

Towards Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/2008 on the Employment of Persons with Disabilities

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Introduction

According to the UN, about 10 *per cent* of the world's population is disabled at anyone time.¹⁹⁶ Reported unemployment rates among the world's 386 million disabled people of working age is far higher than for other working age individuals. The unemployment rate varies from country to country. In many developing countries, it is estimated at a staggering 80 *per cent* or more.¹⁹⁷ Ethiopia has a very large disabled population. Though data pertaining to the prevalence and situation of persons with disability is incomplete, fragmented and sometimes misleading there is no gainsaying that the number of persons affected by disability is very high. According to UNICEF Ethiopia some five to eight million men and women constituting 7 to 10 *per cent* of the entire population have a disability of some sort.¹⁹⁸ What is worse, a baseline survey conducted by the Institute of Educational Research, Addis Ababa University, showed 60 *per cent* of persons with disabilities in Ethiopia were unemployed in 1995.¹⁹⁹ This number would be higher if those who are underemployed were to be included.

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¹⁹⁶ Daniel Mont, Disability Employment Policy, Social Protection Discussion Paper Series, (The World Bank, July 2004) P.4.

¹⁹⁷ International Labour Office, Managing Disability in the Workplace (Geneva 2002) p.v.

¹⁹⁸ UNICEF Ethiopia Disability Programme, Fact Sheet, [http://www.unicef.org/ethiopia/Et Disability fact sheet Nov 06.pdf](http://www.unicef.org/ethiopia/Et%20Disability%20fact%20sheet%20Nov%2006.pdf). (accessed on Oct 2009). As regards the precise causes of disability some studies show that 41.2% of persons with disability are affected by motor disorders, i.e., inability to walk, to sit, to eat and drink; 30.4% by visual impairment, i.e., weak sighted and blind, 2.4% persons with speech and language impairment, 2.4 % persons with behavioral problems and 2% with multiple disabilities. Tirusew Teferra, Disability in Ethiopia: Issues, Insights and Implications, (Addis Ababa University Printing Press 2005) p. 5.

¹⁹⁹ International Labour Organization, Ethiopia Country Profile, (Geneva 2004) p. 3.

That such a sizable number of people are unemployed cannot be explained by an actual inability to work. In fact, most are qualified and suited for particular types of jobs. It is, thus, apparent that disabled people not only have a valuable contribution to make to the national economy but that their employment also reduces disability benefits that the state has to allocate.²⁰⁰ The logical conclusion is that disability does not arise simply from medical conditions but rather from the interaction between impairments and the physical, social, and policy environments. In other words, in an environment and culture that accommodates the special needs of people with various impairments; the impact of disability would be greatly limited.²⁰¹ Laws, regulations and policies issued by states play significant role in the creation of such a conducive environment.

The Proclamation to Provide for the Right to Employment of Persons with Disability (hereinafter Proclamation No. 568/2008) aims at creating an environment that recognizes the potential of persons with disability to work and exploit same. More particularly, according to its preamble, it aims at realizing equal employment opportunity for people with disabilities by providing for reasonable accommodation and procedural rules that enable them to prove before judicial organs discrimination encountered in relation to employment.²⁰²

In this piece, we shall attempt to dwell on the conceptual basis to disability that informs the Proclamation, the specific policy approaches underpinning the legal solutions adopted, and how the specific rules of the Proclamation mesh in with the constitutional order of the country. We shall also try to shed some light on how the rules embodied in the Proclamation should be interpreted so that the objectives set for the same are achieved without contravening the rights of all those involved.

²⁰⁰ International Labour Office, note 2 above, p.vi.

²⁰¹ Daniel Mont, note 1 above, p 4.

²⁰² The law replaced by this proclamation put in place a system whereby certain jobs were to be reserved for persons with disability to enable 'disabled people' get employment. It required employers to identify posts suitable for disabled persons so only persons with disabilities would compete for these positions. Proclamation Concerning Rights of Disabled Persons to Employment 101/1994 Art 4. The new law, rejects this approach to addressing employment problems of persons with disability. In its preamble Proclamation 568/2008 states that reserving vacancies for persons with disability creates the image that persons with disabilities are incapable of performing jobs based on merit and failed to provide the necessary protection of their rights.

1. Theoretical approaches to disability

The theoretical approaches that underpin a program, an organization, law or policy influence the type of interventions and solutions chosen and implemented²⁰³. A basic understanding of the main theories of disability, therefore, can help shed light on the different legal interventions such as the course taken by Ethiopian law.

Disability has been understood in different ways at different times (ages), places, cultures and contexts. But two opposing view points stand out. These are the individual model and the social model of disability.²⁰⁴

1.1. The Individual Model

This model situates the problems of disability in the person concerned while paying little or no attention to the physical and social environment of the person.²⁰⁵ So according to this model, a person with hearing impairment is disabled as a result of individual impairment. S/he can try to overcome the functional limitations which result from this by undergoing medical treatment or using some medical and paramedical aids. Alternatively, persons with disability have to accept their limitations and learn to adapt their aspirations and what they do to the world around them as the source of these people's problem is their own body.²⁰⁶ Within this overriding paradigm two major identifiable formulations of appropriate interventions exist.

²⁰³http://assets.sportadvert.org/downloads/theoretical_approaches_to_disability.pdf, accessed on October 12, 2009.

²⁰⁴ Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany', *Law and Social Inquiry*, Vol. 27, No. 4 (2002) p.726.

²⁰⁵ Mike Oliver, *The Individual and Social Model of Disability*, Available at <http://www.leeds.ac.uk/disability-studies/archiveuk/oliver/in%20soc%dis.pdf> accessed on September 20, 2010. According to Oliver, there are two fundamental points that need to be made about this model. The first is that it locates the 'problem' of disability within the individual and second that it sees the problem as stemming from functional limitations or psychological losses. In sum, one may characterize this model as 'personal tragedy theory of disability'.

²⁰⁶<http://www.gateshead.gov.uk/People%20and%20Living/equality/eddp/guidance/approach>, accessed on October 3, 2009.

a. The Bio-Centric Approach of Intervention: This approach emphasizes disease, disorder, physical or mental characteristics that are regarded as abnormal,²⁰⁷ but which may be prevented or ameliorated through medical intervention. So, the focus here is to bring the individual's embodied experience in line with the conventional standards. In other words, the focus is on restoring normalcy.²⁰⁸

In its extreme form, this approach may treat persons with disability even as undeserving or dangerous. This association of disability with danger underpins the custodial form of care.²⁰⁹

b. The Charity Approach of Intervention: This approach treats persons with disability as helpless victims needing 'care' and 'protection'. To address the needs of these people it relies largely on the goodwill of benevolent humanitarians. This model further assumes the existence of social responsibility on the part of members of the society. The responsibility, however, derives from charity and benevolence, and not justice or equality²¹⁰. Disability laws that are nothing more than a subcategory of social welfare law may be regarded as falling under this model. Such laws focus on cash benefits for persons with disabilities.²¹¹

As regards intervention by the state, the individual model of disability translates into the policy of social welfare prominent in most civil law countries and originating in Western Europe. The welfare approach of intervention by the state follows a separate-treatment doctrine, providing for the different needs of people with disabilities in segregated settings.

²⁰⁷ A typical definition based on this restricted perception is historically found even in some UN documents. A manual relating to the consequences of disease issued by WHO in 1980 is a good example. It defines 'impairment' as 'any loss or abnormality of psychological, physiological or anatomical structure or function' while it defines disability as 'any restriction or lack, resulting from an impairment of ability to perform any activity in the manner or within the range considered normal for a human being'. See Grant Carson, "The Social Model of Disability", available at <http://www.hief.org.uk/sitebuildercontent/sitebuilderfiles/hieftoolkit24.pdf> accessed on September 10, 2010.

²⁰⁸ Indian National Human Rights Commission, Disability Manual (2005) available at <http://nhrc.nic.in/Publication/Disability/chapter02.html>, accessed on August 10, 2009.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Samuel Bagenstos, 'The Future of Disability Law', *The Yale Law Journal*, Vol. 114, No. 1(2004), p. 10

These include special schools, sheltered workshops, nursing home etc...to cater to the special needs of persons with disability.²¹²

Interventions derived from this approach can, despite the good intentions, compromise the rights of the 'beneficiaries'. This is so because entitlement to rights is often substituted by relief measures over which the person declared invalid has little or no power to bargain. The contention is that when persons can not make their own way, even for fully understandable reasons, then a society that undertakes to care for them will necessarily also undertake to make their decisions.²¹³ In other words, it is maintained that, interventions under this approach are essentially paternalistic, arbitrary and oppressive as the person with disability has no role in decisions shaping his life.²¹⁴ Hence, this approach of intervention creates legions of powerless individuals.

1.2 . The Social Model

In contrast to the individual model, the underlying thinking of the social model is that there are varied types of people in the world. Some are blessed with 'extra something' that provides them an opportunity to take on the world. Still, there are some who possess the talent, but fail to give a proper shape due to lack of means and bad fate. People with disability fall under this latter group in that they possess the talent but they become so engrossed in dealing with tough challenges that the social and physical environment etc... pose that they do not get an opportunity to stand on their feet.²¹⁵

This model that has its academic roots in UK and first politically backed in the USA is based on the idea that it is the society that disables physically impaired people.²¹⁶ It draws distinction between physical impairment and the social situation called 'disability'. It views, for instance, lacking all or part of a limb or having a defective limb as impairment. Then it holds

²¹² Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany', Law and Social Inquiry,) Vol. 27, No. 4 (2002) p. 726.

²¹³ Indian National Human Rights Commission, cited at no 13 above, p.13.

²¹⁴ Ibid.

²¹⁵

<http://jobfunctions.bnet.com/abstract.aspx?docid=99525&promo=100511&tag=content;coll>) accessed on February 4, 2010.

²¹⁶ Shakespeare and Watson, 'The Social Model of Disability: an outdated ideology?', Research in Social Science and Disability, Vol. 2 (2002), p.3.

disability is the disadvantage or restriction of activity caused by contemporary social organization that does not take into account people who have physical impairment. Disability is, therefore, something imposed on those who have impairments. Hence, proponents of this view hold that disabled people are oppressed segment of a society.²¹⁷

This social model has two fold impacts on the issue of disability. First, it enables the identification of political strategy, namely, removal of barrier. That is, if people with impairments are disabled by the society, the remedy is political action to dismantle these barriers and achieve inclusion.²¹⁸ The second impact of the social model is on the disabled people themselves. Once this model and thinking arrived, the disabled people began to think of themselves in totally new ways. Eventually, 'they were able to understand that they weren't at fault: society was. They didn't need to change: society needed to change. They didn't have to be sorry for themselves: they could be angry'.²¹⁹

The logical conclusion from the social model is that disability does not arise simply from medical conditions but rather from the interaction between impairments and the physical, social, and policy environments. In other words, in an environment and culture that accommodates the special needs of people with various impairments, the impact of disability would be greatly limited.²²⁰ In the realm of employment specifically, it is contended that most people with disabilities are willing and able to work, and it is hostile attitudes and contingent environmental barriers that are causes for their exclusion from the workforce. Therefore, the remedy is to adopt civil rights laws that prohibit discrimination and require provision of accommodations to individuals with disabilities in the workplace.²²¹ Under the social model that views disability as a social pathology²²² we have two formulations of intervention.

²¹⁷ Ibid.

²¹⁸ Id., p. 5.

²¹⁹ Ibid. Shakespear and Watson hold that this is sometimes carried to the extreme. They conclude that the social model was an excellent basis for political movement but is now an inadequate grounding for social theory. See p. 29.

²²⁰ Daniel Mont, Note 1 above, p 4.

²²¹ Samuel Bagenstos, 'The Future of Disability Law', The Yale Law Journal, Vol. 114, No. 1(2004), p.18.

²²² Indian National Human Rights Commission, cited at note 13 above.

a) The Functional Approach to Intervention: In this model, the difficulties experienced by a person with disability are regarded as arising from a 'mismatch between the individual's biological condition and functional capacities on the one hand, and environmental, situational factors on the other'.²²³ This model tends to emphasize the role of providing trainings, support services etc...with a view to making the individual as functional as possible. It has also been instrumental in establishing rehabilitation services throughout the world and development of assistive technologies.²²⁴

In spite of its remarkable progress compared to the charity and bio-centric approaches to intervention, this model expects a person with disability to fit into the environment through the use of compensatory skills and assistive technologies. In other words, it tends to still expect the individual to fit within the system, not the system to include the individual, hence can be arguably regarded as having the vestiges of the individual model.

b) The Human Rights Approach to Intervention: Over the past several decades, theoretical perspectives on disability have gone through major paradigm shift. The adoption of the ILO Resolution Concerning Vocational Rehabilitation and Social Reintegration of Disabled or Handicapped Persons and the designation of the UN International Year for Disabled Persons in the 1970s marked a conceptual shift in the way disability is understood. These were the watershed periods in that both instruments constituted the first acknowledgment that the exclusion and discrimination that disabled people faced were human rights issues.²²⁵

In part as a consequence of the above, disability is understood as an element of human diversity. As a result, a major shift has taken in addressing issues of disability. For instance, definitions of disability have been revised to locate disability within the discourse of multiculturalism and diversity.²²⁶ In consequence of these developments we have the human rights model. This model considers disability as an important dimension of human culture and underscores that all human beings irrespective of their disabilities have certain rights which are inalienable. It builds on the spirit

²²³ Ibid.

²²⁴ Ibid.

²²⁵ International Labor Organization, *Employment of People with Disabilities: a Human Rights Approach*, A Report of the Tripartite Technical Consultation for East and Southern Africa, September 2005 p.13.

²²⁶ Stephen Gilson and Elizabeth DePoy, 'Theoretical Approaches to Disability Content in Social Work Education', *Journal of Social Work Education*, (2002) p.241.

of the Universal Declaration of Human Rights which affirms that 'all human beings are born free and equal in rights and dignity'.²²⁷

Respect for human diversity is based on two crucial ideas. The first is that despite their apparent differences all persons are the same as regards rights and dignity. The second is that the equality of rights and dignity does not imply all people should be treated in the same way. This means, treating two differently situated persons in identical ways could in reality be discriminatory. So, apparently neutral criteria, practices, treatments, regulations etc...which in fact result in disproportionately harsh impact on persons with certain characteristics result in what is known as 'indirect discrimination'.²²⁸ So, equality is gauged by the results, not similarity of treatment. Therefore, equality implies not only preventing discrimination but also going beyond that and remedying discrimination. In other words, it embraces the notion of positive rights, affirmative action and reasonable accommodation.²²⁹

When translated into policy terms, the rights approach replaces segregation by integration and mandates antidiscrimination. Consequently, it opposes employment quota as yet another stigmatized form of special treatment. It rather opts for equal opportunity law as a primary tool. In other words, people with disability are transformed from 'passive patients or welfare recipients to people with civil rights that are enforceable by law'.²³⁰

With the foregoing conceptual background to disability we will now look at how disability is understood by the Ethiopian Government Institutions as can be gathered from various legislations and policy documents. The aim here is limited to putting in context the Proclamation which is the subject matter of this piece.

2. The definition of disability under Ethiopian Laws

Taking stock of all legislations in Ethiopia that directly or indirectly deal with disability is beyond the objective of this article. Hence, only a glance at the major ones is attempted. To begin with the 1955 Revised Constitution, it did not have provisions dealing with disability other than the equality

²²⁷ Mont cited at note 1 above.

²²⁸ International Labor Office, *Equality in Employment and Occupation* (1996) p.13.

²²⁹ Mont cited at note 1 above.

²³⁰ Heyer cited at note 9 above p. 727.

clause, which may be construed to cover that.²³¹ A statute issued over a decade after the 1955 Revised Constitution, however, seemed to endorse the charity model to disability.²³² This statute established what was then called the Rehabilitation Agency for the Disabled with the aim of fostering and facilitating through direct assistance and extension services, and through increasingly effective participation of private charitable organizations, the rehabilitation of the (physically and mentally) disabled who were assimilated to infants and senile persons.²³³

Another landmark law in Ethiopian legal history, the Constitution of the People's Democratic Republic of Ethiopia, under Article 22 used words intimating its subscription to the charity approach to disability *albeit* in dealing with a particular group of persons with disability.²³⁴ The Charter of the Transitional Government of Ethiopia, another law of constitutional significance, committed itself to the principle of equal treatment of human beings by embracing the Universal Declaration Human Rights.²³⁵ One may infer from this the human rights approach should inform all laws to be issued regarding disability issues in the period when the Charter was the highest law of the land. The Constitution of the Federal Democratic Republic of Ethiopia Constitution (hereinafter FDRE Constitution) clearly

²³¹See Article 37 which provides that: no one shall be denied the equal protection of the laws. Article 38 says there shall be no discrimination amongst Ethiopian subjects with respect to the enjoyment of civil rights. See The Revised Constitution of Ethiopia, Proc. 149, 1955, *Nega. Gaz.* 15th Year No. 2.

²³²See Article of Order of Establishment of the Rehabilitation Agency for Disabled, No. 70, 1971, *Neg. Gaz.* Year 30th No. 16, which: ...any person who, because of limitations of normal physical or mental health, is unable to earn his livelihood and does not have anyone to support him; and shall include any person who is unable to earn his livelihood because of young or old age; this order had in mind in defining the term for the specific purpose of rendering assistance to a person who falls within the purview of such class. The Amharic rendition of this definition evokes the image of total incapacitation of persons with disabilities: it in part runs: "ድኩም" ማለት ሠርቶ ለመኖር የማይችል የካካል ወይም የአእምሮ ጉድለት የደረሰበትና...

²³³ Muradu Abdo, *Disability and the Right to Access to Justice in Criminal Proceedings in Addis Ababa*, (Unpublished May 2010) Id., Article 2 cum Article 5 cum the preamble. This document provides an excellent track of how disability was understood in different legislations in Ethiopia.

²³⁴This Article states: The state and society shall provide special care for those disabled in the course of defending the sovereignty and territorial integrity of Ethiopia and safeguarding the revolution as well as the families of the martyrs. The Constitution of Peoples` Democratic Republic of Ethiopia, Proc. 1, 1987, *Neg. Gaz.* Year 47th No. 1.

²³⁵ See Article 1 of the Charter, 1991.

stipulates that the fundamental rights and freedoms it embodies should be interpreted in conformity with the Universal Declaration of Human Rights and International Covenants ratified by Ethiopia.²³⁶ From this one would assume that the FDRE Constitution would adhere to the human rights approach to the extent it deals with disability. When it does specifically deal with disability under Article 41(5),²³⁷ the FDRE Constitution, however, provides that 'the state shall...allocate resources to provide rehabilitation and assistance to the physically and mentally disabled....'. Hence, one notes that in the only explicit and directly relevant provision the FDRE Constitution uses language suggestive of the charity model. This, however, is not to suggest that the FDRE Constitution prescribes that the charity approach be followed by all laws to be issued. That the FDRE Constitution does prescribe that its interpretation be in conformity with human rights instruments is one indication of the fact that the human rights approach is not ruled out. What is more, the FDRE Constitution can not be expected to embody all the principles that should inform every law. That is simply impossible in a document of a constitution's generality. Policies and laws issued in the wake of the adoption of the FDRE Constitution buttress this view point.

In the year following the adoption of the FDRE Constitution, the Ethiopian Developmental and Social Welfare Policy was issued. The policy lays down guidelines to be followed in order to enable persons with disabilities not only to be self-supporting but also to contribute to the economic, political and social life of the country. The relevant part of the policy provides that:²³⁸

Conditions that will enable persons with disability to use their abilities as individuals or in association with others to contribute to the development of society as well as to be self-supporting by participating in the political, economic and social activities shall be facilitated.

Other policy documents impacting on the employment and employability of persons with disabilities include: Special Needs Education Program Strategy²³⁹ and Special Needs Education in TVET- Framework.²⁴⁰ There are

²³⁶ Proclamation No. 1, 1995. Fed. Neg. Gaz Year 1 No 1, Art 13(2).

²³⁷ See Proc. No. 1, 1995, Fed. Neg. Gaz. Year 1 No. 1

²³⁸ Ministry of Labour and Social Affairs, Developmental Social Welfare Policy, 1996, Art 5.6.1

²³⁹ Ministry of Education, Special Needs Education Program Strategy 2006,

also laws that impact on employability of persons with disabilities. The Ethiopian Building Proclamation is worth mentioning in this regard. This Proclamation requires that 'any public building shall have a means of access suitable for use by physically impaired persons including those who are obliged to use wheelchairs and those who are able to walk but unable to negotiate steps'.²⁴¹ The significance of this law can hardly be overemphasized as issues of mobility and access for persons with disabilities had almost totally been overlooked by urban planners and architects²⁴² till the issuance of this law, and barriers to access and mobility are the major impediments to the employability of persons with disabilities.

A more recent effort in addressing the employment problems of persons with disabilities is represented by the Draft National Plan of Action for Equality of Opportunity being developed by the Ministry of Labour and Social Affairs. This document seems to best summarize the views of the current Government regarding disability. After raising the various models regarding disability it concludes that:²⁴³

Disability is not something that individuals have. What individuals have are impairments. They may be physical, sensory, intellectual, psychiatric or other impairments. Disability is what happens with (when) people with impairments encounter a society created by and for people without impairments.

According to this document, the Ministry of Labour and Social Affairs takes the view that the Human Rights Model of disability complements the 'social' cause understanding of disability. It further underscores that society and especially governments have the responsibility to promote and protect the rights of persons with disabilities through legislations and enforcement

²⁴⁰ Ministry of Education Special Needs Education in TVET-Framework Document 2009.

²⁴¹ Building Proclamation No. 624/2009, Art 36(1).

²⁴² Misrak Tarekegn, Challenges and Opportunities of Access and Mobility in Addis Ababa: The Case of People with Motor and Visual Impairments, 2006 (Unpublished, Thesis Submitted to Addis Ababa University Graduate School for MA in Regional and Local Development Studies) P. 66. Some of major problems identified by Misrak include inaccessibility of buildings and street environment that exposes persons with disability to grave dangers.

²⁴³ The Ministry of Labour and Social Affairs of Ethiopia, Draft National Plan of Action for Equality of Opportunity and Full Participation of Persons with Disabilities 2010-2015. First Draft Updated on March 3, 2010, p. 8.

of anti-discrimination laws.²⁴⁴ The foregoing policy statement sums up the understanding prevailing in the Government of Ethiopia and hence informs the policy considerations that inspired Proclamation No. 568/2008. The solutions adopted by Proclamation No.568/2008, which will be discussed in the fullness of time, make this conclusion plausible.

3. Who is a person of disability under Proclamation No.568/2008?

Whenever laws are drafted with a view to safeguarding the interests and rights of certain groups of people one of the questions that raise their heads at the outset is how to define the beneficiaries of the legislation.²⁴⁵ Perhaps owing to this, that is precisely what Proclamation No.568/2008 does. Thus, we will start by throwing some light on persons with disability, the theme of Proclamation No.568/2008.

According to Proclamation No.568/2008 a " 'Person with disability' means an individual whose equal employment opportunity is reduced as a result of his physical, mental, or sensory impairments in relation with social, economic and cultural discrimination".²⁴⁶ How disability is defined in a legislation depends on the objective of the particular legislation. Hence, there is no single definition of disability which can be used in all legislations. Generally, there are two different approaches to defining persons with disability. The first approach aims at singling out a narrow, identifiable beneficiary group. In this approach, the goal is to craft laws to provide financial or material support to disabled individuals or employers of disabled people. So, in this approach the definition tends to follow the individual or medical model of disability. Therefore, the definition is impairment-related to ensure that support is targeted at those who need that most²⁴⁷. The second approach aims at providing protection from discrimination on the grounds of disability. Therefore, it emphasizes the

²⁴⁴ Id., p.12.

²⁴⁵ International Labour Office, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation Guidelines* (2007) p.14.

²⁴⁶ Proclamation 568/2008, Art 2(1). In contrast to this definition the law that preceded it, Proclamation 101/1994, under Art 2(1) 'A disabled person' is defined as 'a person who is unable to see, hear or suffering from injuries to his limbs or from mental retardation due to natural or man-made causes; provided however, that the term does not include persons who are alcoholics, drug addicts and those with psychological problems due to socially deviant behavior.

²⁴⁷ International Labour Office, *Equal Employment Opportunities for People with Disabilities* Cited at note 50 above p 16.

social model of disability. Hence, it uses broad, inclusive wording to encompass those with minor disabilities, those who are wrongly assumed to have disability and even those others who are associated with people with disability²⁴⁸.

The purpose of Proclamation No. 568/2008 is to combat discrimination, and not to give a targeted support.²⁴⁹ It is against this latter approach that the definition provided under the Proclamation should be gauged. The definition provided by Proclamation No.568/2008 does follow the social model in that it underscores the need to determine persons with disability having regard to 'social, economic and cultural discrimination'.

In a bid to be inclusive of those with minor disabilities perhaps, Proclamation No.568/2008 refrains from prescribing a threshold on impairment. A comparison with equivalent legislations in other jurisdictions makes this point clear. If one looks at the Americans with Disabilities Act, ADA, for example, for a person to be regarded as disabled, 'physical or mental impairment must *substantially limit* one or more of the *major life activities* of such person'.²⁵⁰ It is held that this definition of disability has resulted in many counterintuitive results in employment related suits by excluding many plaintiffs who seem to be covered by the law given the objectives of the Act.²⁵¹

In a similar vein, the Indian Equal Opportunities, Protection of Rights and Full Participation Act, defines, a person with disability as 'a person suffering from impairment of not less than forty *per cent* ... as certified by a medical authority'.²⁵² So, according to this law there is a threshold requirement of 40 *per cent* impairment which needs to be attested to by medical authorities in order for a person to get the protection of the law under this Act. This could make protection under the Act unavailable to a significant number of persons as compliance with these two requirements could be difficult for many victims of discrimination. In fact, this Indian law

²⁴⁸ Ibid.

²⁴⁹ Proclamation 568/2008, the preamble, paragraph 2 states that, 'the existing legislation' on the rights of the disabled persons to employment created, by providing for reservation of vacancies for the disable persons, an image whereby people with disabilities are considered incapable of performing jobs on the basis of merit....

²⁵⁰ Americans with Disabilities Act, 42 U.S.C. Sect. 12102(2)

²⁵¹ Michelle T. Friedland, "Not Disabled Enough: The ADA's 'Major Life Activity' Definition of Disability", Stanford Law Review, (1999) Vol. 52, No 1, p. 172.

²⁵² International Labour Office, Cited at note 50 above p17.

almost seems to follow the medical model contrary to its name hence excluding from its scope of application a sizeable number of persons with disability. Similarly, the Social Code in Germany provides that a disabled person is 'a person whose physical functions, mental capacities or physiological health are highly likely to deviate *for more than six months* from the condition which is typical for the respective age and whose participation in the life of society is therefore restricted'.²⁵³ So, here too, we have a threshold *albeit* only a period of that six months, unlike under Proclamation No. 568/2008.

Proclamation No.568/2008 adopts more inclusive and broader definition than some international instruments such as the ILO Convention No. 159. The ILO Convention No.159, which has the set purpose of facilitating the employment of 'disabled persons', defines a disabled person as 'an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment.'²⁵⁴

As can be easily gathered from the above definition a person's employment opportunity must be *substantially* reduced owing to a *recognized* physical or mental impairment to be covered by the ILO Convention No.159. These two requirements are reminiscent of disability laws directed at giving specific benefits to a narrowly targeted group rather than combating discrimination in relation to 'employment'²⁵⁵. Proclamation No.568/2008 does not use such words which could exclude a significant number of persons from the scope of its application.

The foregoing does not, however, mean that the definition supplied by Proclamation No.568/2008 is the clearest and most inclusive ever. That the

²⁵³ Ibid. The Disability Discrimination Act of UK 1995 and 2005 also require long term impairment. According to it the impairment must have lasted for 12 months or is likely to last for 12 months.

http://www.nao.org.uk/careers_and_jobs/diversity/nao_disability_equality_scheme/definition_of_disability_the.aspx, accessed on March 12, 2010.

²⁵⁴ ILO, Vocational Rehabilitation and Employment (Disabled persons) Convention (No. 159), 1983 Art 1(1).

²⁵⁵ Note in this relation that the UN Convention on the Rights of Persons with Disabilities does not provide a definition for disability it only says under Art 1 paragraph 2 'persons with disabilities include those whose long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Proclamation defines a person with disability as an individual whose equal employment opportunity is reduced *as a result of* his physical, mental...impairments could be interpreted to exclude persons who are suffering discrimination as a result of past and/or imputed disability. Some laws clearly include these people in the definition. Cases in point are Australian, UK and US legislations. The Australian Disability Discrimination Act of 1992 covers disability that previously existed but no longer exists; or may exist in the future; or is imputed to a person. In a similar vein, the UK Disability Discrimination Act of 1995 includes 'persons with past disability'²⁵⁶. The Americans with Disability Act seems to cover past and imputed disability when it provides in the definition of disability '...B) a *record*²⁵⁷ of such an impairment or C) being *regarded* as having such an impairment'.²⁵⁸

One may, however, cogently contend that any reasonable interpretation of the definition of persons with disability provided by Proclamation No.568/2008 covers past disability and imputed disability, as do the above foreign laws. This is particularly so in view of the objective of the Proclamation. As already stated above, Proclamation No.568/2008 is not defining persons with disability to confer particular benefits or give scarce aid to a narrowly defined group of people. This is essentially a non-discrimination act trying to create equal employment opportunity as clearly indicated in the preamble. This being the purpose, if it prohibits discrimination on the basis of present disability, for a stronger reason, it must prohibit discrimination on the basis of past disability or imputed disability. To interpret the Proclamation's definition of disability as covering only present disability would be absurd given its purpose.

Though as seen above, the definition is not particularly problematic compared to analogous legislations in other countries, employers and even courts may still face difficulties in understanding what 'physical, mental, or sensory' impairments exactly constitute disability within the purview of Proclamation No.568/2008. Do, for example, impairments resulting from old age, severe disfigurement, chronic illness such as diabetes, cancer, HIV infection etc... constitute disability for purposes of Proclamation

²⁵⁶ International Labour Office note 50 above p. 17.

²⁵⁷ Samuel Bagenstos, 'Subordination, Stigma and Disability', Virginia Law Review,(2000) Vol. 86 No. 3 p. 503. If courts begin to understand the importance of the 'record prong' says Bagenstos ,the Statute can provide protection to people who face prejudice and stereotypes based on the lingering stigma of a once-active condition.

²⁵⁸ Americans with Disability Act, 42 U.S.C., Sec. 12102(2).

No.568/2008? Developing implementation guidelines would help a lot in obviating doubts as regards these and similar other issues.

4. Scope of application of Proclamation No.568/2008?

Proclamation No.568/2008 applies to employment relationships that exist between any person with disability and an employer.²⁵⁹ So, to understand the exact extent of the scope of application of this Proclamation one has to understand two things. These are what employment relationship means and who an employer is as envisaged by the Proclamation.

Regarding the meaning of employment relationship Proclamation No.568/2008 itself gives a list of situations deemed to fall within that. It provides that employment relationship 'includes recruitment, promotion, training, transfer and other conditions of work'.²⁶⁰ One can easily infer from the word 'includes' that this is just an illustrative list. Hence, relationships that have not been listed but are deemed to follow from an employment relationship are covered by Proclamation No.568/2008.

As regards scope in terms of the types of employers that are bound to apply its provisions, Proclamation No.568/2008 provides that 'employer means any federal or regional government office or an undertaking governed by labor law²⁶¹'. From these we can gather that the Proclamation is meant to apply to three broad categories of employers. These are:

a) Federal government 'offices'; b) Regional government offices and; c) Undertakings governed by the Labor Proclamation.

²⁵⁹ Proclamation to Provide for the Rights to Employment of Persons with Disability Proc 568/2008 Art 2(2).

²⁶⁰ Ibid. Even prior to the issuance of this Proclamation, one may contend that persons with disabilities were protected against discrimination once employed. This is so because the Labor Law outlaws discrimination between 'workers' on the basis of religion, nationality, sex...or 'any other condition'. Labor Proclamation No. 377/2003, Art 14(1)(f). One may further contend that, given the objective of the Proclamation, employment relationship also covers even non-permanent type of employment but the case for that is less persuasive as remedies embodied in the Proclamation such as 'reasonable accommodation' are very likely to pose undue hardship if required to be made in respect of temporary workers or daily laborers.

²⁶¹ Proclamation to Provide for the Rights To Employment of Persons with Disability Proc 568/2008 Art 2(3).

The application of Proclamation No.568/2008 with respect to each of the above three categories gives rise to peculiar issues and concerns. Following, we will briefly look at each one at a time.

a) **Federal Government Offices:** This is a relatively less problematic category of employers. Issues could, however, arise as to what exactly 'Federal Government office' means. Is it limited to civil servants employed by the Federal Government? If so, there could be a significant number of people outside the scope of application of the Proclamation. This is so because the Civil Servants Proclamation excludes clearly: government officials with certain rank such as directors, deputy directors. It further excludes certain categories of employees governed by special laws such as federal judges, prosecutors, members of the armed forces and the federal police and 'other employees governed by the regulations of the Armed Forces and the Federal Police'.²⁶²

If a restrictive interpretation of the term 'federal government office' is adopted, people with disability will not be getting the protection that Proclamation No.568/2008 accords them with respect to employment relations they might have or are seeking let's say as support staff with the armed forces and the police etc.... But such a restrictive interpretation does not seem to be in line with the spirit of the Proclamation. The Proclamation is, as we will see when discussing its pillars below, an essentially non-discrimination law. It prohibits discrimination on the basis of disability against a person who can carry out the essential functions of the position. This being just an equal opportunity law, the term government office should be interpreted broadly so as to include every federal government institution even those outside the scope of the federal civil service law such as the above.

This broad and inclusive interpretation of the 'federal government office' is consistent with the equal protection of the law guaranteed by the FDRE Constitution. In this regard, Article 25 of the FDRE Constitution provides that:²⁶³

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall guarantee to all persons equal and effective protection without

²⁶² The Federal Civil Servants Proclamation No. 515/2007, Art 2(1).

²⁶³ The Constitution of the Federal Democratic Republic of Ethiopia of 1995, Art 25.

discrimination on the grounds of race, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or *other status*. (Emphasis added).

Though disability is not named as a prohibited ground of discrimination, the fact that we have 'or other status' implies that persons with disability should be given protection of the law against discrimination in matters of employment. Only an inclusive and broad interpretation of the term 'government office' will accord the persons with disability the constitutionally guaranteed right to the protection of the law.

b) Regional Government Offices: as indicated already, Proclamation No.568/2008 specifically states that the protection to persons with disability guaranteed in it is to be accorded in employment relations with 'regional government offices'. Though the protection accorded is desirable, whether the Federal Parliament can enact a law with regard to employment issues in state government offices is questionable. Article 51 of the FDRE Constitution which lists down the powers and functions of the Federal Government does not indicate enactment of laws for the administration of the regional states' employees as a matter falling within the powers of the federal government. Nor does Article 55 of the FDRE Constitution specifically indicate this power in the list of the legislative powers of the House of People's Representatives.

So, any attempt to establish the legislative competence of the House of People's Representatives on this issue should perhaps rely on the power of the House to issue 'a labor code'²⁶⁴ or enacting laws aimed at establishing one economic community²⁶⁵. In fact, the Parliament in issuing the Proclamation has expressly stated in the preamble that its competence emanates from its constitutionally vested power to issue 'labour code'.

It does however seem the argument based on the power to issue 'labor code' does not hold water. A cogent argument against the legislator's understanding of its competence in this regard is found under Art 52(2) f of the FDRE Constitution. This provision provides that states have the 'power to enact and enforce laws on state civil service and their conditions of work....' Besides, one should note that in Ethiopia the federal government has powers that are only specifically given to it while every other power

²⁶⁴ FDRE Constitution (1995) Art 55 (3) .

²⁶⁵ *Ibid* Art 55(6).

remains with the regional states.²⁶⁶ That means in cases of doubt an interpretation that favors the competence of the regional states, and not the federal government should be followed.

Besides, interpreting the power to issue 'labour code' as being indicative of power to issue any employment law, inclusive of employment in regional state government offices, would be incompatible with the long established understanding of labor law in Ethiopia, and the FDRE Constitution itself more importantly. Labor law has been understood as the law that regulates the employment relationship between a worker and an 'undertaking'. By undertaking is meant 'an entity established under united management for the purpose of carrying on any commercial, industrial, agricultural, construction or any other lawful activity'.²⁶⁷ Though the list is illustrative, the *ejusdem generis*²⁶⁸ rule of statutory interpretation requires the phrase 'any other lawful activity' be interpreted to accommodate only things of the type listed. Those in the list seem to have business activity as a common trait. Regional government offices are not business entities and hence different from undertakings within the meaning of the current labour law, at least.

As regards the second possible ground, namely, a law needed to establish 'one economic community', there has to be a prior determination to that effect by the House of Federation.²⁶⁹ Any ways, the House of People's Representatives does not claim the existence of such a determination in the preamble of the Proclamation as the basis of its competence.

The foregoing should not, however, be understood as entitlement by State Government offices to disregard the right of persons with disability to equality of opportunity in employment. All the foregoing means is that under the current constitutional arrangement the Federal legislator has no competence to enact laws that govern employment relationship in State Government offices. So, any claim by persons with disability should be on the basis of the equal protection clause of the FDRE Constitution found under Article 25 already discussed under section 3(a) *supra*.

²⁶⁶ FDRE Constitution of 1995 Art 52(1).

²⁶⁷ Labour Proclamation 377/2003, Art. 2(2).

²⁶⁸ Duhaim's Legal Dictionary, available at

<http://duhaime.org/LegalDictionary/E/EjusdemorEiusdemGeneris.aspx>

²⁶⁹ The 1995 FDRE Constitution under Art 55(6) stipulates that the House of Peoples' Representatives 'shall enact civil laws which the House of Federation deems necessary to establish and sustain one economic community.'

This debate regarding the constitutional validity of Proclamation No.568/2008 as regards its applicability to regional state government offices has now been effectively reduced into an academic debate as Ethiopia recently ratified²⁷⁰ the UN Convention on the Rights of Persons with Disabilities. Ratification of an international convention in Ethiopia makes the convention part of the law of the land that is binding on both federal government and regional states²⁷¹. This Convention prohibits discrimination on the basis of disability with regard to 'all matters concerning all forms of employment, including conditions of recruitment, hiring, and employment, continuance of employment, career advancement and safe and healthy working conditions.'²⁷²

The UN Convention on the Rights of Persons with Disabilities also embodies other related core principles of the Proclamation like reasonable accommodation, and protection from harassment. It further requires parties to take appropriate measures to promote employment of persons with disability in the private and public sectors such as by setting in place affirmative action programs, incentives, provision of training etc...²⁷³

c) Undertakings Governed by Labour Proclamation: The third category of employers on which Proclamation No.568/2008 exerts itself is 'undertakings governed by labour law'.²⁷⁴ The Labour Proclamation applies to employment relationship existing between a worker and an employer.²⁷⁵ The term employer is defined as an undertaking which is understood as a business firm as discussed above under b. On top of this, unless the Council of Ministers issues a regulation to the contrary, the Labor Proclamation also applies to employment relationship between Ethiopian citizen and foreign diplomatic missions or international organization operating within the

²⁷⁰ Ethiopia signed this Convention on November 20, 2009. It ratified the Convention on 7/7/2010. Information regarding the ratification status of this convention is available at a UN site called enable at:

<http://www.un.org/disabilities/countries.asp?navid=12&pid=166> accessed on August 12, 2010.

²⁷¹ FDRE Constitution Art 9(4) and Art 13(2). For more on this matter read: Takele Soboka Bulto, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', in the Journal of Ethiopian Law, Vol,XXXIII No. 1, pp.132ff.

²⁷² Convention on the Rights of Persons with Disability Art 27(1)a.

²⁷³ Ibid.

²⁷⁴ Proclamation 568/2008, Art 2(3).

²⁷⁵ Labour Proclamation 377/2003, Art 3(1)

territory of Ethiopia in the absence of a treaty providing otherwise²⁷⁶. The Labour Proclamation further governs employment relationship between a worker and religious or charitable organizations unless the Council of Ministers by regulation provides to the contrary.²⁷⁷ Thus, Proclamation No. 568/2008 similarly applies to the above employment relationships thereby safeguarding the rights of persons with disabilities.

The Labour Proclamation does not apply to certain employment relationships. These include:²⁷⁸

- contracts for the purpose of educating or training other than apprenticeships
- managerial employees who are vested with the powers to lay down and execute management policies by law or by delegation of the employer
- Contracts of personal service for non-profit making purposes
- Contracts relating to a person who performs an act for consideration, at his own business or professional responsibility
- Contracts of employment relationship governed by special laws such as that concerning the armed forces, members of the Police Force, Judges of Courts, Prosecutors etc...

As the third category of persons on which the Proclamation No. 568/2008 exerts itself is those that are subject to the Labor Proclamation, persons with disability will not get the protection under the Proclamation if they fall in any of the above groups. Of course, this does not hold if the problem arises in relation to employment with the federal government. Again here, all that is being said is the Proclamation does not apply to the above employment

²⁷⁶ Ibid., Art 3(3)(a) and (b).

²⁷⁷ Ibid Art 3(3)(b). On the issue of the applicability of Labour Law to religious institutions the Cassation bench of the Federal Supreme Court has ruled that the employees of such institutions are to be divided into two categories. The first category consists of those rendering 'spiritual services' inseparably linked to the core of the faith concerned such as priests, deacons etc.... The second category is those that engage in work that is not linked to the core of the religion concerned such as accountants, store keepers etc....As regards the first category, the Cassation Bench ruled that these are left for the religious institutions concerned and are beyond the scope of the Labour Law. As regards the second category, it ruled these are matters for labour law and the Council of Ministers can exercise the discretion vested in it as regards this matter to issue laws. *Hamerework St Mary's Church Vs. Deacon Mihret Berhan, Agafari Abraham Tadesse and others*, Federal Supreme Court, File Number 18419.

²⁷⁸ Ibid Art 3(2).

relations save arguably for the very last group. This does not mean that these people cannot claim the equal protection of the law under Article 25 of the FDRE Constitution as argued already above. Nor does it mean that they cannot claim essentially the same rights under the recently ratified UN Convention on the Rights of Persons with Disabilities briefly discussed above. Thus, virtually every person with disability can claim the rights embodied in Proclamation No.568/2008 *albeit* on the basis of the Convention on the Rights of Persons with Disabilities.

5. The pillars of Proclamation No.568/2008

There are considerable differences in the ways in which legislations in different countries attempt to produce social change. Not only are the judicial structures and systems that form the context for interpretation of legislation different but also the legislative style such as focusing on proscribing certain conducts or encouraging certain behavior could be the basis for differentiation²⁷⁹. Following essentially the rights approach as will be discerned from the discussion under, Proclamation No.568/2008 relies more on proscribing and prescribing conduct rather than offering inducements to encourage employers to hire persons with disability. The prominent features of the Proclamation are:

- prohibition of discrimination;
- the principle of 'reasonable accommodation' which is related to the norm of non discrimination in the eyes of the Proclamation;
- limited affirmative action and
- reversal of burden of proof.

5.1. Prohibition of Discrimination

The principle of non-discrimination is inherently linked to the principle of equality. The bedrock of equality as enshrined in various conventions and the Universal Declaration of Human Rights is that all human beings are of

²⁷⁹ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, 'Evaluation of the Common Wealth Disability Strategy', available

at http://www.fahcsia.gov.au/sa/disability/pubs/policy/cds_evaluation/Pages?p4.a.px accessed on July 24, 2009.

intrinsic equal value. Thus, every human being is to be accorded equal respect and equal concern irrespective of mental and physical differences.²⁸⁰

In relation to employment of persons with disability, discrimination occurs when an employer treats a job seeker or an employee unfavorably owing to disability. Particularly, the treatment is regarded as discriminatory when the disability in issue has no implication for job performance or only a slight implication that can be remedied by using appropriate equipment²⁸¹ or through other means that do not cause undue burden on the employer.²⁸²

Three types of discrimination are known to take place in relation to employment of persons with disabilities. These are direct discrimination, indirect discrimination and harassment. Direct discrimination²⁸³, the most obvious of the three, implies less favorable treatment of one person as compared to another person in a *similar or comparable* situation. If, for example, a person with some sight problems is fired from a job after revealing this fact to the employer even though that does not affect his ability to fulfill the requirements of the job, there is a direct discrimination on the basis of disability. For direct discrimination to occur it is not necessary that:²⁸⁴

- a) the prescribed *criterion* be the only or the dominant basis for the unfavorable treatment; or

²⁸⁰ International Labor Organization, cited at note 30 above, p. 13.

²⁸¹ Ibid p 15

²⁸² ibid

²⁸³ Though Ethiopian law does not define what 'direct' discrimination is some other laws do. The 1995 Disability Discrimination Act of UK does, for instance, under 3A(5) provide that ' a person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.' One note here that the comparator is not a non-disabled person but specifically ' a person not having that particular disability'. This formulation enables a claim to be brought even in cases where a person is treated unfairly owing to prejudices or hostility to particular types of disabilities compared to others. Akhlaq Choudhury, 'Direct Discrimination and Disability-related Discrimination', available at:

<http://www.11kbw.com/articles/docs/DirectDiscriminationandDisability2007.pdf>
accessed on Sep 14, 2010.

²⁸⁴ Office of Anti-Discrimination Commissioner of Tasmania, Australia
http://www.antidiscrimination.tas.gov.au/information_on_the_act/direct_and_indirect_discrimination, accessed on August 12, 2010.

- b) the person who discriminates regards the treatment as unfavorable; or
- c) the person who discriminates has any particular motive in discriminating.

Indirect discrimination is a less overt form of discrimination. It takes place when an employer imposes a condition, requirement or practice which in the particular circumstance is unreasonable and has the effect of disadvantaging a member of a group of people that share or are believed to share a prescribed attribute; or any of the characteristics imputed to the particular attribute more than a person who is not a member of that group. The person who discriminates need not be aware that the condition, requirement or practice disadvantages the group of people for indirect discrimination to occur.²⁸⁵ For instance, if an employer requires *all* employees to pass a demanding physical test before being recruited to a particular position when in fact physical fitness is not an inherent requirement of the position, he is engaging in indirect discrimination against persons with some form of physical disability or even elderly job seekers.²⁸⁶ So, indirect discrimination implies that criteria that appear neutral at first sight but when applied result in excluding persons with disability or putting them at a disadvantage compared to others are used. In other words, the criteria or policy followed by the employer may seem fair because it applies to everybody but a closer look will reveal that certain groups such as persons with disability are being treated unfairly. This is a disguised or subtle discrimination. Harassment, which may result in creating a hostile work environment that forces a person with disability to quit the job, is also regarded as the third form of discrimination.²⁸⁷

Proclamation No.568/2008 outlaws all the three forms of discrimination. It provides that,²⁸⁸ 'any law, practice, custom, attitude, or other discriminatory situations that impair the equal opportunities of employment of a disabled person are illegal'. This blanket prohibition is obviously aimed at, among others, the more overt discrimination or direct

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid. Harassment means offensive or intimidating behavior, language occurring at work or a work-related setting which aims to humiliate, undermine or injure its target or has that effect.

http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG_10026557 accessed on September 18, 2010.

²⁸⁸ Proclamation 568/2008, Art 5(1).

discrimination that persons with disability may face when seeking employment or already in employment relationship. The law gets more particular by explicitly prohibiting the employer from using selection criteria that makes reference to 'disabilities' of a candidate unless the nature of the work dictates otherwise²⁸⁹. This prohibition addresses the direct type of discrimination.

Proclamation No.568/2008 also prohibits indirect discrimination perpetrated such as by using criteria which do not directly refer to disabilities but are all the same used in relation to recruitment, promotion, placement, transfer or other employment conditions with the effect of prejudicing the equal employment opportunity of persons with disability because they are applied to everybody.²⁹⁰ Particularly, Proclamation No.568/2008 does prohibit treatment of people in different situations in an identical way. This is the import of Article 5(3) which states not providing 'reasonable accommodation' is a form of discrimination. With a view to remedying the disadvantages that a disabled person may face in the process of seeking a job or while at work the law is requiring the employer to make accommodation for the person with disability so long as the accommodation is reasonable. All what this means is that an employer who treats a person with disability and one without disability in an identical way is actually engaging in discrimination outlawed by the Proclamation. Though admittedly this conclusion is a subject of debate in other jurisdictions with similar laws²⁹¹ one may contend that here the discrimination being prohibited is indirect discrimination by criteria that appear to be neutral but have the effect of putting the person with disability in a disadvantaged position.

²⁸⁹ Ibid Art 4(3)

²⁹⁰ Ibid Art 5(2).

²⁹¹ Whether accommodation requirement such as this are normatively similar to the more traditional prohibition of discrimination is a hotly debated issue. Many contend that there is fundamental normative difference between antidiscrimination requirements and accommodation mandate. According to them, antidiscrimination requirements call on employers not to act on illegitimate preferences, such as prejudice on the basis of the color of skin that they should not have in the first place. In contrast, accommodation mandates prohibit employers from acting on the normally legitimate desire to save money. So, it is held that, accommodation rules are redistributive rather than anti-discriminatory. Samuel Bagenstos, 'Rational Discrimination, Accommodation and the Politics of Disability Civil Rights,' Virginia Law Review, (2003), Vol. 89, No. 5 Pp. 827-828.

The third type of discrimination identified as that manifested by harassment is also outlawed explicitly by Proclamation No.568/2008 *albeit* only in relation to women with disabilities. The duty of the employer in this regard is further limited to cases of 'sexual violence'²⁹². This prohibition of discrimination does not seem broad enough to effectively combat discriminatory effects of harassment in relation to employment of persons with disability. For one thing, it applies only to women. The other thing is that it applies only to the sexual form of it. Even at that, it refers to 'violence' which implies that the law will be of very limited utility if the term violence is taken literally.

5.2. Provision of Reasonable Accommodation

Different legal systems require different approaches as to the positive measures that an employer should take in relation to the employment of persons with disability. The two that stand out are the quota system and the requirement of the provision of reasonable accommodation.

The quota system has some three variants.²⁹³ The first is the quota levy scheme whereby a binding quota is set so that employers covered by the law are required to make sure that a specified percentage of their employees are persons with disability. Those who do not fulfill this requirement may be bound to pay a fine or a specified levy. The money so obtained is then pooled in a special fund to be used for enhancing employment opportunities for persons with disabilities. In some cases the option to hire or pay the fine/levy may be left open for the employer.²⁹⁴ Usually this fund is administered for the said purpose by the public authorities though exceptionally social partners are involved such as in France.²⁹⁵ The second is a binding quota without an effective sanction. In this system, employers are required to hire a quota of persons with disability but the obligation is not backed with an effective sanction either because the law does not provide for any sanction or they are there in the law but are not enforced. Some times the enforcement may be lacking because public authorities have taken the decision not to enforce the law in the book.²⁹⁶ The third is a non-binding quota based on recommendation.

²⁹² Proclamation 568/2008, Art 6(1)(d).

²⁹³ International Labour Office, *Achieving Equal Employment ...Guidelines* cited at note 50 above pp. 35-40.

²⁹⁴ *Id.* p. 38.

²⁹⁵ *Id.* p. 36.

²⁹⁶ *Id.* p. 38.

Under this form, compliance with the quota is voluntary. This system is unlikely to have much effect on the number of people with disabilities that get employment²⁹⁷.

Proclamation No.568/2008 does not adopt any variant of the quota system. It rather requires that every employer make 'reasonable accommodation' for persons with disability. Where the right to equal opportunity vested in the person with a disability is violated because of the employer's failure to provide 'reasonable accommodation', the omission on the part of the employer is regarded as discrimination.²⁹⁸ According to the Proclamation 'reasonable accommodation' refers to 'an adjustment or accommodation with respect to equipment at work place, requirements of the job, working hours, structure of the business and working environment with a view to accommodate persons with disability to employment'.²⁹⁹

Proclamation No.568/2008 clarifies the limits to the obligations of employers in regard to accommodation by clearly stating that an employer is relieved from this duty where taking the measures creates 'undue burden' on it.³⁰⁰ Thus, the creation of undue burden is an acceptable ground for not making accommodation for a person with disability. In a bid to further clarify this limit, the law defines undue burden as:³⁰¹

... an action that entails considerable difficulty or expense on the employer in accommodating persons with disabilities when considered in light of the nature and cost of the adjustments, the size and structure of the business, the cost of its operation and the number and composition of employees.

The principle of reasonable accommodation that Proclamation No.568/2008 adopts emanates from recognition that workplace barriers keep many persons with disabilities from performing jobs which they can do with some form of accommodation. There are a number of possible reasonable accommodations that an employer may have to provide starting from the time of recruitment all the way to workplace etc...³⁰² The US law which

²⁹⁷ Id. p. 40.

²⁹⁸ Proclamation 568/2008 Art 5(3).

²⁹⁹ Ibid Art 2(5).

³⁰⁰ Ibid Art 6(2).

³⁰¹ Ibid Art 2(6).

³⁰² At the recruitment stage, for instance, if a job applicant that stammer is being interviewed reasonable accommodation requires that s/he be given extra time for

embraces the same principle as that in the Proclamation identifies the following among others as 'reasonable accommodations':³⁰³

- making existing facilities accessible;³⁰⁴
- job restructuring;³⁰⁵
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests,³⁰⁶ training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to vacant position.³⁰⁷

interview, as a matter of right even though that may result in delays. It may also require that such person be given the chance after the interview to write up what he was unable to express particularly when fluency is not an inherent requirement of the position s/he is seeking. Stammeringlaw.org.uk, Employment: Examples of Reasonable Accommodation,

<http://www.stammeringlaw.org.uk/employment/ra.htm>, accessed on August 14, 2010.

³⁰³ The US Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), p. 4 available at:

<http://www.eeoc.gov/policy/docs/accommodation.html>, Accessed on Oct 7, 2009.

³⁰⁴ Ibid. For instance, if a cashier gets easily fatigued owing to lupus, and as a result, has difficulty finishing her shift such employee's request for a stool is a reasonable accommodation. This is so because this is a common sense solution to remove a work place barrier resulting from being required to stand when the job can be effectively done sitting down.

³⁰⁵ Ibid. According to the Equal Opportunity Commission, this refers to modifications such as reallocating marginal job functions that an employee is unable to perform owing to a disability and/or altering when and or how a function, essential or marginal, is performed. So, an employer may switch the marginal functions of a certain position between two employees to accommodate the employee with disability.

³⁰⁶ Ibid. According to the US Equal Employment Opportunity Commission, an employer must provide reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and be considered for the job unless that causes 'undue hardship'. This is so even where the employer believes that it will be unable to provide this applicant with accommodation on the job.

³⁰⁷ Ibid. The Americans with Disability Act specifically lists 'reassignment to a vacant position as a form of reasonable accommodation. This type of accommodation must be provided to an employee who, because of disability, can no longer perform the essential functions of her/his current position with or without reasonable accommodation, so long as the employer can not show that would cause undue hardship. Note however that the employee must be qualified for the new position and

In the USA, reasonable accommodation is also to be accorded with respect to benefits and privileges of employment. The benefits envisaged by the US law include but are not limited to, employer sponsored: a) training b) services such as employee assistance programs, credit unions, transportation etc...c) social functions etc.... In other words, equality of opportunity in relation to employment is inclusive of all employment related benefits³⁰⁸. This wide understanding seems to be in line with the Ethiopian Proclamation as it is based on the rights approach implying the employee with disability is not in anyway being done favors.

As is the case in Ethiopia, in the US the only statutory limit to 'reasonable accommodation' is what is known in their legal parlance as 'undue hardship'. The US Equal Employment Commission underscores that 'undue hardship' refers to significant difficulty or expenses and focuses on the resources of and circumstances of a particular employer in view of the costs or difficulties of providing a specific accommodation. In other words, undue hardship refers not only to financial difficulty, but to accommodations that are 'unduly extensive, substantial, disruptive or those that would fundamentally alter the nature or operation of the businesses'.³⁰⁹

If an employer is to discharge its obligations with respect to reasonable accommodation, it must have a comprehensive disability management strategy. The strategy should cover the entire employment relationship starting with the recruitment process and going all the way to job retention by persons with disability. The ILO Code of Practice underscores the need for such a holistic strategy. Particularly, employers must adopt a strategy for managing disability as an integral part of their overall employment policy and specifically as part of the human resources development strategy.³¹⁰

As one of the components of this strategy employers are expected to conduct job analysis. This means with respect to each job, they have to make a detailed list of the duties that a particular job involves and the skills required. This will indicate what exactly the worker has to do, how he or she has to do it, why he or she has to do it and what skill is involved in

be able to perform the essential functions of the latter with or without reasonable accommodation. The employee need not however be the best qualified person for the new position in order to get the reassignment.

³⁰⁸ Ibid p. 11.

³⁰⁹ Ibid p. 5.

³¹⁰ International Labour Office, cited at note 2 above p. 10.

doing it. The analysis may also include facts about tools to be used and machines operated, if that is the case.³¹¹ Having such a clear and detailed view of what a particular position entails and what is expected from the person who occupies such a position can greatly facilitate the employment of persons with disabilities. This will, among other things, guide those in charge of recruitment in screening applicants, interviewing and making decisions regarding employment. Consequently, they will be able to hire persons with disability who would otherwise be rejected using some hazy standards. The employer will have also clear view of what accommodation needs to be made and the precise implication of the accommodation on it, thus, limiting the possibility of engaging in discrimination while the employment lasts and enhancing the chances for job retention.

Where the employer fails in his/her duty to make reasonable accommodation the person with disability has the right to sue and enforce his/her right. Thus, in a way the enforcement of the right is in the hands of the affected person with disability. This could be a positive aspect of the 'reasonable accommodation' approach if courts are accessible and persons with disabilities are sufficiently sensitized of their rights. The approach is certainly better than the non-binding quota system and quota without effective sanctions approach such as owing to deliberate decision by public authorities not to enforce the law. Unfortunately, an early survey of some of the biggest employers³¹² in Addis Ababa conducted by the author in March 2010, almost two years after the issuance of Proclamation No.568/2008 when writing this piece revealed that the reality on the ground is still a far cry from what the Proclamation envisages. It is perhaps too early to evaluate implementation and impact of the Proclamation. In any event, that is beyond the scope of the current topic. It suffices to indicate that the law is

³¹¹ Ibid. p 6

³¹² The persons who filled out questionnaires were: Habtamu Fantaye, Compensation and Labour Relations Manager at Ethiopian Telecommunications Corporation; Genet Aman, Human Resource Administrator at Ethiopian Electric Power Corporation; Samuel Asfaw, Legal Services Manager at Total Ethiopia Share Company; Hailegiorgis Gemedo, Employee Recruitment and Selection Team Leader at Ethiopian Postal Services; Yossief Mulugeta, Director, The Ethiopian Human Rights Council; Damtew W/Tekle, President, Labour Union of the Commercial Bank of Ethiopia; Mohammed Beyar, Director for Human Resource Development and Administration at the Ministry of Labour and Social Affairs. Other pertinent officials who responded but on condition of anonymity were from The Commercial Bank of Ethiopia, NIB International Bank Share Company, and Bank of Abyssinia.

still little known by decision makers in the human resource management departments of even the biggest employers.

5.3. Limited Affirmative Action

One way in which Proclamation No. 568/2008 attempts to address the employment problems of persons with disability is by providing for affirmative action in some circumstances. This is provided for under Articles 4(2), 5(4) and 6(1) b of the same. The first of these three provisions states that where a person with disability having the necessary qualification scores equal or close score to that of another candidate preference must be given to the candidate with disability. Article 5(4) simply underscores that affirmative actions taken to create equal opportunity for persons with disability may not be regarded as discriminatory. All it is doing is assuring employers that any measure of support aimed at persons with disability, they might take, will not result in contravention of the law prohibiting discrimination. Yet another provision of limited application is to be found under Article 6(1) b. This provision provides that every employer has the responsibility to take affirmative action in favour of women with disability taking into account their multiple burdens that arise from their gender and disability. This relatively broad measure of affirmative action is confined in its application to women with disability to the exclusion of males.

5.4. Reversal of Burden of Proof

Proclamation No.568/2008 aims at making enforcement of the prohibition of discrimination easier for persons with disability. One of the ways³¹³ in which it does so is by providing for procedural rules that facilitate judicial enforcement of the right of people with disability to equality of opportunity in matters of employment. The reversal of burden of proof is aimed at this. It provides:³¹⁴

Any person with disability who alleges that discrimination on the ground of his disability existed with respect to recruitment, promotion, placement, transfer or other conditions of employment may institute a suit to the

³¹³ Art 10 which allows associations of which a person with disability is a member to institute legal action on his or her behalf is also a procedural law aimed at making enforcement of the rights of persons with disability.

³¹⁴ Proclamation 568/2008, Art 7.

work) competent court on the issue *without the requirement of burden of proof*. (Emphasis added).

According to Article 7 (2) of Proclamation No.568/2008, it is for the defendant to the suit above to prove that there was no discrimination. The onus of proof lies with the defendant. This is a stark departure from the process of litigation as it exists in Ethiopia. The rule is party presentation. Each party must allege facts to support his claim and introduce evidence that will prove the existence of these facts.³¹⁵

If the above is taken to mean the person with disability has to simply make an allegation of discrimination without showing anything, the defendant will be in extremely difficult position. In other words, s/he will be clueless as to the facts from which the person with disability came to the conclusion that there was discrimination. Thus, the person will be completely in the dark as to what to prove or disprove in the court.

Cognizant of this, other jurisdictions which provide for such a rule in discrimination disputes require the person with disability to allege certain facts and make a *prima facie* case.³¹⁶ The Amended Burton rules could particularly provide good starting point for the interpretation of Article 7 of Proclamation No.568/2008. The Barton guidelines require:³¹⁷

1. claimant to prove certain facts showing *prima facie* discrimination;
2. claimant will fail if he does not prove facts;
3. court should keep in mind that the outcome at this stage will depend on inferences the court will make from proven facts;

³¹⁵ Allen Sedler, *Ethiopian Civil Procedure*, (Haileselassie I University, Faculty of Law, Oxford University Press 1968) 120. Art 222(1)(f) of the Civil Procedure Code Decree 52/1965 embodies this rule.

³¹⁶ European Council Directive 2000/78/E, The UK Procedural Rules of 2009 on Disability and Grievance, The American Case Law in *Barton Vs EAT* as amended by Court of Appeals.

³¹⁷ Sue Johnstone, 'Burden of Proof Guidelines Revised', *Equal Opportunities Review*, available at <http://www.michaelrubenstein.co.uk/default.aspx?id=1034337>, accessed on March 24, 2010. Also see <http://www.thompsons.law.co.uk/ltext/1470002.htm>, accessed on March 24, 2010.

4. tribunal should bear in mind that it is difficult to get a direct proof of discrimination. So, only indirect proof suffices;

5. tribunal could, but is not obliged to, draw inferences of discrimination;

6. tribunal must assume there is no adequate explanation by the employer;

7. court must take into account, if there are any codes of practice, whether they have been adhered to. If not, discrimination is inferred;

8. if facts are proved and inferences can be made from them burden of proof shifts to employer;

9. Employer must prove, 'on balance of probability,' that the treatment was in 'no sense on grounds of disability' and

10. since the facts to prove an explanation are usually with the employer, he/she is expected to provide cogent evidence.

The lack of clarity in the law in this regard is possibly attributable to the fact that the term burden of proof is used in two different senses often in a confusing way. These are the burden of production and the burden of persuasion. The former refers to the burden of going forward with the evidence, i.e, proceeding with evidence on a particular issue at the start of the case. This burden ordinarily lies with the same party who ultimately has the burden of persuasion but not necessarily.³¹⁸ The burden of persuasion in contrast refers to establishing the fact in the courts mind by preponderance of evidence or beyond reasonable doubt depending on the nature of the case at the court. If the court is left in equilibrium as to the existence of the fact, the party with the burden of persuasion fails.³¹⁹ It may be contended that the reversal of burden of proof Article 7 of Proclamation No. 568/2008 talks about is the burden of persuasion. To hold otherwise would be to put the employer in extremely difficult position as he would not know what facts to prove or disprove in order to show that the employer's behavior was not discriminatory.

³¹⁸. Robert A. Melin, Evidence in Ethiopia, Unpublished Material Available at the Library of the Faculty of Law , Addis Ababa University (1972) pp 308-309

³¹⁹ Ibid.

Conclusion

There are various conceptual approaches to disability which in turn determine the type of policy and legal response to the problem. The Proclamation to Provide for the Right to Employment of Persons with Disability is inspired by the 'rights approach'. It sees the issue of disability through the lens of diversity. It, thus, regards employment as the right of persons with disability. To safeguard this right of persons with disability it prohibits discrimination. More importantly, it equates failure to provide 'reasonable accommodation' to persons with disability to discriminatory practice. To ensure that persons with disability enforce their rights in courts of law, in this respect, it provides favorable procedural rules. Namely, it reverses the burden of proof and allows unions and other associations in which the person with disability is a member to institute action on his behalf. Its definition of disability too is expansive even superseding analogous legislations of developed countries and some international instruments. In sum, the Proclamation is modern in both approach and content, following the more recent 'rights strand' of the social model. Whether it is compatible with the economic, social, cultural, legal and institutional reality on the ground and hence will make difference in the lives of persons with disability is an open question.

