



**A CRITICAL APPRAISAL OF RIGHT TO EMPLOYMENT FOR PERSONS WITH DISABILITIES IN NIGERIA: A COMPARATIVE ANALYSIS OF THE SALUTARY LEGAL FRAMEWORK IN MALAWI AND INDIA**

CULJ

ISSN 2957-8647

Volume 1

pp. 223-251

August 2022

[www.cavendish.ac.ug](http://www.cavendish.ac.ug)

Email: [secretaryculj@cavendish](mailto:secretaryculj@cavendish)

John Oluwatomisin Akinselure\*

and

Dr. Alaba Ibronke Kekere\*

**Abstract**

*Unemployment has attained a significant worrying dimension in Nigeria. This has made many jobless Nigerians resort to diverse forms of anti-social vices. It is a generally accepted fact that unemployment rate for persons with disabilities is quite higher when compared to persons without disabilities. This wide disparity in employment ratio has also made some persons with disabilities to resort into soliciting for alms in public as objects of charity and rapidly encouraged public begging in various cities in Nigeria. Unemployment seems to have battered the prestige and dignity of persons with disabilities (PWDs) thereby making them predisposed to denigrating treatment in the world of work. One of the probable reasons adduced for denial of employment seems to be the unenforceability of the right under Chapter II of the 1999 Constitution of the Federal Republic of Nigeria. However, the Special People's Law of Lagos State, 2010 and the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 appeared to have bestowed a legal right of employment on PWDs. The aim of this paper is to appraise the legal framework regulating the right to employment for PWDs in Nigeria, Malawi and India. This article found that this right is not enforceable in spite of the statutory recognition in Nigeria. But it is not so in some other jurisdictions because the Malawian and Indian laws especially their Constitutions, Disability laws and Labour laws have salutary provisions that significantly promote right to employment of PWDs. Thus, Nigeria can borrow a clue in an attempt to reform her disability laws as well as her*

---

\* LL.B(Hons);B.L.,LL.M(Lagos);Doctoral Candidate Ekiti State University, Ekiti State, Lecturer, Department of Commercial & Industrial Law, Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State; [Email-tomiakinselure@yahoo.com](mailto:Email-tomiakinselure@yahoo.com); 08066917912; P.M.B 001, Akungba-Akoko.

\* LL.B(Hons);B.L.,LL.M; Ph.D; Lecturer, Private Law Department, Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State; 070610488574.

*Labour Act so that inclusiveness at work will be enthroned. To actualize this, fundamental amendments are necessary in Nigerian legislation. This paper argues that employment right should be prioritized for qualified and competent persons with disabilities. This article adopts a doctrinal and comparative approach in its research methodology. Primary and secondary materials were studied in arriving at its conclusion. Recommendations were also made.*

**Keywords:** Right, Employment, Persons with Disabilities, Fair Labour Practices, Workers

## Introduction

The right to work is guaranteed in different international instruments.<sup>1</sup> This right implies not only free choice of employment but also entails a workplace that accommodates just, favourable conditions of work and protection against unemployment.<sup>2</sup> The question that arises is whether the Nigerian Constitution has done enough to safeguard the right to employment. Aside from stating that all citizens have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment<sup>3</sup>, the Nigerian Constitution does not make the right to work enforceable<sup>4</sup>. Although, the Constitution under its Fundamental Objectives and Directive Principles of State Policy also states that ... ‘reasonable national minimum living wage, unemployment, sick benefit’ would be provided for all her citizens, it is however doubtful if Nigeria firmly abide by such policy.<sup>5</sup> Persons with disabilities (PWDs) often face diverse barriers which usually prevent them from getting jobs. Some other barriers encounter by PWDs include restrictive practices, rules and regulations relating to disabled employee’s training, recruitment and work practices which are impossible for some PWDs to observe, let alone the inaccessible workplaces.<sup>6</sup> It has also been opined that the most insurmountable obstacle is the negative attitudes of potential employers about PWDs ability to work and to contribute to the performance of the enterprise.<sup>7</sup>

---

<sup>1</sup> See for instance, the Universal Declaration of Human Rights 1948, Art. 23, See also Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICECSR)

<sup>2</sup> Ibid

<sup>3</sup> The 1999 Constitution of the Federal Republic of Nigeria (as amended) , s. 17(3)(1)

<sup>4</sup> See the 1999 CFRN (as amended); s 6(6)(c)

<sup>5</sup> Ibid, s. 16 (2)(d); Though in recent time after much outcry by the Nigerian Labour Congress, the national minimum wage has been increased to ₦30,000.00

<sup>6</sup> C.S. Ibekwe and O.C. Aduma, “The Evolution of Disability Rights in Nigeria: Pitfalls and Prospects” (2019) 3 (2) *African Journal on Law and Human Rights*, 137-147

<sup>7</sup> See E. Etiyebo and O. Omiegbe, “Religion, Culture and Discrimination against People with Disabilities in Nigeria” (2015) 5(1) *African Journal of Disability*, 192

However, it seems that the state of affairs has changed in modern time particularly with the Special People Law of Lagos State, 2010 and the recent enactment of the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (DAPDPA). This is because the right to employment for persons with disabilities is becoming enforceable under both laws. This article is divided into six parts. Part I introduces the subject-matter. Part II examines relevant provisions which deal with equal right to employment under the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018. Part III discusses right to employment for persons with disabilities under the Special People Law of Lagos State, 2010. Part IV dwells extensively on the legal framework which promote right to employment for PWDs in Malawi. Part V explores the extant legal framework in India and some judicial authorities that effectively guarantee PWDs the right to employment in India. Part VI is the conclusion and recommendation.

### **Equal Right to Work under the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (DAPDPA)**

Although, the Constitution does not specifically guarantee the right to employment on the basis disability<sup>8</sup> but the DAPDPA, 2018 has abundantly made novel provisions for employment of disabled persons at the workplace. According to the World Health Organization, in 2018, about 29 million of the 195 million people who comprise Nigeria's national population were living with a disability.<sup>9</sup> Similarly, a group, named the CBM Global Disability Inclusion frowned at the situation were out of the current over 40 million PWDs in Nigeria, not more than 400,000 of them are employed.<sup>10</sup> It is submitted that PWDs now have the right to work on an equal basis with others as well as the right to opportunity to gain a living by freely choosing any work in a labour market that is open.<sup>11</sup> The DAPDPA encourages competitive and open employment for disabled instead of sheltered employment. In order to reiterate the importance of the right to work for the disabled

---

<sup>8</sup> See Chapter II of the 1999 CFRN (as amended) especially the Fundamental Objectives and Directive Principles of State Policies

<sup>9</sup> World Bank Group Report on Disability Inclusion in Nigeria: A Rapid Assessment ( World Bank, 2020)

<sup>10</sup> A. Otaru, "Group Seeks More Employment for People Living with Disabilities" reported in The Guardian on 26<sup>th</sup> February, 2022. Available at <http://guardian.ng/news/nigeria/metro/group-seeks-more-employment-for-people-living-with-disabilities> accessed on the 25th July, 2022.

<sup>11</sup> See the Discrimination Against Persons with Disabilities (Prohibition) Act, 2018; s. 28

persons, the DAPDPA provides criminal sanctions for violation of equal right to work by any person.<sup>12</sup>

Therefore, in a bid to promote employment opportunities for persons living with disabilities, the DAPDPA urges all employers of labour in public organization provided it is practicable to have persons with disabilities constituting at least 5% of their employment.<sup>13</sup> However, it is doubtful if employers of public organizations really comply with this provision because it is still possible not see five percent (5%) of disabled workers in the entire workforce of a public organization. The defence that might be given is that the DAPDPA in section 29 specifically states that this percentage should be complied with by adhering to the phrase ‘as much as possible.’<sup>14</sup> That means if it is rather impossible to recruit 5% of disabled persons, the public organization has not flouted the law. Another issue of concern is why does the DAPDPA exclude private organizations from recruiting 5% of disabled jobseekers into her workforce? It may be due to the fact that some private employers do not have the financial resources to provide reasonable accommodation for disabled workers. In my view, this defence is not tenable as it may prolong exclusion of qualified disabled workers from securing gainful employment in the private sector.

### **An Overview of the Right to Employment for PWDs under the United Nations Convention on Rights of Persons with Disabilities (CRPD)**

Nigeria signed and ratified the CRPD and its Optional Protocol as far back as 30<sup>th</sup> March, 2007 and 24<sup>th</sup> September, 2010 respectively.<sup>15</sup> However, due to a lack of domestication of the CRPD in Nigeria, in accordance with section 12 of the 1999 Nigerian Constitution (as amended), the rights of PWDs enshrined in the CRPD were not enforceable in Nigeria as they continued to face work-related discrimination (especially, denial of right to work). The CRPD was adopted by the United Nations General Assembly in December 2006 and it entered into force in May, 2008.<sup>16</sup> One of the principal objectives of the CRPD is to “protect and ensure the full and equal enjoyment of all

---

<sup>12</sup> DAPDPA; s. 28(2); In addition, section 28(3)(a)(b) also makes a company liable for contravening the right to work and upon conviction nominal damages of a minimum of ₦500,000.00 is paid to the affected disabled person.

<sup>13</sup> *ibid*; s. 29

<sup>14</sup> *ibid*

<sup>15</sup> See Consolidated disability finding from the 2010 US State Department Country Reports on Human Rights Practices. Available at <[https://www.usicd.org/doc/africa\\_disability-references/pdf](https://www.usicd.org/doc/africa_disability-references/pdf)> accessed 10 June, 2020

<sup>16</sup> World Health Organisation (WHO), Convention on the Rights of Persons with Disabilities: Roles and Responsibilities of the Health Sector. [http://www.searo.who.int/LinkFiles/Publications\\_DisabilitiesSEA\\_CRPD.PDF](http://www.searo.who.int/LinkFiles/Publications_DisabilitiesSEA_CRPD.PDF) (accessed 22 June, 2020)

human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>17</sup> Similarly, the preamble to the CRPD expressly recognizes that ‘discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.’ In realization of the equal right to work for PWDs globally, the CRPD enjoins member states to take appropriate steps to prohibit discrimination on the basis of disability in respect of all matters concerning all forms of employment, including conditions of recruitment, hiring and employment; protect the rights of persons with disabilities, on equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value; promote employment opportunities and career advancement for PWDs in the labour market; together with providing reasonable accommodation for PWDs.<sup>18</sup> States parties are also enjoined to ensure that PWDs are not held in slavery or in servitude and they are protected on an equal basis with others, from forced or compulsory labour.<sup>19</sup> This article requires States to uphold and promote the rights of PWDs so as to : give them the right to work and earn a living, choose the work of their own preference, not to be treated unfairly when employed, to benefit from equal opportunities, safe and healthy working conditions just like everyone else, to promote self-employment and business opportunities, to have the possibility to be hired both in the public and in the private sector, to ensure reasonable accommodation among other vital objectives.<sup>20</sup> The right of PWDs to work involves an obligation on the part of States parties to create an enabling and conducive environment for employment, in both the public and private sectors.<sup>21</sup> Article 27 of the *CRPD* also states the implementation measures that State parties should adopt in aligning its national standards and practice to the measures enshrined in the *CRPD*.<sup>22</sup> The CRPD’s twenty-five preambular paragraphs and fifty articles provide a framework within which disability rights may be addressed in African country context.<sup>23</sup>

---

<sup>17</sup>See the CRPD, 2006; Art.1

<sup>18</sup>CRPD; Art. 27(1)(a)-(k)

<sup>19</sup>Ibid; Art. 27(2)

<sup>20</sup>See the European Association of Service Providers for Persons with Disabilities (EASPD), *Analysis of the Legal Meaning of Article 27 of the UN CRPD* ( EASPD, 2012) 14-16

<sup>21</sup>M. Fasciglione, ‘Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism’ in V. D. Fina and R. Cera (eds.) *Protecting the Rights of People with Autism in the Fields of Education and Employment* (Springer International Publishing AG Switzerland, 2015) 145-170

<sup>22</sup>See *CRPD*; Art. 4(1)(a) and(b)

<sup>23</sup>J. Lord and M.A. Stein, ‘Prospects and Practices for CRPD Implementation in Africa.’(2013) 1 *African Disability Rights Yearbook* 97-113

### **Appraisal of Right to Employment under the Special People Law of Lagos State**

The Special People's Law (SPL) of Lagos guarantees persons living with disabilities right to work and employment<sup>24</sup> however contrary to the DAPDPA, 2018, it specifies that all employers of labour employing up to one hundred (100) persons must necessarily reserve at least 1% of such workforce for qualified persons with disability.<sup>25</sup> The Special People's Law is applicable to both public and private employers of labour and makes it an obligation for both employers to reserve 1% for this category of workers. While this provision is commendable as it will accelerate the employment of prospective disabled job seekers, the percentage is rather too meager compared with the overwhelming population of disabled persons in search of a job. It is also a criminal offence for any person to subject a disabled person to any form of forced or compulsory labour, servitude or unfair disadvantages save by an order of a court.<sup>26</sup> In some foreign jurisdictions such as India and Malawi, the right to work is interpreted or equated as though it were a right to life guaranteed under the Indian Constitution.<sup>27</sup> With regards to the right to work and employment of the disabled persons, the SPL specifically provides in *Section 34*<sup>28</sup> as follows:

1. Persons living with disability shall have the right to work, on equal basis with others and this includes the right to opportunity to gain a living by working freely in a chosen or accepted labour market and work environment.
2. No employer or his agent or purported agent shall discriminate against a person living with disability in any manner whatsoever but not limited to:
  - (a) job application procedure;
  - (b) the terms and conditions of employment;
  - (c) the terms and conditions of employment;
  - (d) denying the employee access or limiting the employee's access to opportunity for promotion, advancement, transfer or training, or to any other benefit associated with employment;

---

<sup>24</sup>Ibid

<sup>25</sup> Special People's Law of Lagos State, contained in the Revised Laws of Lagos State, 2015 which came into force on the 25<sup>th</sup> of May, 2015, Section 34.

<sup>26</sup> Special People's Law of Lagos; s. 34(3)

<sup>27</sup> See the Constitution of India; Articles 14, 16 and 21; See also sections 13(g), 20, 29 and 31 of the 1995 Malawi Constitution

<sup>28</sup> Lagos State Office for Disability Affairs, *A Guide to the Lagos State Special People's Law*, (Disability Affairs, Lagos, 2013) p.4

- (e) on the job training;
  - (f) accommodation, where applicable;
  - (g) employee compensation
  - (h) dismissal mainly on the ground of disability; or
  - (i) subjecting the employee to any other detriment.
3. No person or corporate body shall subject a person living with disability to slavery/servitude, forced or compulsory labour or undue disadvantages in any form except by an order of court.
  4. Any person in breach of subsection (3) shall on conviction be liable to a maximum imprisonment of 3 months or fine of ₦100,000 .00 or both, while any corporate organisation in breach shall be liable to payment of ₦500,000.00 as damages to the affected person with disability.
  5. All employers of labour employing up to 100 persons shall reserve at least 1% of such workforce for qualified persons living with disability.
  6. (a) Government shall take steps to ensure the self-reliance of persons living with disability and accordingly give adequate assistance to persons living with disability who desire to be employed.  
(b) Government may set up vocational training institution to facilitate acquisition of special skills by persons living with disability.
  7. No employee shall be relieved of his employment on the ground of disability sustain during his employment.
  8. An employer of labour whose employee sustained a disability shall:
    - a. remain and re-train the employee for effectiveness within the organisation
    - b. pay him off with a sum that is not less than the aggregate value of his 48 months' salary, if his disability is of such degree that permanently renders him unable to discharge his function or any other function that may be assigned to him; or.
    - c. pay him off with a sum that is not less than the aggregate value of his 60 months' salary, if his disability is sustained in the course of the employment and is of such degree as to permanently render him unable to discharge his function or any other function that may be assigned to him.



This Lagos State Legislation is highly commendable as it effectively meets the needs of the disabled employee by providing for remedies in the event that any person takes undue advantage of an employee with disabilities. Besides, the Lagos State Special People's Law of 2010 also established the Lagos State Office for Disability Affairs (LASODA) with the sole mandate to ensure the proper implementation of the Lagos State Special People's Law and policies which guarantee inclusion, equal rights and opportunities, self-esteem for people living with disability. It should however be noted that aside from the vehicle parking lots specially built for the disabled at the LASODA in Alausa, Ikeja, Lagos and engagement of few disabled workers who sweep the pedestrian bridges and a visually impaired lawyer who is working in LASODA, the Law has not been fully implemented as a large number of disabled persons remain unemployed and continuously beg for alms in various streets of Lagos.

Antagonists of equal employment right for the disabled argue that the actual realisation of equal employment opportunities of the disabled person may be difficult because there are societal factors, environmental barriers that hamper the disabled persons from freely securing a job in the labour market. However, proponents of equal employment for PWDs submit that provision of reasonable accommodation for PWDs could facilitate equal employment for PWDs. But surprisingly, both the SPL and DAPDPA do not provide detailed definition for the term "reasonable accommodation". Besides, the quota system for disabled worker as provided in the Law<sup>29</sup> seems to be rather cosmetic because it is rarely applied. Another contention about the Law is the section<sup>30</sup> that provides for 'paying off an employee 48 months' salary or 60 months' salary for disability sustained in the course of the worker's employment.

It is suggested that the law should have made provision for a periodic payment for the lifetime of the disabled worker. The rationale behind this is for the disabled person not to result into street begging after spending the 48 months' salary collected as pay off. Another shortcoming of the Special People's Law is that though it provides for human right perspective to disability but disability is primarily defined in only the medical concept in form of different kinds of impairment.<sup>31</sup> The Law fails to define disability to accommodate the social model of disability

---

<sup>29</sup>SPL, 2010; s. 34(5)

<sup>30</sup>Ibid; s. 34(8)(b)(c)

<sup>31</sup> See section 40 of the Special People Law, particularly the Interpretation Section on the definition of 'Disability'.



which apparently is one of the current trends in disability studies aside from the rights-based model of disability. In the words of Michael Oliver,

All disabled people experience disability as social restriction, whether those restrictions occur as a consequence of inaccessibly built environments, questionable notions of intelligence and social competence, the inability of the general population to use sign language, the lack of reading material in Braille or hostile public attitudes to people with non-visible disabilities.<sup>32</sup>

For instance, arising from the foregoing observation, a person would have impairment if he had no eyes to choose not to allow books in accessible digital formats to be available on the internet or failure to build steps (staircase) outside a building instead of providing a ramp or lift. Importantly, the social model ‘explores how ableism has shown up in social practices and institutions’ that have in turn portrayed people with disabilities as useless, marginal, abnormal, a burden on society, and perhaps most offensively is living a life that is not worth living.<sup>33</sup> The disability in this case is as a result of the failure of the society.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) has brought about a paradigm shift in disability policy. This is premised on a new understanding of disabled persons as right holders and human rights subject.<sup>34</sup> Elucidating on the rights-based approach, Degener and Quinn wrote:

Human dignity is the anchor norm of human rights each individual is deemed to be of inestimable value and nobody is insignificant. People are to be valued not just because they are economically or otherwise useful but because of their inherent self-worth ... the human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary on the person’s medical characteristics. It places the individual at the centre stage in all decisions affecting him/her and most importantly, locates the main “problem” outside the person and in society.<sup>35</sup>

---

<sup>32</sup>M. Oliver, *The Politics of Disablement*. (London: Macmillan, 1990) 11

<sup>33</sup> M. Oliver, (n.34)

<sup>34</sup>T. Degener, ‘A New Human Rights Model of Disability’, in V. Della Fina, R. Cera and J. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities : A Commentary* ( Springer, 2017),

<sup>35</sup>Ibid

Realisation of the value of human dignity serves as a potent reminder that people with disabilities have a stake in and a claim on society that must be honoured aside from any considerations of social or economic utility.<sup>36</sup>

## **Legal Framework for the Protection of Persons with Disabilities (PWDs) in Malawi**

### **The 1995 Constitution of Malawi**

PWDs in Malawi are among the poorest and most disadvantaged.<sup>37</sup> Verifiable record from the Malawian National Statistical Office (NSO) Census as at 2008 put the population of PWDs<sup>38</sup> at 498, 122. Malawi signed the Convention on the Rights of Persons with Disabilities as far back as 27 September, 2007 and ratified same on 27 August, 2009. But Malawi has neither signed nor ratified the CRPD Optional Protocol. Section 29 of the 1995 Constitution of Malawi guarantees every person the right to work, engage in economic activity and pursue a livelihood anywhere in Malawi. With respect to PWDs, section 13(g) of the Constitution directly addresses disability. For emphasis, the Constitution provides:

13(g) The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals<sup>39</sup> –

#### Persons with Disabilities

To enhance the dignity and quality of life of persons with disabilities by providing-

- (i) adequate and suitable access to public places;
- (ii) fair opportunities in employment; and

---

<sup>36</sup>Ibid

<sup>37</sup>International Labour Organisation ‘Promoting the Employability and Employment of People with Disabilities in Southern Africa’ ILO Malawi country report (ILO, Geneva, 2006)

<sup>38</sup> See the National Statistical Office (NSO) Population and Housing Census 2008: Main Report. p. 24.

<sup>39</sup>E.M. Chilemba, ‘Malawi’ (2014) 2 *African Disability Rights Yearbook*, 207-226

- (i) the fullest possible participation in all spheres of Malawian Society<sup>40</sup>

The summary of the foregoing is that the state is expected to accord PWDs equalization of opportunities in accessing public places and ensure fair opportunities in employment whenever it takes any action that affect PWDs. In addition, the PWDs in Malawi are explicitly guaranteed the right to freedom from disability discrimination.<sup>41</sup> This follows that PWDs are entitled to enjoy all human rights on equal basis with others. The Malawian Constitution also gives room for affirmative action by requiring the state to take special temporary measures which includes affirmative action so as to achieve substantive equality of PWDs.<sup>42</sup> It is submitted that the non-discrimination provision which prohibits discrimination on the ground of disability and on other grounds will protect the rights of PWDs.<sup>43</sup> In addition, the rights to fair and safe labour law practices, fair remuneration and equal remuneration for equal work are enshrined in section 31. Section 30(3) implores the state to take measures that will bring about reforms directed at eradicating social injustices and inequalities. It is apparent that Malawian Constitution has useful provisions to safeguard disabled employees' rights. However, it has been observed that the constitutional framework in Malawi is not effective to protect the right to equality and non-discrimination in the workplace because it does not conform to the PWDs' employment standards specified by article 27 of the CRPD.<sup>44</sup> In spite of the shortcomings in the Malawian laws, there are some good aspects which Nigeria can imitate. One of the major impacts of the Malawian Constitution on the disabled is that it directly addresses disability and specifies measures to combat disability discrimination. However, the Nigerian Constitution does not directly address disability.

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

This is the principal piece of legislation which specifically deals with matters of PWDs in Malawi. This Act was intended to make provision for the improvement of care, assistance and education

---

<sup>40</sup> See the 1995 Constitution of Malawi; S.13(g)

<sup>41</sup> 1995 Constitution of Malawi; S. 20

<sup>42</sup> Ibid; S. 20(2) Non Discrimination Provision; See also E.M. Chilemba, (n.34)

<sup>43</sup> Ibid

<sup>44</sup> V. Jere, 'The Right to Equality in the Workplace for Persons with Physical Disabilities in Malawi: Does the Convention on the Rights of Persons with Disabilities Offer any Hope?' in I. G. Plessis and T. V. Reenen (eds.) *Aspects of Disability Law in Africa* (Pretoria University Law Press, 2011) 159-180

of handicapped persons.<sup>45</sup> However, a close study of the objectives stipulated in the Act unravel an archaic approach of treating PWDs as objects of charity and social protection contrary to the recent trend of viewing them as ‘subjects’ with rights. The definition of a ‘handicapped person’ reflects a medical perspective of disability.<sup>46</sup> In modern time, the social and rights-based models to disability are far more preferable to the traditional medical model. Surprisingly, the Act does not make any substantive provisions in respect of the rights of PWDs. It is submitted that the Act is not a veritable instrument for adequate protection of disabled employees in Malawi.

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

The Act above establishes the Technical, Entrepreneurial and Vocational Education and Training Authority (TEVETA) along with a Board whose constitution must include one member representing PWDs.<sup>47</sup> This is the only mention of PWDs in the whole Act. The Act does not contain a single provision dealing substantively with PWDs.<sup>48</sup> Although the principal function of the Act is to facilitate training of employees, yet it failed to make substantive provisions for employees with disabilities. This is one of the shortcomings of the Act. The rights of disabled employees are not protected in the Act.

### **Employment Act No. 6 of 2000**

The above Act protects PWDs in their chosen employment in Malawi. It prohibits employment discrimination on the ground of disability among other prohibited grounds.<sup>49</sup> Specifically, the Act provides that:

- (1) No person shall discriminate against any employee or prospective employee on the ground of race, colour, sex, language, religion . . . disability, birth, marital or other status . . . in respect of recruitment, training, promotion, terms and conditions of employment, termination of

---

<sup>45</sup> See the Handicapped Persons Act, 1971, Preamble

<sup>46</sup> Ibid; s. 2

<sup>47</sup> See the TEVETAA, 1999; s. 6

<sup>48</sup> V. Jere (n. 44)

<sup>49</sup> See the Employment Act No. 6, 2000; s. 5(1)

employment or other matters arising out of the employment relationship.<sup>50</sup>

It is a criminal offence punishable with fines and two years' imprisonment for any employer to discriminate against PWD based on the employee's disability.<sup>51</sup> Sadly, the Nigerian Labour Act does not criminalize discrimination against PWDs in employment. In addition, the Act states that:

Every employer shall pay employees equal remuneration for work of equal value without distinction or discrimination of any kind, in particular, on basis of race, colour, sex, language . . . disability, property, birth, marital status or family responsibilities.<sup>52</sup> (emphasis mine).

Interestingly, the burden of proof in cases of disability discrimination is not placed on the PWD under the Act. Rather, it is the employer that bears the burden of proving that there is no violation of the section above.<sup>53</sup> If any employer terminates PWD's employment solely on the basis of the employee's disability, it constitutes unfair dismissal.<sup>54</sup> In that case, the court has the discretion of reinstating, awarding compensation among other remedies enshrined in the Act.<sup>55</sup> The Act also empowers the government to adopt special measures directed at favouring disadvantaged groups which includes PWDs among others.<sup>56</sup> Affirmative action policies and programmes are tools whereby additional efforts are made to recruit, hire and promote qualified women, minorities and persons with disabilities.<sup>57</sup> The application of these special measures which is in form of affirmative action does not constitute discriminatory practice. One of the major defects of this Act is the failure to provide reasonable accommodation for PWDs.<sup>58</sup>

### **The Disability Act, 2012**

---

<sup>50</sup>Ibid

<sup>51</sup>Ibid; s. 5(3)

<sup>52</sup>Ibid; s. 6(1)

<sup>53</sup>Ibid; s. 6(2)

<sup>54</sup>Ibid; s. 57(3)(a)

<sup>55</sup>Ibid; s. 7

<sup>56</sup> Ibid; s. 5(2) ; See also, ILO: Malawi Country Profile (37)

<sup>57</sup>See M. Schneider and M. Papi, "Affirmative Action and Disability in South Africa" (2011) 7(1) *Transformation Critical Perspectives on Southern Africa*, 90-106

<sup>58</sup> V. Jere (n.44)

The Act above (herein referred to as the DA) was enacted in 2012 as Malawi's contemporary principal disability legislation.<sup>59</sup> It has five parts and 33 sections. The DA sets out the rights of PWDs in Part 4.<sup>60</sup> With regards to protecting the rights of PWDs in employment, the DA specifically provides as follows:

12(1) The Government shall recognize the rights of persons with disabilities to work and employment, which rights shall include –

- (a) The right to gain a living through work that is freely chosen or accepted in a labour market; and
- (b) a working environment that is open, inclusive and accessible to persons with disabilities.

(2) The Government shall safeguard and promote the realization of the right to work and employment by –

- (a) prohibiting discrimination on the basis of disability with regard to all matters concerning all forms of employment, including –
  - (i) conditions of recruitment;
  - (ii) hiring and restructuring of employment;
  - (iii) career advancement; and
  - (ii) safe and healthy working conditions;
- (b) providing persons with disabilities access to just and favourable conditions of work including -
  - (i) equal opportunities and equal remuneration for work of equal value;
  - (ii) safe and healthy working conditions;
  - (iii) protection from harassment; and
  - (iv) redress of grievances;
- (c) providing persons with disabilities effective access to general, technical and vocational guidance programmes, placement services with vocational and continuing training;

---

<sup>59</sup>See the DA, Act 8 of 2012; See also E.M. Chilemba, "Disability Rights and Emerging Disability Legislation in Selected African Jurisdictions: A Diagnostic Momentary" (2015) 3 *African Disability Rights Yearbook*, 291-308

<sup>60</sup>The DA, 2012 (Malawi); ss. 6-26

- (d) providing persons with disabilities employment opportunities and career advancement in the labour market, as well as assistance in finding, obtaining, maintaining and retaining employment;
- (e) creating a conducive environment for persons with disabilities for self-employment, entrepreneurship, and the development of cooperatives; and
- (f) promoting the employment of qualified persons with disabilities in the public and private sector through appropriate policies and measures, which shall include affirmative action programmes and incentives.<sup>61</sup>

The foregoing provisions are laudable as they adequately guarantee the employment rights of PWDs. Inclusive as well as open employment was provided for PWDs and disability discrimination in employment was prohibited in all its entirety. This section seems to be all encompassing for PWDs because it contains effective measures to adopt in order to facilitate the employment and retention of PWDs. This was aptly recognized in the DA. However, the law does not provide for definite quota of PWDs that should be employed in the public sector aside from restating that affirmative action programmes will be adhered to in promoting employment. Reserved quota for PWDs was not specified. The DA also prohibits discrimination against PWDs in work and employment.<sup>62</sup>

Furthermore, for any form of disability discrimination in employment, the Act makes it a criminal offence and guilty persons are liable to pay fine and serve imprisonment for twelve months.<sup>63</sup> But for a corporate body, only fine is payable no term of imprisonment is specified for a corporate body.<sup>64</sup> It is however suggested that the DA should have made provisions for civil remedies so that the affected PWD will be the primary beneficiary of the money so paid. This is because fines paid belong to the government and not to the PWDs. In an attempt to resolve this defect, the Act also provides for civil remedies in form of equitable reliefs, monetary damages and provision of

---

<sup>61</sup>See the DA, 2012; S. 12(1)(a)(b), (2)(a)(b)(c)(d)(e) and(f)

<sup>62</sup> Ibid; S.13(1)(a)(b)(c)(d)&(d)

<sup>63</sup> Ibid; s.13(2)(a)

<sup>64</sup>Ibid; S.13(2)(b)



auxiliary aids or services to be paid to an aggrieved PWD in the event of instituting legal action for violation of rights enshrined, in Part III of the DA.<sup>65</sup> The DA further provides for ‘administrative penalties’<sup>66</sup> whereby the Minister has the discretion to impose penalties on any person or institution if satisfied on reasonable grounds that such person or institution has contravened the Act or any regulations made under it<sup>67</sup>.

Other rights guaranteed under the Act include: accessibility<sup>68</sup>, healthcare<sup>69</sup>, education and training<sup>70</sup>, social protection<sup>71</sup>, association and representation<sup>72</sup>, cultural and sporting activities, recreational services<sup>73</sup>; participation in political and public life<sup>74</sup>; housing<sup>75</sup> and information and communication technologies (ICT).<sup>76</sup> The DA also provides for economic empowerment for PWDs to access loan and credit facilities for purposes of carrying out income generating activities.<sup>77</sup> There is a prohibition of disempowerment against PWDs.<sup>78</sup> Criminal sanctions are provided for persons who segregate or deny any benefits or services to PWD on the basis of disability.<sup>79</sup> Interestingly, the definition of disability under the DA mirrors an understanding of disability under the CRPD and embodies the social and human rights models of disability.<sup>80</sup>

### **Criticisms and Defects in the Disability Act**

First and foremost, the DA does not mention equal legal capacity for PWDs.<sup>81</sup> Again, it does not contain a general anti-discrimination provision as it only prohibits discrimination in the enjoyment of certain specified substantive rights only. Furthermore, the Act does not recognise the taking of specific or affirmative action measure for engendering de facto equality. It only talks about

---

<sup>65</sup> See the DA, 2012 ; S.31(1),(2)(a)(b)(c)

<sup>66</sup> Ibid; S.32

<sup>67</sup> Ibid; S.32(1)(b)(b)(i)&(ii)

<sup>68</sup> Ibid; Ss. 8&9

<sup>69</sup> Ibid; S. 7

<sup>70</sup> Ibid; Ss. 10&11

<sup>71</sup> Ibid; S.14

<sup>72</sup> Ibid; S.16

<sup>73</sup> Ibid; Ss. 19&20

<sup>74</sup> Ibid; S.17

<sup>75</sup> Ibid; Ss. 21&22

<sup>76</sup> DA,2012; ss. 25&26

<sup>77</sup> Ibid; S.23

<sup>78</sup> Ibid; S.24(1)

<sup>79</sup>Ibid; S. 24(2)(a)(b)

<sup>80</sup> Ibid; S.2; See also, E.M. Chilemba (n. 39)

<sup>81</sup> E.M. Chilemba (n.39) p. 295

affirmative action measures within the provision on the right to employment.<sup>82</sup> Sadly and quite fundamentally, the DA does not recognize the denial of reasonable accommodation as amounting to discrimination and so it does not impose any obligation to provide reasonable accommodation<sup>83</sup> save in pursuant to a court order issued under section 9(3) in the context of facilitating the exercise of right of accessibility to premises or services. As such, one may conclude that it does not conform with the equality and non-discrimination standards under the CRPD. PWDs in Malawi still face a number of discriminatory practices as the DA does not seem to be firmly enforced.<sup>84</sup> Employment opportunities for PWDs are limited despite the provision of the DA regarding right to employment and work for PWDs. Although there are many lacunae in Malawi's laws in respect of PWDs, however there are some useful lessons Nigeria can learn from Malawi. The good aspects of Malawian legal framework are examined in another sub-theme in this paper.

### **Child Care, Protection and Justice Act (Act 22 of 2010)<sup>85</sup>**

Children living with disabilities are protected under this Act. Specifically, the Act requires that in legal proceedings involving a child, the court should be informal and in particular, the presiding officer must ensure that children with disabilities are accorded with assistance to meet their special needs where appropriate<sup>86</sup>. Similarly local government authority is under obligation to keep a register of children with disabilities within their area of jurisdiction and provide assistance to those children where feasible so they can grow up with dignity among other children.<sup>87</sup>

### **Policy on Disability in Malawi**

In Malawi, the government has come up with a National Policy on PWDs.<sup>88</sup> The Policy is titled the National Policy on Equalisation of Opportunities for Persons with Disabilities, 2006 (Equalization Policy) which principally seeks the equalisation of opportunities for PWDs in all

---

<sup>82</sup> Ibid

<sup>83</sup> See E.M. Chilemba, 'The Right to Primary Education of Children with Disabilities in Malawi: A Diagnosis of the Conceptual Approach and Implementation (2013) 1 *African Disability Rights Yearbook* 21-22

<sup>84</sup> M.J. Tembo, 'Problems Facing Disabled People in Malawi: A Critical Reflection on my Encounter with a Disabled Woman in a Rural Area in Malawi (2014) 1 *Journal of Comparative Social Work*

<sup>85</sup> See The Education Act, 2013; S.4(1)(a)

<sup>86</sup> Child care Protection and Justice Act, 2010; S. 145(d)

<sup>87</sup> Ibid; S.72

<sup>88</sup> ILO, Malawi Country Profile ; See also E.M. Chilemba (n. 83 )

aspects of the society.<sup>89</sup> The Policy is effectively implemented in Malawi. There is a Ministry responsible for monitoring and evaluating the implementation of the Policy. In addition, the policy appears to have addressed unemployment of PWDs in Malawi. The main goal of the policy is to promote the rights of PWDs in Malawi and to ensure that they play a full and participatory role in society. It envisions that Malawi will become a nation where people with disabilities will have equal opportunities to participate in several undertakings and attain their potentials in life.<sup>90</sup> The ultimate mission of the Policy is to promote the inclusion of PWDs at all levels through the creation of an enabling environment for the respect of human diversity, human rights and development of all human potential.<sup>91</sup> The Policy has seven cardinal objectives and they are: to formulate strategies towards disability prevention, rehabilitation and equalization of opportunities for PWDs; to support community-based service delivery in conjunction with local and international development agencies and organisations; to promote efforts that encourage positive attitude towards children, youth, women and adults with disabilities; to develop programmes that alleviate poverty amongst PWDs and their families; to mainstream disability in the social, economic and political sphere.<sup>92</sup>

### **Legal Protection for Persons with Disabilities (PWDs) in India**

Persons with disability in India experience diverse challenges whenever they desire to acquire employable skills and it is even more difficult for PWDs to find gainful employment in conditions of decent work.<sup>93</sup> Based on the 2011 Census in India, there are over 26.8 million people in India who are disabled.<sup>94</sup> PWDs constitute a significant proportion of the Indian population and their quest for meaningful employment still remain dissatisfied despite the enactment of the new

---

<sup>89</sup> See Malawi Government National Policy on the Equalisation of Opportunities for Persons with Disabilities (2005) (The Equalisation Policy)

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> E.M. Chilemba 'Malawi' (2014) 2 *African Disability Rights Yearbook*, 207-226

<sup>93</sup> ILO, *Persons with Disability & the India Labour Market: Challenges and Opportunities* Working Paper (ILO, 2011) 1-56

<sup>94</sup> See the Social Statistics Division of the Ministry of Statistics and Programme Implementation, Government of India, *Persons with Disabilities (Divyangjan) in India- A Statistical Profile: 2021* (New Delhi, 2021)

disability law in India.<sup>95</sup> There are different legal frameworks for protecting PWDs in India. The core disability legislation in India shall be examined in detail.

### **The Indian Constitution**

The Indian Constitution guarantees civil and political rights for all her citizens under Part III of the Constitution.<sup>96</sup> Part IV of the Indian Constitution provide for Directive Principles of State Policy which is also almost synonymous with social and economic rights stated in the 1999 Constitution of Federal Republic of India (as amended<sup>97</sup>). Concerning PWDs in employment, the Constitution guarantees equality of opportunity in matters of public employment to all her citizens.<sup>98</sup> The Constitution also gives room for affirmative action and reservation of appointment or posts in favour of any backward class of citizens which is not adequately represented in the services under the State<sup>99</sup>. On the right to work for PWDs, the Constitution provides:

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want.<sup>100</sup>

There is also provision for securing just and humane conditions of work.<sup>101</sup> However, Article 37 of the Indian Constitution provides that ‘the provisions contained in this Part (i.e. Part IV) shall not be enforceable by any court’, the principles are only to serve as a guide to the State. This provision has whittled down constitutional protection for PWDs right to work in India. Similarly, the provisions enshrined in Chapter II of the Nigerian Constitution are not justiciable just like the Indian Constitution. Part of the Economic Objectives as enshrined in the Nigerian Constitution, is

---

<sup>95</sup> The old, repealed disability law in India was the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act but this Act has now been replaced by the Rights of Persons with Disabilities Act, 2016

<sup>96</sup>See the Constitution of India, 2018; Arts.14-29

<sup>97</sup>The Constitution of India, 2018; Arts. 38-51

<sup>98</sup>Ibid; Art 16

<sup>99</sup>Ibid; S. 16(4)(4A), (4B)

<sup>100</sup>Ibid; S. 41

<sup>101</sup> Ibid; S. 42; See also, A. Raub and Others, ‘Constitutional Rights of Persons with Disabilities: An Analysis of 193 National Constitutions’ (2016) 29(1) *Harvard Human Rights Journal*, pp. 203-240

the right to secure adequate means of livelihood for all citizens without discrimination.<sup>102</sup> Sadly, this right is not enforceable in Nigeria. Initially, the Indian courts had originally taken the position that the rights in Part IV (socio-economic rights) ‘run subsidiary to the Chapter on Fundamental Rights.’<sup>103</sup> Suddenly, the decision of the Supreme Court in *Kesavananda Bharati v. State of Kerala*<sup>104</sup>, reversed this perspective and held that in spite of the acclaimed facts that rights in Part IV are not justiciable yet the Directive Principles of State Policy enjoy the same status as the Fundamental Rights.<sup>105</sup>

Despite the explicit provision of Article 37 of the Indian Constitution, the Supreme Court has, through ingenious legal interpretation pronounced orders that ultimately have the effect of firmly enforcing socio-economic rights in the same manner as civil and political rights.<sup>106</sup> Arising from the foregoing, disabled employees in India can rely on the decisions of the Indian Supreme Court in advancing or enforcing their right to work despite the fact that it is enshrined in Part IV as mere ‘Directive Principles of State Policy’ with no enforcement capacity. In contemporary time, it might be difficult to contend that Indian courts would decline jurisdiction principally on the sole basis that an alleged human rights infringement is in respect of a socio-economic right.<sup>107</sup> With regard to advancement of disability rights, the Indian Supreme Court has made tremendous success. It is contended that the significant triumph of the Indian Supreme Court particularly in respect of disability rights is attributable to the Court’s jurisprudence on the enforcement of socio-economic rights.<sup>108</sup>

For instance, in *Amita v. Union of India & Ano*<sup>109</sup>, pursuant to an advertisement issued at the instance of the Banking Services Recruitment Board in an Employment Newspaper inviting applications for the post of Probationary Officers in Indian Overseas Banks, the Petitioner, who was a visually handicapped lady, applied for the said post. The requisite qualifications for eligibility were (i) a degree from a recognized university or any qualification recognized as

---

<sup>102</sup>See the 1999 CFRN(as amended); s. 17(3)

<sup>103</sup>See the case of *State of Madras v. Champakam Dorairajan* (1951) SCR525, 531 155

<sup>104</sup>(1973) 4SCC 225.

<sup>105</sup>Supra, para 672; See also, J. Srem-Sai, ‘The Hugger-Mugger of Enforcing Socio Economic Rights in Ghana: A Threat to the Rights of Persons with Disabilities’ (2015) 3 *African Disability Rights Yearbook*, 135-159

<sup>106</sup>See *Daily Rated Casual Labour Employed under P & T Development v. Union of India* (1988) 1 SCR 598; See also *Chameli Singh and Others v. State of Up and Another* (1996) 2 SCC 549

<sup>107</sup>*Dharward PWD Employees Association v. State of Karnataka* (1990) 1 SCR 544, 549-50

<sup>108</sup>J. Srem-Sai, ‘The Hugger-Mugger of Enforcing Socio-Economic Rights in Ghana: A Threat to the Rights of Persons with Disabilities’ (2015) 3 *African Disability Rights Yearbook*, 135-159

<sup>109</sup>(2005) 13 SCC 721



equivalent by Government of India; (ii) not below 21 years and above 30 years. Despite the fact that the petitioner satisfied both requirements, yet her application was rejected by the Bank. This was in spite of the fact that the Petitioner disclosed that she was a blind candidate so that the Board could make adequate arrangement of a scribe for her during the entrance test as is normally done. The Bank in rejecting the Petitioner's application enclosed the order 'As we do not recruit blind candidates for the post of Probationary Officers, your application is rejected'. The court held that the order passed by the authorities rejecting the application of the petitioner on the ground shown in the order was erroneous, illegal and invalid in law and therefore cannot be sustained. Similarly, in *National Federation of Blind v. Union Public Service Commission & Ors*<sup>110</sup>, the petitioner, in his application filed for permission for the visually impaired persons to compete and write Civil Service Examination and also to be given preferential treatment in respect of the identified post. The Court observed in the instant case that:

The list of category A & B posts identified as suitable for the visually handicapped by the committee includes number of posts which are filled as a result of the civil services examination. When there are posts to which blind and partially blind can be appointed, we see no ground to deprive them of their rights to compete for those posts along with other candidates belonging to general category.

In the final decision, the Court directed the authorities to permit the visually impaired persons to compete in the Civil Services Examination. The court also noted that the list of jobs identified by the committee as suitable for being held for physically handicapped persons are not exhaustive and that the Ministries/Departments can further supplement the list based on their knowledge for the jobs requirements, essential qualifications, etc.<sup>111</sup> Both cases are significant victory for prospective disabled job applicants. This is because from the decisions of the Indian Supreme Court, discrimination in employment against PWDs is strongly frowned at and the court is ready to protect PWDs by applying the extant disability law and provisions of Part IV of the Indian Constitution to safeguard PWDs' employment rights.

---

<sup>110</sup> (2005) 13 SCC 721(1993) 2 SCC 411

<sup>111</sup>Supra; See also, *Javed Abidi v. Union of India* (1988-1999) 1 SCC 469

## **Disability Legislation in India**

There are many important disability legislations in India. While some are outdated, others have been repealed and replaced by recent comprehensive legislation. Right from 1980 onwards, the following disability legislation were in existence in India. They include: the Mental Health Act, 1987; the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995; the Rehabilitation Council of India Act, 1992 amended in 2000; the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, 1999.<sup>112</sup> The most recent of all the disability laws in India is the Rights of Persons with Disabilities, Act, 2016. This legislation will be holistically analyzed particularly in relation to protection of employment rights of PWDs in India.

### **Protection of Disabled Employees under the Rights of Persons with Disabilities, Act, 2016** (herein referred to RPWD, 2016)

The above law contains ample provisions for adequate protection of PWDs in the world of work.

In relation to employment rights of PWDs, the RPWD, 2016 specifically provides:

- (1) No Government establishment shall discriminate against person with disability in any matter relating to employment<sup>113</sup>; provided that the appropriate Government may having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.
- (2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability;<sup>114</sup>
- (3) No promotion shall be denied to a person merely on the ground of disability;<sup>115</sup>
- (4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service;<sup>116</sup>

---

<sup>112</sup> ILO, (n. 74)

<sup>113</sup> RPWD, 2016; s.20(1)

<sup>114</sup> Ibid; s. 20(2)

<sup>115</sup> Ibid, 2016 ; S. 20(3)

<sup>116</sup> Ibid; s. 20(4)



Provided that if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits;

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

The foregoing provisions prohibit disability discrimination in employment and mandate the Indian Government as an employer of labour to provide reasonable accommodation at the workplace to suit employees with disability. Employment security is also promoted for employees with disability as the RPWD, 2016 prohibit the Government from doing away (terminating) or reducing in rank the appointment of an employee who acquires a disability during his service. However, it is observed that the Government may exclude the application of non-discrimination in employment where in regard to the type of work executed in any establishment, such exemption is justified.<sup>117</sup> If any disabled employee is aggrieved as to violation of section 20 of the RPWD, 2016, such PWD is at liberty to file a complaint and address same to the Grievance Redressal Officer whose duty is to investigate the matter and take corrective action.<sup>118</sup>

There are different measures, in the RPWD which enhance the prospect of employment or self-employment for PWDs. For instance, the Government is under obligation to formulate schemes and programmes which includes provision of loans at concessional rates to facilitate and support employment of persons with disabilities particularly for developing vocational training and self-employment for PWDs.<sup>119</sup> Other measures prescribed by the RPWD in facilitating employment of PWDs in India are the exclusive reservation of employment posts or vacancies exclusively for some category of PWDs.<sup>120</sup> For example, the RPWD requires Government establishment to reserve not less than four percent of the total number of vacancies in the cadre strength in each

---

<sup>117</sup>Ibid; Proviso to S.20(1)

<sup>118</sup>RPWD; s. 23(2)

<sup>119</sup>Ibid; 2016; S. 19(1)(2)(a)(b)(c)(d)(4)

<sup>120</sup>Ibid; s. 34

group of posts meant to be filled with persons with benchmark disabilities.<sup>121</sup> The fair percent reservation is distributed among the following:

- (i) One percent for blindness and low vision;
- (ii) One percent for deaf and hard of hearing;
- (iii) One percent for locomotors disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;
- (iv) Autism, intellectual disability, specific learning disabilities and mental illness;
- (v) One percent also for multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disability.

Although, the foregoing provision is laudable as it will accelerate the employment of PWDs but the proviso to section 34 which empowers the Government to exclude the application of reservation of posts for PWDs if the nature or type of work justifies such exemption. It therefore follows that the right to non-discrimination of PWDs in employment is not absolute. In safeguarding employment opportunities for PWDs, the RPWD provides that ‘If any of the reserved employment vacancy is not filled up in any recruitment year because of the absence of a suitable person with benchmark disability or for any other sufficient reasons, then the vacancy shall be carried forward in the succeeding recruitment year.’<sup>122</sup> Peradventure, if in another succeeding recruitment year, there are still not suitable persons with benchmark disability available to fill up the reserved post, it may first be filled by interchange among the five categories of disabilities highlighted in Section 34(1)(a)-(e) of the RPWD, 2016. The RPWD, emphasized that only when there is no person with disability available for the post in that year, then the employer shall fill up the vacancy by appointment of a person, other than a person with disability.<sup>123</sup>

The inference from the above is that there are reserved vacancies for suitable (qualified) persons with disability in each recruitment year. The reservation is still kept till the subsequent recruitment year. When it is obvious that there are no suitable benchmark PWDs, then the category of PWDs itemized from i-v (that is, stated in section 34(1)(a)-(e) of RPWD) are to fill up the reserved vacancy by an interchange among them. However, when it is apparent that there are no PWDs

---

<sup>121</sup>Ibid; s.34(a)(b)(c) &(d)

<sup>122</sup>RPWD, 2016; s. 34

<sup>123</sup>Ibid, 2016; s. 34(2)

available to occupy the post in that given year, the employer can fill up the vacancy by employing a person that is not disabled. The effect is that the reserved vacancies for PWDs are not infinite. They are time bound. It may however be unlikely that PWDs will be unavailable to fill the reserved post even though there may occasionally be few suitable benchmark PWDs to fill the reserved post.<sup>124</sup>

For private employers who ensure that its workforce consists of five percent of persons with benchmark disability, the Government and the local authorities shall within the limit of their economic capacity, provide incentives to such employer in the private sector.<sup>125</sup> But the nature of the incentives is not disclosed under the RPWD. One wonders whether it will be tax relief, tax break or reimbursement for expenses incurred in providing reasonable accommodation for PWDs at work. On the issue of providing reasonable accommodation, the Indian Supreme Court has ruled in favour of PWDs in different cases.

For instance, in *Syed Bashir-Ud-Din Qadri v. Nazir Ahmed Shar & Ors*<sup>126</sup>, the Supreme Court observed that:

In order to overcome the impediment of writing on the black board, an electronic external aid could be provided to the appellant which could eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum efforts with these directions for providing reasonable accommodation, the Supreme Court held that the disengagement of the appellant goes against the grain of the PWD Act hence the order was set aside by the Court.<sup>127</sup>

Similarly, in the recent case of *Disabled Rights Group & Anor v. Union of India & Ors.*<sup>128</sup>, the RPWD, 2016 was applied by the Court. The first issue of the petitioner was related to the non-

---

<sup>124</sup>Ibid See also P.K. Pincha, *Rights of Persons with Disabilities Act, 2016: An Overview* (NASSCOM Foundation, India, 2016) 1-24

<sup>125</sup>Ibid; s. 35

<sup>126</sup>(2010) 3 SCC 603

<sup>127</sup>Supra; See also, the Hans Foundation, *Handbook on Rights of Persons with Disabilities, Act 2016* (The Hans Foundation in partnership with National Centre for Promotion of Employment for Disabled People, 2016) 1-71

<sup>128</sup> (2018) 2 SCC 397; See also *Rajive Raturi v. Union of India* (2018) 2 SCC 413

implementation of 3% reservation of seats in educational institutions as provided in Section 32 of the RPWD, 2016. The second issue which is somewhat connected to the first issue was to provide access to orthopaedic disabled persons so that they are able to move freely in the educational institution and access the facilities. The third issue relates to pedagogy that is, making adequate provisions and facilities of teaching for disabled persons, depending upon the nature of their disability, to enable them undertake their studies effectively. The Court in the instant case directed all educational institutions run or aided by the Government to comply with their obligation to reserve 5% seats for the disabled and directed them to report their compliance with the same to appropriate authorities set up under the Act. In addition, the Court also ordered the setting up of a Committee to suggest measures on how the physical infrastructure and methods of pedagogy adopted by educational institutions can be made accessible to disabled within the stipulated time-frame.

In connection with the employment rights of PWDs, the Indian Supreme Court in *Union of India and Another v. National Federation of Blind and Others*<sup>129</sup>, went into the provisions of the repealed Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (referred to as PWD, 1995) in particular Sections 32 and 33 of the PWD, 1995 were the applicable sections in issue and they pertain to identification and reservation of posts for the employment of PWDs. The said sections of the PWD, 1999 are conterminous with sections 32, 33 and 34 of the RPWD, 2016. After a thorough evaluation of the foregoing sections, the Court expressly held:

Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.<sup>130</sup>

---

<sup>129</sup> (2013) 10 SCC 772

<sup>130</sup> *Supra*, para 50 of the case

In emphasizing the above point firmly, the court further observed that:

The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties for disabled persons in particular, to protect the rights of disabled person. Even though the Act was enacted way back in 1995, the disabled people have failed to get the required benefit till today.<sup>131</sup>

In summary, the court finally concluded that the new government memorandum which altered the percentage of posts reserved in the PWD Act was contrary to the computation reserved for PWD. The government Memorandum was struck down and ordered to be consistent with the percentage laid down in the PWD.

Other rights which PWDs are entitled to under RPWD, Act 2016 include; the right to equality, life with dignity and non-discrimination;<sup>132</sup> right to protection from cruelty and inhuman treatment;<sup>133</sup> right to protection from abuse, violence and exploitation;<sup>134</sup> reproductive rights are guaranteed;<sup>135</sup> the right to access any court in pursuit of justice is entrenched.<sup>136</sup> Right to education and specific measures to promote inclusive education are recognized under the Act,<sup>137</sup> particularly under Part III. Vocational training, self-employment and non-discrimination clause in respect of employment of PWDs are stated abundantly under the RPWD, Act.<sup>138</sup> Interestingly, the RPWD, Act 2016 makes provision for the establishment of special courts for speedy trial of offences committed in contravention of the Act.<sup>139</sup> There is also a provision for appointment of a Special Public Prosecutor that is versed in law and disability issues so as to conduct cases speedy in the special court.<sup>140</sup> The punishment for violating the provisions of the RPWD, Act 2016 ranges from payment

---

<sup>131</sup> Supra, para 51 of the case

<sup>132</sup> RPWD, Act, 2016; S.3(1)(2)(3)(4)&(5)

<sup>133</sup> Ibid; S.6(1)(2)

<sup>134</sup> Ibid; S.7

<sup>135</sup> Ibid; S.10

<sup>136</sup> Ibid; S.12

<sup>137</sup> RPDW,2016; ss..17 & 18

<sup>138</sup> Ibid; Ss. 19, 20, 21; See chapter IV of the RPWD, Act; See also Ss. 33, 34, 35, 36 of the RPWD.

<sup>139</sup> Ibid S.84

<sup>140</sup> Ibid; s.85

of fines or imprisonment for two years.<sup>141</sup> Quite novel, the RPWD provides for punishment for offences of atrocities.<sup>142</sup> Thus, it is now a criminal offence to intentionally insult or intimidate a PWD in any place within public view provided there is an intention to humiliate such PWD. Other acts that constitute criminal offence on the person of PWDs are specified in the RPWD.<sup>143</sup>

### **Lessons Nigeria Can Learn from the Indian and Malawian Laws on PWDs' Rights to Employment**

There are numerous lessons Nigeria can learn from the two jurisdictions examined especially in respect of safeguarding the employment rights of PWDs. First and foremost, the Constitutions of India and Malawi directly addressed disability and specifically stipulate measures for PWDs to secure fair opportunities in employment.<sup>144</sup> The Nigerian Constitution can be amended to reflect same position in these jurisdictions. Furthermore, although the socio-economic rights are not enforceable in the Constitutions of India and Malawi, but the courts in these countries have given innovative interpretations and expansive approaches in making socio-economic rights justiciable. This includes the right to employment.<sup>145</sup> Nigerian courts can take a clue from this in order to promote employment rights for PWDs. The Employment Act No. 6, 2000 in Malawi prohibits unfair dismissal of PWDs' employment based on disability. This provision makes PWDs enjoy employment security. The Nigerian Labour Act can also imitate this by expressly prohibiting termination of employment for PWDs based on the disability sustained. At the moment, the Nigerian Labour Act is not protective for PWDs. It is time to effect a change in the Nigerian labour law. In India, the extant disability law provides for "reasonable accommodation" for the PWDs at the workplaces, schools etc. This makes the work of employees with disabilities a bit easy as they can perform designated tasks. Furthermore, it facilitates the actualization of rights to employment for PWDs in India. Surprising, the Nigerian disability law does not provide for "reasonable accommodation" for PWDs. Nigeria can also learn how PWDs are afforded reasonable accommodation in India. In India, there are Special Courts to try persons who violate disability

---

<sup>141</sup> Ibid; Ss. 89, 90, 91

<sup>142</sup> Ibid; s.92

<sup>143</sup> Ibid

<sup>144</sup> See for instance the Constitution of India; Articles 14, 16, 21 and 41; See also sections 13(g), 20, 29 and 31 of the 1995 Malawi Constitution

<sup>145</sup> *Stanton v City Council of Blantyre* [1996] MLR 216 (HC)(Malawi case); See also the *Union of India and Another v. National Federation of Blind and Others*(*supra*)

legislation and specially trained Public Prosecutors who are versed in disability matters are responsible for conduct cases in the special courts. Nigeria can borrow from this good practice. In the recruitment process in India, there is a mandatory quota reservation specified in the Indian disability law which can only be filled by different category of persons with disabilities. Nigeria can also imitate this good practice as it will promote the employment of different PWDs in Nigeria.

### **Conclusion and Recommendation**

The right to employment is so pivotal to the enjoyment of right to life and other fundamental rights guaranteed in the 1999 Constitution of the Federal Republic of Nigeria (as amended). Right to life may become meaningless to a person living with disabilities if right to secure livelihood is not adequately protected. Although the Special People Law of Lagos State and the Discrimination against Persons with Disabilities (Prohibition) Act have made strenuous effort to protect right to employment for persons with disabilities (PWDs), but there are still some gaps in the laws which apparently makes the enjoyment of this right illusory. It is submitted that the Constitution, Disability Act and the Employment Act in Malawi adequately protect right to employment for persons living with disabilities. Similarly, in India there is a progressive interpretation of RPWD, Act, 2016 by the Indian Courts such that right to employment for persons with disabilities is judicially recognized and enforced in deserving cases. Nigeria can draw useful lessons from both jurisdictions in an attempt to ensure that the right to employment is attainable for this category of vulnerable workers.

The following recommendations are therefore proposed so that this right will be adequately protected in Nigeria: First, the Nigerian Constitution should be amended to provide some form of affirmative action for the disabled. This is because persons with disabilities have been historically denied their rights. To compensate these vulnerable workers for past neglect and exclusion at work, justiciable employment right for persons with disabilities as well as right to fair labour practices for all classes of vulnerable workers should be provided in the Nigerian Constitution. Again, the Nigerian Labour Act should be inclusive in its protection of disabled employees at work. Lastly, Nigerian disability legislation should expressly make it mandatory for employers of labour to provide “reasonable accommodation” for PWDs. This will greatly facilitate speedy realization of equal right to employment for PWDs in Nigeria.



