an intellectual disability can not work.

The right to employment for disabled persons is a human rights issue which must be dealt with in a holistic manner therefore a state can do this if it simply guarantees these rights. Despite the fact that the issue is holistic requiring the participation of various stake holders, an enabling legislation is the starting point for any human rights issue.

2.3 The Courts and the Role of the Judiciary under the UN CRPD

Depending on the constitutional structure of each state party, ratification of the UN CRPD will either follow a Monist or Dualist approach. Zambia follows dualist approaches were after ratification there is need for incorporation into domestic legislation. Regardless the approach a country follows signing or ratification of the convention alone creates a strong interpretative preference in favour of the convention.³¹ Most of the legal systems Zambia inclusive use a formal hierarchical judicial process to determine rights and duties and establish legal principles. Therefore, the Doctrine of Precedence comes into play. The Doctrine of precedence helps to ensure that the

³¹UN, From Exclusion to Equality: Handbook for Parliamentarians, page 107

development of law and principles is consistent over time. It also has an advantage of bringing “test cases” before the higher courts, composed of senior judicial officers’. Cases at this level also normally attract high quality legal submissions and representation of the parties. This can facilitate the systematic policy changes and therefore, to an improvement in the realisation of rights for a large group of people.³²

This is a very important expectation from State parties and should not be taken lightly. One year after the ratification of the UN CRPD a check at the courts registry shows the Zambian courts have not been tested yet.³³

2.4 Significant Issues arising from the Conventions

These are the issues steaming from the International Instruments that are expected to be incorporated in the national legislation of governments that have ratified them in order to enhance the right to employment of people disabilities.

2.4.1 Non-discrimination and equality

The principle of non-discrimination is the cornerstone of human rights law and the principle is included in all other human rights treaties. The UN CRPD complements the other international human rights treaties. It does not recognise new rights for persons with disabilities but it simply clarifies what State parties need to include in legislation to ensure the achievement of equal enjoyment of these rights by persons with disabilities. Discrimination on the basis of disability in the UN CRPD is defined as,

“ any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise , on equal basis with others, of all human rights and fundamental freedoms in the political ,economic , social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”³⁴

This is strongly highlighted both in Convention No. 159 and Convention No.111 as well. Non-discrimination is addressed rather comprehensively in the selected human rights instruments, which gives a strong impetus to the development of National Legislation in

³² UN, From Exclusion to Equality: Handbook for Parliamentarians, page 108

³³ See the case of *Olmstead v LC* (1999) 527 US 581. This is an American case that created precedent in terms of non-discrimination, although the case was on discrimination in mainstream education it definitely has the same effect in mainstream employment. It was held in this case that isolation of individuals with disabilities was a serious and pervasive form of discrimination. This case is relevant to illustrate the fact that the courts can be used to create precedent where the law is passive.

³⁴ Article 2 of the UN CRPD

this regard an example is the UNDHR. Convention No. 159 in Article 4 uses the term ‘equal opportunities’ which can be taken to mean non-discrimination. The UN CRPD in article 5 emphasises on non-discrimination. Non-discrimination in the areas of employment is addressed in Article 27 of the CRPD. Convention No.111 is entirely based on discrimination in employment and occupation. In Article 1 it gives a comprehensive definition of what discrimination is. Article 27(1) (I) of the CRPD also emphasises on the affirmative action that encourages employers to recruit persons with disabilities.

A good example of how discrimination can be dealt with is Article 30 of Thailand’s 1997 constitution which makes specific mention of the right of disabled persons to be protected against discrimination and contains provisions concerning access, welfare and education for people with disabilities.³⁵

2.4.2 Inclusion

This is reflected in the background of all instruments dealing with human rights law as an important part of the functions of society. Inclusion means that there should be no segregation between people with disabilities and those without a disability. When disability law provides for inclusion in the mainstream of employment it means that even persons with an intellectual disability will definitely benefit from such a provision in the quest to achieve their right to employment in the mainstream of the employment sector.

Convention No. 159 in Article 3 addresses inclusion in the field of employment in the Open Labour Market whilst Article 27 of the UN CRPD addresses inclusion in the same regard.

When dealing with inclusion, the role of the legislature in employment law is to facilitate for persons with disabilities to find an opportunity to secure a place in the mainstream of employment. For inclusion to be acceptable by potential employees awareness raising is important and this is the point at which DPO’s and other stake holders come into play.³⁶ Having persons with an intellectual disability in the workplace contributes to attitude change of stereotypes.

³⁵ ILO (2006), Page 17

³⁶ Article 8 of the UN CRPD

The legislative framework of a country should be modelled in such a way that inclusion is well addressed in disability issues otherwise a law adequately addressing discrimination and not inclusion is not effective at all. The two issues have to be addressed simultaneously, because they compliment one another in terms of implementation of the rights of disabled people.³⁷

2.4.3 Accessibility

Accessibility means that there should provide for measures that make it possible for persons with disabilities to access buildings, roads, transportation and other facilities such as schools and workplaces. This means that the law should provide for the minimum standards and guidelines for the accessibility of facilities and services open or provided to the public.³⁸

In the case of *PGA Tour v Martin*³⁹ the courts held that the PGA golf tournament, conducted on public grounds should modify its rules to accommodate a qualified entrant who could not walk great distances and should provide for cart transport rather than requiring that the person walk the course as other contestants. This case dealt with the issue of having measures in place to facilitate the access of disabled persons to public facilities. It has been used here to illustrate the point that employers alike have to facilitate access to work for persons with disabilities in general and in particular persons with an intellectual disability. The lack of accessibility to the workplace is one of the biggest hindrances to employment of disabled persons. Convention No. 159 does not mention the word “accessibility” but by implication it is emphasised through inclusion and equal opportunity. The UN CRPD in Article 9 and 27 directly addresses accessibility and when Article 9 is read together with Article 5 on discrimination, it emphasises the need of reasonable accommodation which has a link to accessibility.

2.4.4 Participation of DPO's and Persons with Disabilities

The participation of disabled persons and their organisations is critical to developing disability laws and policy making matters. Convention No. 159 in Article 5, places an

³⁷ See information on UN CRPD at <http://www.un.org/disabilities/>. Accessed 27/02/2011

³⁸ Article 9(2) (a)

³⁹ [2001] 204 F 3d 994

obligation on the ratifying governments to consult with employers and workers organisations involved to be involved in the planning and implementation of national policy. This also includes consultations on modelling a law that is disability sensitive. The UN CRPD also values the participation of DPO's in policy and law making.

2.5 Public Opinion on Discrimination and Inclusion in Lusaka

Despite non-discrimination being an important aspect that State parties should consider to incorporate in National Legislation, Random interviews with a selected group of members of the public shows that people generally think that in practice non-discrimination against intellectually disabled persons is not attainable⁴⁰.

From the analysis of the opinions expressed in the questionnaires it was clear that people think that persons with intellectual disabilities have very low rate of productivity. They attribute this to the nature of the disability itself. The opinions indicated that people think that persons with an intellectual disability are naturally unable to learn and at the most even work thus mainstreaming or inclusion is not practically possible.

In terms of inclusion in mainstream employment most people felt that employers are most likely not to be enthusiastic to take them on. The general feeling was that employers' interest in the world today is to make profit and this profit can only come with increased productivity and productivity of persons with an intellectual disability is questionable anyway. Hence employers will prefer to take on persons without a disability or at the most one with a physical disability because their interest is to achieve high levels of productivity. Furthermore, with high levels of unemployment amongst non disabled persons in Zambia it is likely that employers will indirectly discriminate when considering people for employment.

On the issue of inclusion there was some positivity in that people felt that this is possible only in so far as there is much sensitisation that it is safe to work with such persons without them being a danger to other employees. This comes in the light of the 'notion' people with intellectual disabilities are capable of losing their mind and hence being a danger to others and equipment in the work place. They feel that as long as people's

⁴⁰ See Appendix.I

perceptions are not dealt with no law can help in terms of non-discrimination and inclusion.

2.6 Preliminary Conclusion

The Zambian government has a lot to do in terms of taking action on the requirements of these International Conventions. The most important expectation on governments is to take all the necessary measures to incorporate into national legislation laws that are inclusive, accommodating and non-discriminating in disability rights, such as the right to employment of persons with disabilities which is the major concern of this paper. Another important obligation is to modify or abolish laws, regulations, customs and practices that constitute discrimination against persons with disabilities.⁴¹ A Rights based approach means in real and practical that the approach should move towards one that is based on entitlements on the part of the individuals and groups-advocated to the state related Actors. The key implication is that the rights at stake are not realised merely as part of the states discretion; rather, the state is obliged to effectively and expeditiously implement the rights concerned.⁴²

The UN CRPD also expects that ratifying governments will recall their commitment to the international covenant on economic, social and cultural rights, the convention on civil and political rights, the international convention on all forms of racial discrimination etc.⁴³

The next chapter analyses various legislation in Zambia dealing with the rights and freedoms of persons, employment and those dealing with issues of persons with disabilities. This is in order to assess whether the law in this regard conforms to expectations of the International Conventions talked about in this chapter in enhancing the right to employment of persons with intellectual disabilities in the mainstream of

⁴¹ Article 4 (1)(b) of the UN CRPD

⁴²Prof. Vitit Muntarbhorn, professor, faculty of law, Chulalongkorn University, Bangkok. He is also UN special Rapporteur on the situation of human rights in Democratic Peoples Republic of Korea. He is a former UN special Rapporteur on the sale of children.

⁴³See the preamble of the UN CRPD paragraph (d)

CHAPTER THREE

THE EFFICACY OF THE ZAMBIAN LAWS IN ENHANCING THE EMPLOYMENT OF DISABLED PERSONS.

3.0 Introduction

This chapter critically analyses the various pieces of legislation that are concerned with enhancing the right to employment of persons with a disabilities. When the rights of disabled persons are well protected by law, it trickles down to the protection of these rights to all categories of disabilities. This means for example, that persons with an intellectual disability, whom are the major concern of this dissertation will benefit from this law if it is designed in such a way that it facilitates this changed emphasis on the rights of persons with disabilities.

The analysis is important in that it will facilitate the identification of areas to be modified in order for the law to be effective in addressing disability rights and particularly the right to employment. This will satisfy the expectations of ratified governments to the relevant international instruments

The legislation that is analysed in this paper are; 1) The Constitution⁴⁴, 2) The Employment Act⁴⁵, 3) The Persons with Disabilities Act⁴⁶ and 4) The Education Act⁴⁷

3.1 Analysis of the specific pieces of Legislation

3.1.2 The Constitution, Chapter 1 of the Laws of Zambia

Unlike the Westminster model the Constitution of Zambia is the supreme law of the land.⁴⁸ This means that any other law should be in conformity with it otherwise that law is null and void to the extent of its unconstitutionality.⁴⁹ This Article entails that the Constitution forms the foundation for all other Legislation below it. Therefore, subsidiary legislation draws its validity and strength from the constitution. This means then, that in

⁴⁴ Chapter 1 of the laws of Zambia

⁴⁵ Chapter 268 of the laws of Zambia

⁴⁶ Act No.33 of 1996

⁴⁷ Chapter 134 of the laws of Zambia

⁴⁸ Article 1(3) of the Constitution

⁴⁹ See the case of Christine Mulundika and 7 others V the people, SCZ Judgement No. 25 of 1995. In this case certain sections of the public order act were held to be null and void because they were inconsistent with the constitution.

Zambia there is a hierarchy of legislation as propounded by Hans's kelsen.⁵⁰ In his theory kelsen stated that law is a system of norms that are arranged in a dynamic hierarchy, with each norm deriving its validity from another norm which occupies a position higher up in the hierarchy. These norms range from the general, which are higher norms to the particular, which are lower norms.⁵¹ In this light there is doubt that the constitution should be the *genesis* of all law in Zambia. Thus, if the right to employment and employability of persons with an intellectual disability are to be protected and enhanced the Constitution has to facilitate for this.

Part III of the Constitution regulates fundamental rights and freedoms of the individual. In Article 11 particularly, there is an emphasis on equal enjoyment of fundamental rights and freedoms of an individual. The grounds that have been listed for equal enjoyment are namely, race, place of origin, political opinions, colour, creed, sex or marital status. The constitution does not list disability as a ground for equal enjoyment of these rights. This is not in line with international non-discrimination law, which insists that disability be included as a specific ground for non-discrimination.⁵² This exclusion poses a serious concern and the legislature should take quick action to add disability as a ground for equal enjoyment of the fundamental rights and freedoms. This exclusion is discriminatory to persons with disabilities. This is a serious lacuna in the law which the legislature must quickly consider an amendment as soon as possible and incorporate the requirements of the UN CRPD, since the government has ratified the relevant instruments advocating for non- discrimination against disabled persons. The legislature in Zambia needs to act in the interest of the society which it seeks to serve. It is not in the interest of good governance if the law does not change to reflect the needs of that society.

As if not enough Article 23 includes prohibition of discrimination under the Constitution. This Article is exhaustive but does not include disability once again. The inclusion of disability or other status would make the Constitution more coherent with international law on the issue of non- discrimination against disabled persons and hence provide for a foundation for subsidiary legislation. Part III rights are fundamental in nature and hence have a bearing in all aspects of life including employment; this exclusion is detrimental to

⁵⁰ A.Chihengo, Essential jurisprudence, Cavendish publishing Ltd, London, 2000. Page .39

⁵¹ A.Chihengo,Essential jurisprudence,2000 Page 40

⁵² Article 4 of convention No.159 and Article 5, 24 and 27 of the UN CRPD

achieving the employment of persons with a disability. Therefore, the Constitution has fallen short of protecting the rights of the disabled by maintaining this Article as it is, even after ratifying the relevant international instruments.

The Zambian Constitution does not guarantee economic, social and cultural rights which make it even more complicated as it centres on civil and political rights. The Zambian government has pledged progressive realisation on the basis of financial constraints as a reason for not guaranteeing economic, social and cultural rights. This paper is of the view that financial constraints as a reason for not incorporating third generation rights is an unrealistic claim and a mere *façade* on the part of the government. With the reported increase in the levels of corruption and plunder of national resources evident in Zambia,⁵³ Zambia is well placed in terms of financial resources to incorporate the third generation rights in the constitution. What is lacking really is the absence of the necessary political will and commitment on the part of the government.

Part IX of the constitution addresses the directive state principles of state policy and the duties of a citizen. This section attempts to address the third generation rights in Article 111 (g) which in its self is inadequate and further states in Article 111 that these directives are not justiciable. Article 112 Part (f) and (c) states that the state will provide social benefits and amenities as suitable to the needs of disabled persons and the right to employment of all citizens respectfully, however, this is very frustrating for disabled persons because the Directive principles of state policy are not justifiable⁵⁴, hence they carry the weight and functions of dead law.

Article 65 (1) (b) expressly disqualifies intellectually disabled persons from election to National Assembly and being a parliamentarian is one of the many forms of employment. According to this article persons that are under any law in Zambia, Adjudged or otherwise declared of unsound mind, are defined as not qualifying to be elected as a member of the National Assembly. This Article contradicts Article 29 of the UN CRPD, which guarantees the participation of persons with disabilities in political life. Thus, one can argue, that this has implications also on the spheres of education vocational training

⁵³ See the case of Fredrick T.J Chiluba V the People. From the facts of this case it is clear that the government has a lot of money. Which it is capable of putting such money into good use. Such as the realisation of third generation rights.

⁵⁴ Article 111 of the constitution, cap 1 of Zambia.

and employment of persons with disabilities.⁵⁵ The Constitution as observed from the selected Articles discussed above is hostile to enhancing the right to employment of disabled persons worse still the intellectually disabled.

The persons with disabilities themselves have not been silent on matters of their plight being addressed in the Constitution, during there submissions to the Willa Mung'omba Constitutional Review Commission (CRC) in Lusaka when ZAFOD and ZANFOD jointly made their submissions.⁵⁶ In his presentation ZAFOD co-ordinator Mr. Felix Simulunga told the Commission that in the struggle of achieving equal opportunities for persons with disabilities there is need for a Constitution that embraced affirmative action towards them. He also observed that a Constitution that was disability friendly was very cardinal to persons with disabilities. There was also demand that as a matter of affirmative action the president should ensure that persons with disabilities are also appointed to positions of authority in the republic.

3.1.3 The Employment Act, Chapter 268

This is the principle Act that deals with all matters that are incidental or related to employment in Zambia. This act does not address disability issues extensively.

However, there is willingness by the Legislature to give special attention to some groups of employees in this Act. This willingness is evident in the care given to pregnant employees as a group⁵⁷. Therefore, this willingness to give special attention to some groups of persons could be extended to disabled persons through a specific reference to the persons with disabilities Act persons with an intellectual disability may be given attention regarding their employability as well. One could well argue that employees with intellectual disabilities would need special protection as they have been sidelined in getting jobs in the mainstream of employment.

⁵⁵ See also part XIII of the constitution , where in Article 133(2)(f) the office of the member of house of chief is subject to vacancy in case the member is declared or becomes of unsound mind under any law in Zambia.

⁵⁶ Disability Herald Bi-Annual, June 2004 Issue No.006

⁵⁷ Section 15(A) of the Employment Act

In Section 26(A)⁵⁸ the legislature intends to offer protection against termination based on performance (or productivity), this Section may be well extended to protect intellectually disabled persons from termination based on productivity since productivity is an issue when it comes to persons with an intellectual disability especially.⁵⁹

The employment Act has not addressed the issue of termination of employment in the context of an employee with a disability. This is a serious *lacuna* in the law that has adverse consequences on the rights of persons with disabilities to employment especially the intellectually disabled. The intellectually disabled are more at a risk of losing their place in the work place because of the characteristic of the disability which have a bearing on work performance. This is not to say that intellectually disabled persons cannot perform but, the quality of performance is attached to the nature of the disability. Thus, the nature of work in relation to the effect of disability to work performance has to be evaluated case by case.⁶⁰

Section 36(2)⁶¹ gives other grounds for termination as sickness or accident on the report of registered medical practitioner only, when an employee is unable to fulfil a written contract of service. Thus, if an employee becomes disabled by sickness or accident but can still fulfil the duties laid down in the contract, there should be no ground for the termination of employment on the ground of disability, this the act should expressly state this in this particular section. This should also be the same in the case of previous and continued disability, in terms of interpretation.

This section has the potential of causing serious problems when dealing with intellectually disabled persons because this disability is medical in nature and can be proved by medical tests done by a medical practitioner, thus employers may use this as a justification for the termination of employment. Therefore such provisions are not desirable in the national legislation of a country like Zambia that has ratified the necessary international instrument that enhance the right to employment and employability of persons with disabilities and which emphasise that the special needs of

⁵⁸“An employer shall not terminate the service of an employee on grounds related to the conduct or performance of an employee without affording the employee an opportunity to be heard on the Charges laid down.”

⁵⁹ See Appendix 1

⁶⁰ J. Kumpuvori, (2008). Disability audit of Legislation relevant to education, vocational training and employment

⁶¹ Of the employment Act cap 268

different categories of disabilities should be addressed realising the fact that the group of disabled persons is not a homogenous one. This section should be repealed.

Part VI of the Employment Act talks about housing and welfare of employees. The important welfare here applicable to intellectual disability is medical attention⁶² although housing and water are critical as well. Section 43 plays a significant role in addressing the special needs of intellectually disabled persons. This Section echo's the spirit of Article 27 and Article 28 of the UN CRPD on work and employment and adequate standard of living and social protection respectively. However, the use of the word 'may' is not desirable because this gives the employer discretion as to whether or not to provide for medical care. Therefore the language of the Act should be drafted in such a way as to avoid the use of the word 'may', thus make it mandatory for employers to do like wise.⁶³

It is clear that the Act is not effective in addressing the plight of the disabled persons in terms of their right to employment, yet this is the principle Act dealing with employment issues and matters incidental to employment in Zambia. It is also clear that the Act is not in conformity with the international instruments on employment and the rights of persons with disabilities.

3.1.4 The Persons with Disabilities Act, 1996

From the preamble it is clear that this Act was meant to fill in the gap that all other legislation has left in addressing disability issues such as the rights of persons with disabilities. Thus main object of this Act is to establish the Zambia Agency for Persons with Disabilities and to address the issues concerning disabled persons.

⁶² Section 43 of Employment Act "(1) an employer may as agreed under a collective agreement registered under the industrial and labour relations Act ;

(a) a contract of employment; or

(b) the general conditions of service relating to that organisation or institution;

Provide an employee with medical attention and medicines and where necessary, transport to a medical institution during the illness of the employee."

⁶³ See the case of Dora Saliya V the AG, William Harrington (intervener) (2009) HP/0601. This case has been cited to illustrate that the use of the words such as "may" causes confusion when it comes to discretionary power conferred on an individual, thus should be avoided in the language of legislation.

Part VI of the Act prohibits Discrimination on grounds of disability. Section 19 provides a definition of Discrimination as follows:

19. (1) for the purposes of this part,

“Discrimination” means:-

- (a) Treating a person with a disability less favourably from a person without a disability;
- (b) Treating a person with a disability less favourably from another person with a disability;
- (c) Requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over; or
- (d) Not providing different services or conditions required for that disability.

This section does not address discrimination as required by international non-discrimination law and practice. International standards demand that discrimination should aim at ensuring maximum equality of persons with disabilities which should include all forms of discrimination and different types of direct and indirect discrimination.⁶⁴ Further the section should be able to address the issue of discrimination amongst disabled persons themselves but at the same time it should allow for the special needs of different categories of disabled persons to be addressed because this group of persons is not homogenous. This is important because the needs of different categories differ based on the complexities of each disability for example physically disabled persons are more likely to be employed than those intellectually disabled. Once again the law in this regard has not embraced the requirements reflected in the international instrument. Section 24 deals with Tax rebate, this provision is welcome in that it encourages the employment of disabled persons and intellectually disabled persons especially. However there is need to carryout an audit on the practical implementation of the section. For this section to be more effective there is need to cross reference it to the employment Act. This Act being the principle Act for persons with disabilities it leaves a lot to be desired in terms of enhancing the rights of persons with disabilities thus, it is not effective in this regard.

3.1.5 The Education Act

Although this paper is not concerned with the education and training of persons with an intellectual disability, it is impossible to address their right to employment if they are not

⁶⁴ Recommendations of the technical committee on the Review of the persons with disabilities Act, cap 65 of the laws of Zambia, p.6

well placed both in mainstream education and training. Therefore, this section will also address the inadequacy of the TEVET Act⁶⁵ in the training of disabled persons.

The education Act provides for special schools for persons with a disability but this is not so much in line with the principle of inclusion or reasonable accommodation in article 24 of the UN CRPD. The UN CRPD provides in Article 24(3) that one possible ground where special schools are justifiable is where there are requirements particular to a disability say for example using sign language. The Act should state that the special schools will apply only in extreme cases where inclusion is not possible. The UN CRPD also aims at full inclusions that result in maximisation of academic and social development which are cardinal to mainstreaming in employment.

Section 24 provides for the grounds of denying admission to a school, this section could do justice if it included disability as one such ground.⁶⁶ Section 32(b) is quite sensitive it allows the minister to make regulations for exclusion of pupils on medical grounds there should be a way of ensuring that this section should not be used for disabilities such as intellectual disabilities which can be medically proven.

For the TEVET Act it would make a significant difference if in section 6(1) which regulates the composition of the Authority would provide room to include representation of a DPO. This would be a good safe guard to ensure that disability rights are taken into consideration at all times. This would be in line with Article 4 (3) of the convention.

3.2 Preliminary Conclusion

From the analysis of the pieces of legislation above it is clear that the law as it stands in Zambia today is not anywhere close to being effective in enhancing the right to employment for persons with disabilities and this consequently affects persons with an intellectual disability. The government in consultation with DPO's has yet to seriously embark on a legislative process that will facilitate domestication and modification of these pieces of legislation to incorporate the expected issues in national law.

⁶⁵ Act No. 11 Of 2005

⁶⁶ See, Article 24(2) of the UN CRPD: "persons with disabilities are not excluded from the general education system on the basis of disability.....".

The next chapter gives an insight of the available employment models on the international scene and gives an analysis of how selected countries have managed to enhance the right to employment of intellectually disabled persons using certain employment models. The employment models enabled this paper to suggest an employment model or models suitable for Zambia and the country experiences helped to suggest what the Zambian government can learn from these countries in order to enhance the right to employment of intellectually disabled persons

CHAPTER FOUR

EMPLOYMENT MODELS AVAILABLE FOR PERSONS WITH AN INTELLECTUAL DISABILITY AND OTHER COUNTRY EXPERIENCES ON HOW THE MODELS HAVE WORKED IN THEIR JURISDICTIONS

4.0 Introduction

In this chapter, the aim is to analyse the various employment models designed for persons with an intellectual disability to ascertain what model is suitable for Zambia as a country. International experiences are important in that they provide a basis for a country that intends to find a lasting solution to a problem to copy the measures being taken by other countries to overcome that problem. In this case the problem being that of enhancing the employment and employability of persons with an intellectual disability in Zambia.

4.1 Employment Options (Models) on International Level

There are various models that have been developed to enable the participation of intellectually disabled persons in the open labour market. This came from the realisation that participation of persons with a disability in the open labour market is considerably lower than that of the general population. Disappointingly, the situation for those with an intellectual disability is even worse. Evidence indicates that irrespective of the culture or the economic circumstances of a country, the employment situation of those with intellectual disabilities are equally depressing. Just as they are denied education, they have been denied access to jobs. This depressing state of affairs has come about largely through ignorance and superstition.⁶⁷

4.1.1 Supported Employment (SE)

The SE programme is targeted at empowering individuals with mental health disorders to develop the socio-emotional capacity and vocational skill necessary for finding employment in the open labour market. In supported employment, the job must be in the community, real wages must be paid and the person with the disability must receive ongoing support.⁶⁸ The programme offers a range of strategies that facilitate economic empowerment and self sufficiency. It also helps to foster a change in attitude within the

⁶⁷ ILO/Irish Aid report, people with intellectual disabilities. Annex 2-7

⁶⁸ P. Wehman & V. Brooke, Competitive employment: Has it become "first choice" yet? Journal of policy studies, 14. 2003. Page 163-173.

corporate sector. It seeks to change the thinking of employers and society with each successful placement and to open up a range of opportunities for employment for people with mental health disorders.⁶⁹

SE developed in the early 1970s in the USA. This was because of the need to move away from sheltered workshops and day activity centres as the major employment facility for people with intellectual disabilities.⁷⁰ The normalisation principle⁷¹ was the key to deinstitutionalization movements which called for persons with a disability to live in normal community settings. This principle also led to a number of projects which led researchers to demonstrate the employability of persons with an intellectual disability.

Generally, there are four alternative 'supported employment pathways' these are specifically designed for persons with intellectual disabilities that need high supportive needs; the supported Jobs model; the enclave model, the mobile crew model and the bench work model.⁷²

4.1.1.1 Supported Job Model

This employment model involves a 'place and train' approach, rather than in practice where the model is 'train and then place'. In this approach a job is required from the very beginning of the service. This model requires the active involvement of job coaches to work with the potential employee to identify skills and interest. The employer might also be encouraged to make adaptations to a specific job in order to match it with the abilities and skills of the employee with an intellectual disability. Job coaches eventually become mentors to the persons with the disability and become part of the natural support for the person, within the work place.⁷³ Research shows that 'natural' supports are leading to greater sustainability of the job placement than external support. Nevertheless a combination of job coaching and natural supports may be needed, tailored to individual circumstances and needs.

⁶⁹ <http://www.changemakers.com/en-us/node/58425>. Accessed 21/02/2011.

⁷⁰ ILO/Irish Aid report, people with intellectual disabilities. Annex 2-8

⁷¹ The normalisation principle means making available to all people with disabilities patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life or society. (Nirje, 1982)

⁷² T. Parmentor, Promoting Training and Employment Opportunities. Page 9

⁷³ T. Parmentor; Promoting Training and Employment Opportunities. Page.9

The significance of this model seems to be in the opinion of this paper that the potential employee can choose his /her areas of interest without limitations as to the type of work the employee wants to do.

4.1.1.2 Enclave Model

This involves a group of persons with disabilities who are trained and supervised among workers who do not have a disability; usually in an industrial or commercial environment. This model is originally designed that workers be paid commensurate to the workers without disability, often adjusted on the relative productivity. This model does provide opportunities for interactions between the persons with a disability and regular workers in a company. There is ongoing support just like in the supported job model. This model is cost effective for the Tax payers as welfare and support costs are decreased substantially.⁷⁴

This in my opinion has an advantage over the supported job model in that if the government subsidises the salary they encourage employers to take on persons with intellectual disabilities. On the other hand it is important for the government to play this role because it shows governments commitment to disability issues.

4.1.1.3 Mobile Crew Model

This model is a combination of service and business. It may consist of a crew of say five people with disabilities working from a van rather than a building, performing service jobs in community settings. This model has a disadvantage of the employee's still remaining dependent upon the sheltered workshops for their wages and conditions. The advantage on the other hand is that this gives increased opportunities for community participation and interaction with people in the general community. The full time presence of the crew supervisor is generally required to monitor the crew's performance.⁷⁵

This model in the view of this paper serves as an awareness platform as well for people with intellectual disabilities; society is able to see that they are capable of working and being productive, hence useful persons in society.

⁷⁴ T. Parmentor; Promoting Training and Employment Opportunities. Page. 10

⁷⁵ T. Parmentor; Promoting Training and Employment Opportunities. Page. 10

4.1.1.4 Bench work Model

This model was developed in the early 1970s by the specialised training program at the University of Oregon US, as an alternative to day activity programs. This was to provide long term employment to people previously denied access to any vocational services. This model operates as a small single-purpose, not-for-profit commercial operation. This model requires a number of highly qualified staff skilled in instructional technology with a very high support of more than 1-5 staff to worker ratio. This was designed for disabilities that result in very low productivity. This initially depended heavily upon contracts from the electronics industry, many of which have disappeared as this industry has become more automated. This model shares many characteristics and constraints with traditional sheltered workshops. Employees receive wages based on their productivity.⁷⁶

This paper is of the view that this model could be more workable in countries such as China and Japan that have a lot of industries with a great need for labour due to the heavy presence of electronic industries.

4.1.2 Self Directed Model

The self directed employment model is defined as income generating work where disabled people, to a significant degree, have a prime decision- making role in the kind of work that is done, how time is allocated, what kind of investment time and money should be made and how to allocate revenue generated.⁷⁷ Business considerations for persons with intellectual disabilities are a little different from those people without a disability. In case of the former, it is usual for someone to perform duties dissimilar to the role of a job coach. Sometimes this is a family member.⁷⁸

This model has also been described as a micro Enterprise-a small business created around one person. The main strengths of the model include the following;

“It respects the capacity and the assets of people with intellectual disabilities, focuses on people’s interests and strengths, and can be more flexible than mainstream employment and working conditions. It pursues equality by opening up the self-employed sector of the labour market where people with an intellectual disability are not represented. Micro-enterprises reflect aspects of government thinking on increasing employment for disadvantaged groups, and that services should be developed to met individual needs;

⁷⁶T. Parmentor, Promoting Training and Employment Opportunities .Page 11

⁷⁷ A. Neufeldt, and A. Albright, (1998). Disability and Self Directed Employment, Business Development Models. Ontario: captus press.

⁷⁸ T. Parmentor; Promoting Training and Employment Opportunities. Page 11

For some a small business is a way of gaining income from a hobby or an interest and that person-centred planning, direct payments and individualized budgets are always to help the person get support and funding. Micro-enterprises are another way of people; with intellectual disabilities moving from being a client to being a citizen.”⁷⁹

The Citizen Economic Empowerment Commission Act⁸⁰ aims at empowering people with disabilities economically through start-up business that will employ others. This Act seems to fall in line with this employment model in that it aims to move the disabled person from being a client to being a citizen.

4.1.3 Social Firms

These were developed in the European context. Social enterprises are businesses which trade for social or environmental purposes, and their profits are reinvested back into the company to help them achieve this purpose. The specific social purpose of social firms is to create jobs for people who find it hardest to get them. The majority of workers are people with a disability with few opportunities to engage in regular work-related activities within the general community.

This model in the opinion of this paper is discriminatory because it does not foster mainstreaming which is the main object the UN CRPD. Persons with an intellectual disability must be able to get real jobs.

4.1.4 Community Economic Development- CED

CED is a community-based and community directed process that explicitly combines social and economic development and is directed towards fostering the economic, social, ecological and cultural well-being of communities and regions. As such it recognises, affirms and supports all the paid and unpaid activity that contributes to realization of this well-being. CED has emerged as an alternative to conventional approaches to economic development. It is founded on the belief that problems facing communities - unemployment, poverty, job loss, environmental degradation, economic instability, and loss of community control- need to be addressed in a holistic way.⁸¹

⁷⁹ S. Beyer & C. Robinson, A review of research literature on supported employment: A report for the cross-government learning disability employment strategy team. London: cabinet office. 2009.

⁸⁰ Act No. 9 of 2006

⁸¹ <http://www.sfu.ca/cscd/gateway/sharing/principles.htm>. Accessed 21/02/2011

CED projects may provide an alternative approach to providing support for people with disabilities. This model seems to me best suited for highly urbanised communities in high income countries thus may be expensive to embark on for a poor and developing country like Zambia.

4.2 What Works in the United Kingdom: Country Experience

4.2.1 Introduction

In this section the United Kingdom experience will be analysed based on a presentation made by Dr. Ann Minchin, Parent of an intellectually disabled child and Activist. The presentation was done during an ILO/Irish Aid Workshop; People with Intellectual Disabilities – opening pathways to training and employment in the African Region that took place in Lusaka, Zambia from 9-11 March, 2010.⁸²

Dr. Minchin has a daughter Jacquelyn who has an Intellectual disability (Down syndrome) and is has been working as a part-time clerical assistant at Penglais Secondary School in Aberystwyth for the past 10 years. This experience (or case study) will enable us to have an overview of what has worked in the United Kingdom regarding the employment of intellectually disabled persons.⁸³

4.2.2 Policies and Models that have worked for the UK

Dr. Minchin stressed that the most important ingredient is family acceptance and the way inclusion in every family life is done. For Jacqueline Minchin inclusion in family activities was evident. The family would take her along for swimming and other related activities. She ended up being a professional swimmer because her family included her in out door activities. In October 2009 she swam for Wales in Special Olympics Regional competitions. She was then chosen for the Great Britain Team at the Special Olympics European swimming championships, where she won gold, silver and bronze medals. If the Minchin family had not included her in outdoor activities they wouldn't have discovered her swimming talent.⁸⁴

⁸²ILO/Irish Aid report, people with intellectual disabilities, Page .30

⁸³ILO/Irish Aid report, people with intellectual disabilities, Page .30

⁸⁴ILO/Irish Aid report, people with intellectual disabilities, Page .30

In Zambia there is no inclusion at the family level. This is because people believe in the myth that if one has a child with an intellectual disability then that family is cursed or paying for some sin they committed in their earlier years. Therefore, most families with a member who has an intellectual disability will do anything possible to hide this individual from society because they feel if society knew about it they would be stigmatised. This then manifests into a negative perceptions starting within the family itself. This attitude or stereotype behaviour from society forces the family to exclude this member from all activities that involve exposure to the outside world.⁸⁵ Thus, in most instances they are kept under lock and key with someone (usually their mothers) to watch over them all the time. This shows the absence of inclusion at the family level⁸⁶.

Another ingredient to enhance the employability of person with an intellectual disability is inclusion into mainstream Education. The opportunity of an education cannot be underestimated in providing intellectually disabled persons with skills and confidence to work in open employment.⁸⁷ The government changed the fate of intellectually disabled persons in the UK because of the Warnock Report of 1978. This report proposed that children with an intellectual disability should be integrated where possible into mainstream education. This report was instrumental in forming the inclusive education policy adopted by the governments of the United Kingdom in 1981.⁸⁸

This policy was not easy to employ, there was a lot of resistance from teachers and parents on what effect inclusion would have on the other children without the disability.⁸⁹ This is the point where Activism came into play through an element called 'parent power' exercised by parents of children with intellectual disabilities. The parents insisted that their children had the right to attend main stream schools. Although it took a lot of effort to get the policy to work, it was evident that children with an intellectual disability gained confidence and had an opportunity to mix with other pupils, learned social skills and became much more independent.⁹⁰ This is not only beneficial to persons with an

⁸⁵ Interview: R. Kapaso, 26/01/2011 (parent of an intellectually disabled child).

⁸⁶ This was the general observation amongst the participants who attended the ILO/Irish Aid funded project held 9-11 march 2010. Lusaka - Zambia. see the declaration in the report

⁸⁷ A. Minchin, presentation during the ILO/Irish Aid workshop, March 2010 Lusaka-Zambia

⁸⁸ <http://www.archive.official-document.co.uk/documents/cm50/5034/5034.htm>. Accessed 28/02/2011

⁸⁹ A. Minchin, presentation during the ILO/Irish Aid workshop, March 2010 .Lusaka-Zambia

⁹⁰ Jacqueline Minchin is an example of how this has worked. A video of her showing her day at work showed how she has gained confidence to do things on her own, is able to freely mingle with other people and she is able to do everything without the help of anyone.

intellectual disability it also serves as an awareness platform for mainstream pupils to become more accepting and this spills over to society at large.

In Zambia the National Policy on Education, 1996 recognises the right to education for persons with an intellectual disability by providing for special education. Special education is not inclusive but segregatory and discriminatory.

In the UK there is involvement of DPO's for example a careers service organisation called REMPLOY. This is a job placement service for persons with disabilities in the UK. This organisation plays an important role in finding a suitable employer with a positive attitude. On the other hand the careers service facilitates persons with an intellectual disability to choose their careers of interest.⁹¹

ZAEPD is the agency that deals with the employment of disabled persons in Zambia. It has not been able to involve itself with job placement of the persons it represents on its own. It involved itself with job placement during the FAIDD funded project but after this it was unable to sustain these activities because of lack of funding. Furthermore, ZAEPD has not done much concerning the employment of intellectually disabled persons since the end of the FAIDD sponsored project.⁹²

In addition to parent activist programs there are government programmes in the UK that promote and encourage employers to employ persons with intellectual disabilities. These programmes are designed in such a way that they overcome factors precluding employment such as productivity. One of the schemes employed in the UK is through the Enclave model which is classified under the SE employment model. This scheme creates a link between productivity and income. This scheme works in such a way that if the employee works 60 percent of workload, the employer will pay for the 60 percent and the government will pay for the 40 per cent. This model works well if the employer has a positive attitude and provides mentoring and support to the employee with a disability.

In addition to government efforts representative, DPOs have made a difference in the employment of persons with an intellectual disability in the UK.

⁹¹ ILO/Irish Aid Report ,People with Intellectual Disabilities. page 31

⁹² Interview; A. Phiri: 10/03/2010

“The UK Downs Syndrome Association (DSA) has had tremendous effort towards legislation related issues to working opportunities for its members by responding to government requests for submissions and taking part in consultations. It responds to consultations about its members throughout the community. It has been most effective in raising public awareness about the hidden workforce represented by people with Downs Syndrome and valuable assets that people with Downs Syndrome can bring to the workforce. The DSA also seeks to educate and train potential employers about the benefits of employing people with intellectual disabilities, and to share information with government and other NGO’s to ensure that it reaches as many people and effects policy as much as possible. From 2006 to 2008, DSA ran a national employment campaign, aiming to promote positive images and highlighting the achievements and capacity of people with Downs’s syndrome.”⁹³

The UK Government has recently embarked on a project called valuing employment-Real Jobs for people with Learning Disabilities. This is a strategy which set out an ambitious goal to increase radically the number of persons with an intellectual disability in employment by 2025. The strategy specifies that by ‘work’ it means real jobs in the open labour market that are paid the prevailing wage or self-employment.⁹⁴ Another project is the British Association for Supported Employment (BASE) it provides a mechanism through which SE agencies can share information.⁹⁵ These are programs that DPOs here in Zambia should be embarking on with the much needed government support and funding.

4.3 What Works in Singapore: Country Experience?

There are two associations in Singapore that deal with employment services. These are; the Association for persons with special needs (APSN). This one conducts schools and employment services for those with ‘mild’ intellectual disabilities; and the movement for the intellectually disabled of Singapore (MINDS) conducts schools, employment services, day activity programs and residential living for those in the ‘moderate’ to ‘severe’ range.⁹⁶

“Both APSN and MINDS have made efforts to place people in competitive, open employment. In the case of APSN a special program is being conducted at one of its senior schools to assist students to make the transition from school directly into paid work in the community, a feature of which is extended work experience placements. The MINDS project is an open employment programme that is an adjunct to the sheltered workshop programme known as social enterprises. In this program people are chosen to make the transition from the segregated setting to community-based jobs on the basis of their interests and performance in the sheltered environment.”⁹⁷

⁹³ ILO/Irish Aid report, people with intellectual disabilities. Page 32

⁹⁴ ILO/Irish Aid report, people with intellectual disabilities, Annex 2-26

⁹⁵ <http://www.base-uk.org/links/index.htm>. Accessed 21/02/2011

⁹⁶ ILO/Irish Aid report; people with intellectual disabilities, Annex 2-26

⁹⁷ ILO/Irish Aid report; people with intellectual disabilities, Annex 2-26

This programme exhibits a greater intention to develop permanent and workable choices as there is an extra effort to determine the interests of an individual and also on performance. This is very significant way of intervention in that it eventually sorts out the issue of productivity that has always been a great concern for potential employers.⁹⁸

Further, in Singapore there has been a deliberate effort to engage into social enterprises such as the “crew” where employees are paid by the welfare organisation rather than earning wages directly from the business. The “crew” is a car wash.⁹⁹

This social enterprise mechanism has the potential of working effectively in Zambia if embarked on seriously. The car wash business is booming in Zambia at the moment, organisations such as ZAEPD could use this as an avenue for collaborating with the local government in order to be allocated land to venture into such projects just like in Singapore for those persons that would be interested in a car wash business.

4.4 What Works in South Africa: Country Experience?

South Africa combined with a good legal framework has made tremendous progress in the employment and employability of persons with intellectual disabilities. The projects it has initiated include; Durban and Coastal Mental Health; the living Link; the Nitro Project for Supported and Inclusive Employment and the Astra Centre project. For the purposes of this paper the Living Link project will be discussed in detail.¹⁰⁰ South Africa being an African country serves as a good example to Zambia that it is possible to achieve the right to employment and employability of persons with an intellectual disability

4.4.1 The Living Link

This is a non-profit organisation founded in Johannesburg South Africa. It supports the inclusion of people with intellectual disabilities into society and facilitates their transition from school to work to independent living.¹⁰¹

⁹⁸ T. Parmentor; Promoting Training and Employment Opportunities. Page 11

⁹⁹ See the ILO/Irish Aid report; people with intellectual disabilities. Annex 2-26, for more details on how the project works.

¹⁰⁰ T. Parmentor, Promoting Training and Employment Opportunities. Page 13

¹⁰¹ T. Parmentor, Promoting Training and Employment Opportunities. Page 13

Under this project is an adult Integration Program aimed at integration into mainstream society and the community at large. The program is life skills based and focuses on practical components of daily living that are essential. The living Link then assists to place their members into suitable positions in the open labour market and supports both the member and the employer in a way that is mutually beneficial. They use the SE model. Salaries and benefits are negotiated in a realistic way that reflects performance. The Living Link provides services such as, job market screening, job site observations/job analysis; job sampling, recommendations on job; restructuring; data base prospective employees with intellectual impairments; job matching and placement; job coaching/on site training and support and employer and co-worker sensitization and training.¹⁰²

These experiences are sufficient to give an overview of what has worked for other countries and these are sufficient for the purposes of the recommendations for this paper.

4.5 Preliminary Conclusion

This paper is of the view that the SE model is a model best for Zambia. This was the model also recommended by the ZAEPD/FAIDD project. However, Zambia being a developing country the self directed employment model has a potential of yielding the much needed results. From the country experiences the lesson is that a good legal framework on disability issues combined with serious commitment on the part of the government, parents of these persons, DPO's and vigorous participation is the key to achieving the right to employment of persons with an intellectual disability.

The next chapter suggests ways in which the government and the various stakeholders can come in to facilitate the right to employment of persons with an intellectual disability. These are in the form of recommendations.

¹⁰² T. Parmentor, Promoting Training and Employment Opportunities. Page 13

CHAPTER FIVE

RECOMMENATIONS AND CONCLUSION

5.0 Introduction

The recommendations of this paper will be divided into three parts. The first part addresses recommendations based on the international instruments that have been ratified. The second part addresses the changes that should be taken into account with regards to the existing laws in the specific Acts of parliament discussed earlier in chapter three. The last part of the recommendations focus on what the stakeholders involved in the facilitation of the right to employment and the employability of persons with an intellectual disability can do to contribute to the realization of this right.

The conclusions will highlight the achievements of this paper in terms of the objectives and generally will epilogue the desertion all together.

5.1 Recommendations

Since Zambia has ratified the UN CRPD, ILO Convention No. 111 and Convention No. 159, which are the key instruments dealing with employment and rights of disabled persons. This shows that the Zambian government has contemplated on facilitating the protection of the rights of persons with disabilities and issues involving their employment. This also indicates that the Government is committed to disability issues. Based on this, these recommendations may be valuable to the realization of the right to employment of persons with an intellectual disability.

5.1.1 Recommendations Based on International Instruments

This paper recommends that the Zambian government through the legislature, judiciary and the executive should incorporate these international instruments into domestic legislation. As the law stands today it is not effective to enhance the right to employment and employability of disabled persons. The Zambian government can do this by incorporating these rights into the constitution the same way it incorporated the UNDHR rights in Part III (Bill of Rights) of the Constitution.¹⁰³ The incorporation of the first

¹⁰³ Chapter 1 of the laws of Zambia

generation, gave *locus standii* to the person seeking constitutional guarantee of these rights, the result was that the courts have an obligation to protect these Rights and Freedoms.¹⁰⁴ This could be the same if the Rights of persons with disabilities under the UN CRPD were protected and guaranteed. Domestication would further facilitate for the paradigm shift which is articulated in Article 27 of the UN CRPD, which states that;

“Persons with disabilities have equal rights to work and gain a living countries are to prohibit discrimination in Job – related matters, promote self employment, ones entrepreneurship and starting one’s own business employ persons with disabilities in the public sector, promote their employment in the private sector, and ensure that they are provided with reasonable accommodation at work.”

This paper recommends that the government should also pursue a National policy that is designed to promote equality of opportunity and treatment in respect of employment and occupation. This is as required by the ILO convention No. 111. The mere declaration in the TEVET Act which that;

“The special needs of people with disabilities will be taken into consideration”

The Act has to expressly mention or list what these special needs are so that the government does pay specific attention to these special needs such as employment, inclusion and other related factors as mentioned in Article 2 of Convention No.111 which lists these special needs.

This paper further recommends that the government be active and quick to formulate, implement and periodically review policies on vocational training as per Article 2 of the ILO Convention No. 159. The essence of this requirement to governments that have ratified this instrument is to allow for incorporation of new ideas and needs of disabled persons. For example there is a need to have a policy on intellectual disabilities since the discovery that these persons are more sidelined in terms of employment compared to their physically disabled counterparts, despite the fact that they are trainable and able to work. Article 3 further, places and emphasis on policies to encompass appropriate vocational rehabilitation measures that are specific to all categories of disabled persons. Based on this, this paper recommends also that there should be a deliberate government policy aimed at enhancing the employment and employability of persons with an intellectual disability.

¹⁰⁴ See Christine Mulundika and 7 others V the people, S.C.Z. Judgment No. 25 of 1995

A more effective way of addressing the right to employment and employment of intellectually disabled persons, is to enact a statutory instrument that would specifically address the issues of employment for these persons.

5.1.2 Recommendations on the Existing Laws (those analyzed in chapter 3)

The General Recommendation on the existing laws in Zambia that are concerned with the rights, employment and employability of disabled persons and non disabled persons alike is that , they should be amended to incorporate the Rights and employment of persons with disabilities as reflected in the international instruments dealing with these matters. In particular these pieces of legislation should be structured and formulated in such a way that they reflect the special needs and the Rights of disabled persons.

Suffice to note that main object of this paper was to find ways in which the legislature should incorporate provisions in legislation that should aim to facilitate the employment and employability of persons with an intellectual disability. The following recommendations are specific to selected pieces legislation;

Recommendations on the constitution:

This paper recommends that the constitution should expressly guarantee and protect the rights of disabled persons in terms of employment and Discrimination. The Constitution being the supreme law of the land¹⁰⁵, should be the foundation for the Rights of persons with a disability. This would then make it easy for subsidiary legislation to conform to constitutional standards.

The constitution should in the non-discrimination clauses include disability as a ground, Article 11 is one such section. Amending the constitution is not easy task but, with the necessary political will and governments commitment to disability issues amendment is possible.

This paper recommends that economic, social and cultural rights be included in the constitution. As mentioned earlier in this paper, the rights of disabled persons can be realized easily if the constitution protects and guarantees third generation rights.

¹⁰⁵ Article 1 (03) of the constitution of Zambia, cap 1

Recommendations on this Act are very significant to the employment of persons with an intellectual disability because without education and training it is practically impossible to address the issue of employment.

Recommendations on the Education Act:

Recommendations on this Act are very significant to the employment of persons with an intellectual disability because without education and training it is practically impossible to address the issue of employment.

This paper recommends that there should be a provision in the Education Act that expressly states that persons with an intellectual disability have the right to be in main stream education system and do away with special education system which is discriminatory. Special schools should be provided for only in extreme circumstances. The 1996 policy on special education has to be revealed in light of the new requirements on inclusion emphasized by the UN CRPD.

This paper recommends that the Education Act should facilitate the inclusion of Disability in the list of prohibited grounds for discrimination during admission to schools.

This paper also recommends that the Act should do away with exclusion of pupils from schools on grounds of health. This has the potential of being misused in terms of persons with an intellectual disability.

This paper recommends that the inclusion provisions in the Act should also apply to institutions that provide tertiary Education e.g. Universities. This will allow persons with disabilities to pursue careers of interest rather than limiting them to vocational training specifically designed for disabled persons. This in my view is discriminatory to have specific job training designed for the disabled. These persons should have the freedom to choose their career path.

This paper recommends that the use of general purpose fund should extend to measures aimed at enhancing the inclusion of the disabled persons into main stream education.

5.2 Recommendations on the Employment Act and other related acts on Employment

This paper recommends that the employment Act should contain express provisions that enhance the employment of persons with an intellectual disability. This recommendation is based on Section 16 which indicates that the Act is ready to give special attention to specific groups as it gives to the group of pregnant women. Therefore, the Act can have provisions that specifically aim at facilitating the employment of persons with an intellectual disability

The Act could expressly offer tax exemptions to employers who employ persons with an intellectual disability. The Act should also include a provision which suggests that an employer can pay salary to a person with an intellectual disability based on their productivity and the government to subsidize the rest of the salary. This method has been adopted in the UK, there is a government program, whereby if an intellectually disabled person works 60 per cent of the work load the employer pays 60 per cent and the government will pay 40 per cent.¹⁰⁶ With government commitment and including such a provision in the Act would with no doubt encourage employers to take on intellectually disabled persons.

The employment Act should also include provisions that have an effect of avoiding termination of employment based on a person's disability. This would provide for job security for disabled persons and this would definitely trickle down to persons with an intellectual disability as well.

Just like there is a statutory instrument regulating the minimum wages of shop workers.¹⁰⁷ This paper recommends that the Zambian legislature should go an extra mile and enact a statutory instrument that regulates the wages for persons with an intellectual disability. If the legislature has recognized shop works as a special group of workers by regulating their minimum wage, then it is prudent that the same is done for intellectually disabled persons as a group that is often exploited based productivity thus requires regulation of their wages.

¹⁰⁶ See the story of Jacqueline Minchin in the ILO/Irish Aid report; people with intellectual disabilities.
Page 31

¹⁰⁷ Statutory instrument No. 56 of 2006

This paper also recommends that the Employment Act should include cross referencing sections to the persons with disabilities Act in order to adequately deal with inclusion and non-discrimination in employment for disabled persons and particularly intellectually disabled persons.

5.3 Recommendations on the Persons with Disabilities Act.

The general recommendation on this Act is that being the principle Act dealing with the various aspects of persons with disabilities. The Act should conform in all aspects to the various international instruments dealing with the rights, employment and employability of persons with disabilities. When this is done all aspects affecting specific categories of disability will be brought into perspective.

This paper specifically recommends that the Act should contain a part that specifically deals with the special needs of the different categories of disabilities that require attention in certain aspects. This will be in conformity Article 3 of ILO Convention Number 159 taking into account the employment of intellectually disabled persons. This is important because the group of disabled persons is not homogenous. This need is inevitable because each category of disability seems to have its own special needs depending on the nature of that disability. For example, physically disabled persons are more likely to be employed in mainstream employment than their intellectually disabled counter parts.

This paper recommends that the legislature should Amend Section 19 of the Act. This will be to facilitate for the inclusion of a broader definition of what discrimination should include. Being the principle Act for disabled persons the definition must be broad and more elaborate as in Article 2 of the UN CRPD for example the section could read as follows:

“For the purposes of this part, discrimination means:-

Any situation, regulation practice or conduct where a person with disability is treated less favourably from a person without disability;

Any situation regulation, practice or conduct where a person with disability is treated less favourably from another person with a disability;

Any situation regulation, practice or conduct requiring a person with a disability to comply with a requirements or condition which persons without a disability may have an advantage over: or

Not providing different services or conditions required for that disability.”¹⁰⁸

This paper recommends that Section 21 of the Act should expressly state that disabled persons have the right to be included into mainstream society, with particular emphasis in the education system and employment sector.

This paper recommends that the Act should include provisions that addresses the role of the public in issues of persons with disabilities and where necessary roles specific to types of disabilities e.g. persons with an intellectual disability.¹⁰⁹

This paper recommends that the Act should impose criminal liability for acts of gross discrimination towards disabled persons in general.

If the Zambian legislature took these recommendations into serious consideration the rights of persons with an intellectual disability to secure a place in mainstream employment would be achieved.

5.5 Other Recommendations

The following recommendations are to the various stakeholders that have an obligation to foster the rights of people’s disabilities. As the saying goes “good legislation alone cannot lead to good outcomes when it comes to disability rights.”¹¹⁰

5.5.1 Recommendations On An Employment Model Suitable For Zambia

This paper recommends that the SE model as suggested by the FAIDD/ZAEPD Project is the best model applicable to Zambian conditions. However, the self-directed employment model has the potential to reap the required success in Zambia based through the citizen Economic Empowerment commission Act of 2008 which has as its objective to empower persons with disabilities economically through start up businesses that will employ others. ZAEPD could work on the strength of this Act to facilitate the workings of this

¹⁰⁸ Recommendations of the Technical Committee on the Review of the Persons with Disabilities Act, cap 65 of the laws of Zambia. Page 6

¹⁰⁹ The UK Disability Discrimination Act (UKDDA) which was passed in 1995 would be a good example to copy from. It has been praised by ILO as one that articulates and places the rights of disabled persons to employment very well. See ILO/Irish Aid report; People with intellectual disabilities. Page 36

¹¹⁰ T. Parmentor, Promoting Training and Employment Opportunities for People with Intellectual Disabilities. Page 2

model. This paper recommends that the government together with the concerned DPOs seriously this into consideration and facilitate the success of this model.

It should be taken into account that a suitable employment model without an enabling legislation is difficult to implement.

This paper further recommends that the government could engage in initiatives such as the “valuing people” program running in the UK which identified significant difficulties in the coordination’s and delivery of services with persons with an intellectual disability in the UK.¹¹¹ Zambia owes its legislative success to borrowing legislation from the UK.¹¹² Therefore, it should not be difficult for the government to do like wise regarding initiatives involving the disabled.

5.5.2 Recommendations To Parents Of Persons With An Intellectual Disability

This paper recommends that parents should from the home begin the inclusion process by allowing children with this disability to participate in all family activities. This can only be achieved if the negative attitudes of the family and society are dealt with adequately through sensitization.

This paper recommends that the parents through already existing organization should step up the fight against stereotypes and negative perceptions towards intellectually disabled children in inclusion in educational institutions and employment sectors. Parents of these children should exercise ‘parent power’¹¹³.

5.5.3 Recommendations To DPOs

This paper recommends that DPOs in the country should step-up their role in enhancing the employment of persons with an intellectual disability. Their activities for job placement should not be based on donor funded projects such as FAIDD/ZAEPD Project because these are not sustainable, funded projects eventually come to an end at some point. ZAEPD with the help of the government should embark on job placement activities

¹¹¹ ILO/Irish Aid report. people with intellectual disabilities. Page 36

¹¹² See the English Extent of Application Act ,Chapter 11 of the laws of Zambia

¹¹³ ILO/Irish Aid report, people with intellectual disabilities; Page. 31

aimed at facilitating the employment and employability of persons with an intellectual disability.

ZAEPD should vigorously engage itself in awareness programs targeted at stereotypes both in society, and potential employers.¹¹⁴ Without awareness the pursuit to achieve employment and employability of persons with an intellectual disability is in vain. Awareness rising should involve the telling of success stories. Awareness rising should be designed in such a way as to suit the environment in Zambia. The Zambian government has achieved awareness of HIV/AIDS as a pandemic because of governments and NGO's commitment to the same this could be extended to employment of the intellectually disabled.

This paper recommends that ZAEPD and the concerned NGO's should be active in lobbying for government and international funding. There should be a deliberate effort by NGO's to strengthen local networks to enhance coordination with national and regional bodies in order to broaden the resource base.

5.5.4 Recommendations To The Government of the republic of Zambia

This paper recommends that the Zambian government should embark on the amendment process of the specific pieces of legislation highlighted in Section 5.1.2 of this paper. These amendments will definitely enhance the right to employment and employability of persons with an intellectual disability. When a country ratifies a convention, the obligations that are reflected in the convention must be incorporated in the states national legal framework, development planning and budgeting, and related policies.

This paper further recommends that the Zambian government addresses seriously its obligations placed upon it by the international instruments, especially those under the UN CRPD which are a Right based approach. Since this instrument has already been ratified

This paper recommends that the Zambian government should focus on the Domestication process of the various international instruments taking into consideration social, cultural and especially economic conditions prevailing in the country.¹¹⁵

¹¹⁴ Article 8 of the UN CRPD Emphasises on awareness raising

¹¹⁵ An example to learn from is the Disability Discrimination Act (UKDDA), 1995

This paper recommends that the health monitoring systems should incorporate the early detection of an intellectual disability in children through the under five programme that has been running under Ministry of Health for so many years now. This should be done through the same procedures used to identify malnourished children or children with polio or HIV.

This paper recommends that there should be a deliberate effort on part of the government to collaborate with the ministry of education, teachers training college, universities, NGO's and DPOs and even churches to train teachers and support staff to assist in the education process and Job placement activities.

The government should also begin to explore its options on how it can come in to facilitate the employment of intellectually disabled persons by subsidizing salaries and introducing Tax incentives and other measures to employers.

The government should also to have clearly written policies on employment of disabled persons which clearly state its values and specific goals that are realistic.

This paper recommends that it develops a system through health institutions such as clinics to develop an adequate data base on population information. The government has been successful in population information on HIV/AIDS the same should be extended to children and adults with an intellectual disability.

This paper recommends further that the Zambian government should take a deliberate effort to increase its budget allocation to disability issues. This will facilitate the initiation of disability programs by DPOs, such as job placement activities. DPO's are in most cases under funded hence unable to carry out their role in awareness programs and job placement programs

5.6 Final Conclusion

There is hope that with the necessary political will on the part of the government these recommendations are not far from achievement. The Zambian legislature on the other hand should take it upon itself to develop legislation that reflects the needs of the society that it represents. The need in this case is to achieve the right to employment and employability of persons with intellectual disability. A quick response from the

legislature will put Zambia at a position where it addresses this issue at the same pace with the international community. Domestication is the only viable solution.

The government, legislature and all stakeholder need to realize that this change sort for can only be achieved with genuine commitment and belief that this change is desirable in order to come through for the needs of persons with an intellectual disability. Article 27 of the UN CRPD gives reason for poor countries like Zambia with limited financial resources to embark on such programs that concentrate on disadvantaged groups in society such as those with an intellectual disability.

The issues with which this dissertation was concerned with are: 1) the efficacy of the law protecting the Rights of persons with an intellectual disability 2) the significant issues arising from the international instruments that ratified governments are expected to incorporate into national legislation 3) what employment model is suitable for Zambia, 4) what can Zambia learn from other country experience in terms of workable employment models and policies and; 5) how the Zambian law can be modified to incorporate the requirements of the relevant international instruments. The position of this dissertation is that: 1) the law protecting the Rights and employment of disabled persons is not effective to address the Right to employment for intellectually disabled people. 2) the significant issues arising from the international instruments to be incorporated in national laws are; non-discrimination, inclusion, participation of persons with disabilities and their organizations and accessibility. 3) The suitable employment models for Zambia is the Supported Employment Model and the Self- Directed Model 4) the country can learn and copy a lot from other countries that have been successful in fostering the right to employment for intellectually disabled persons, as shown in the recommendations. 5) The Zambian government has to seriously embark on Domestication and modification of the existing laws concerning the disabled in order to incorporate the standards set in the instruments that it has ratified if it has to foster the right to employment for intellectually disabled people.

The End

APPENDIX

APPENDIX 1: SURVEY QUESTIONNAIRE

Introduction: My name is Mauyaneyi Marebesa. I am a 4th year student at the University of Zambia in the school of Law conducting a survey of the Employment of persons with intellectual disabilities.

Intellectual disability is characterised by significant limitations both in intellectual functioning and in adaptive behaviour as expressed in conception, social and practical adaptive skills. This disability originates before the age of 18.

Please ask me to explain further if you do not understand what this disability is from the definition above.

Mark "Yes" or "No" for each option.

1. Do you think these persons can work? Yes [] No []
2. Please explain in your own words for the answer given in Q1.
.....
.....
.....
.....
.....
3. Do you think its possible for these persons not be discriminated against in employment? Yes [] No. []
4. please explain in your own words the reasons for your answer in Q3.
.....
.....
.....
.....
.....

5. Do you think employers should be castigated for not taking on intellectually disabled persons? Yes [] No []

49

6. Please explain the reasons for your answer in Q5.

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7. Is it possible for these persons to work together in the same place with non disabled persons? Explain in your own words.

.....
.....
.....
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.....

THANK YOU VERY MUCH FOR ANSWERING THIS QUESTIONNAIRE

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