

Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?

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ABSTRACT: *This article analyzes and reviews the legal framework for the protection, promotion and fulfilment of rights of Persons with Disabilities (PWDs) in Zimbabwe. The analysis and review shed light on the degree of compliance of disability legislation in Zimbabwe with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter the CRPD). The author has used the CRPD as a measuring stick because the whole world is approaching disability issues based on the CRPD. The laws under scrutiny include the Constitution of Zimbabwe², the Disabled Persons Act³ (DPA) of 1992, the Mental Health Act⁴, the War Victims Compensation Act⁵, the Criminal law (Codification and Reform) Act⁶, the Social Welfare Assistance Act⁷ and the State Service (Disability Benefits) Act⁸. The paper argues that save for the Constitution; other laws addressing disability in Zimbabwe are in need of reform. Such an observation is made in light of the shortcomings of the laws when measured against the provisions of the CRPD. The article concludes by underscoring the need of overhauling or aligning Zimbabwe's disability legislation with the CRPD.*

KEY WORDS: *Persons with Disabilities (PWDs), disability legislation in Zimbabwe, Convention on the Rights of Persons with Disabilities (CRPD).*

I. INTRODUCTION

Zimbabwe was once viewed as a model country for disability rights in Africa and the world over.⁹ It was one of the first countries to adopt disability related legislation through the promulgation of the Disabled Persons Act (DPA) of 1992.¹⁰ This was a progressive development considering that for years, PWDs were saddled by absence of disability legislation. Apart from the DPA, Zimbabwe now boasts other statutes addressing disability in both general and specific terms.¹¹ This article reviews disability laws in Zimbabwe so as to ascertain their degree of compliance with the provisions of the CRPD.

A brief historical trajectory of disability legislation in Zimbabwe

As has been noted, Zimbabwe was one of the first countries in Africa to enact disability legislation. The enactment of the DPA in 1992 broadened the horizons of disability rights activism in Zimbabwe, with disability organizations advocating opportunities for PWDs on an equal footing with their non-impaired counterparts. However, it is pertinent to note that such activism did not yield much as the rights of PWDs were not formally recognized under the erstwhile Lancaster House Constitution.¹² It was not until 2005 that the Zimbabwean

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² Act No.20 of 2013.

³ [Chapter 17:01].

⁴ [Chapter 15:12].

⁵ [Chapter 11:16].

⁶ [Chapter 9:23].

⁷ [Chapter 17:06].

⁸ [Chapter 16:05].

⁹ See an article entitled Disability Rights in Zimbabwe, available at <http://www.msc.st/Docs%20-%20updated%202013/HRBA-Disability-Zimbabwe-121015.pdf>.

¹⁰ Ibid.

¹¹ These include the Constitution of Zimbabwe, the Mental Health Act, the War Victims Compensation Act, the Criminal law (Codification and Reform) Act, the Social Welfare Act and the State Service (Disability Benefits) Act.

¹² Prior to 2005, the non-discrimination clause of the Lancaster House Constitution did not include disability as a ground upon which discrimination was prohibited.

legislature saw it fit to amend section 23 of the Lancaster House Constitution¹³ to include disability as a ground upon which discrimination could be prohibited. However, even with this amendment, it could still be argued that this Constitution was weak as it only prescribed physical disability as a ground upon which discrimination was proscribed thereby not encapsulating other forms of disability enunciated under Article 1 of the CRPD.¹⁴

With the formulation and entry into force of the CRPD¹⁵ in 2007, it was hoped that Zimbabwe would ratify the Convention and implement its provisions. However, that was not to be as it took more than half a decade for Zimbabwe to ratify the CRPD.¹⁶ The above notwithstanding, the ratification of the CRPD by Zimbabwe signals the birth of a new era as it signifies more recognition for the rights of PWDs in the country.¹⁷ As posited by Mandipa¹⁸, Zimbabwe also adopted a new Constitution in 2013 which embraces a human rights based approach to the concept of disability.¹⁹ This represents a great leap forward in the right direction and it demonstrates the country's willingness to protect, promote and fulfil the rights of PWDs as required by the CRPD.

The protection of rights of PWDs under the CRPD

The CRPD is the major treaty that addresses disability at the international level. The coming into force of the CRPD has been hailed by many as a landmark in the struggle to reframe the needs and concerns of PWDs in terms of human rights.²⁰ The CRPD embodies a paradigm shift from a social welfare response to disability to the human rights-based approach.²¹ This entails that PWDs are no longer viewed as objects of charity and as people in need of social and medical assistance but as individuals with full rights and entitlements. To this end, the CRPD is commended for coming up with an enlightened, realistic and people-centred approach to the concept of disability.²²

Although the CRPD has avoided defining what a PWD is, it did state that PWDs include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.²³ This was a bold step in the right direction as any attempt to define disability in the CRPD would have run a risk of time locking the Convention.²⁴ To avoid such eventualities, the CRPD adopts an open-ended approach which recognizes that disability is an evolving concept.²⁵ Such an approach further acknowledges that disability is an inter-play between various impairments on one hand and socio-attitudinal and environmental barriers on the other hand. This standpoint holds water since impairments on their own cannot be an impediment to the enjoyment of one's rights on an equal footing with others. On the contrary, it is the nature of the built up environment and social attitudes that inhibit PWDs from enjoying their rights at par with their non-impaired counterparts.

With regards to the aim of the CRPD, Article 1 clearly states that the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Convention thus places obligations on State parties to ensure and promote the full realization of all human rights and fundamental freedoms for all PWDs without discrimination of any kind on the basis of disability.²⁶ In achieving the afore-stated aim, State parties are to be guided by the following general principles of the CRPD, namely; *respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-*

¹³ Section 23 of the then Lancaster House Constitution was amended through Amendment No. 17 section 4 of Act No. 5 of 2005 which came into force on 14 September 2005.

¹⁴ Under Article 1 of the CRPD, other forms of disability include mental, intellectual and sensory impairments.

¹⁵ The CRPD was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.

¹⁶ Zimbabwe ratified the CRPD on the 23rd of September 2013.

¹⁷ See an article by Esau Mandipa entitled New Constitution disability friendly, Chronicle of Thursday 30 January 2014, available at <http://www.chronicle.co.zw/new-constitution-disability-friendly/>.

¹⁸ Ibid.

¹⁹ The new Constitution of Zimbabwe came into force on the 22nd of August 2013.

²⁰ See Kayess R & French P 'Out of darkness into light? Introducing the Convention on the Rights of Persons With Disabilities' (2008) 8 *Human Rights Law Review* 1 5.

²¹ Mandipa, E. (2011) A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe (Unpublished master's thesis) University of Pretoria, South Africa.

²² See Choruma T, *The forgotten tribe: People with disabilities in Zimbabwe* (2006) Progressio at page 10.

²³ See Article 1 of the CRPD.

²⁴ See Kayess R and French P (note 20 above at 23).

²⁵ See the Preamble to the CRPD.

²⁶ See Article 4 (1) of the CRPD.

*discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women...*²⁷.

Zimbabwe's disability legal framework

From the foregoing, one can discern that the CRPD contains progressive provisions. Such provisions provide the basis for the justification of the reliance on the CRPD as a measure. In the discussion to follow, Zimbabwean disability laws are juxtaposed with the provisions of the CRPD so as to determine their degree of compliance with the CRPD. It is of utmost importance to start with the legislation that predated the Constitution so as to trace the historical development of disability laws in the country.

The Disabled Persons Act (DPA) [Chapter 17: 01]

The DPA is the major law that addresses disability in Zimbabwe.²⁸ As noted by Mwalimu²⁹, the DPA of 1992 of Zimbabwe covers two main areas prohibiting discrimination against PWDs namely; access to public premises, services and amenities and employment. The DPA also establishes the office of Director for Disabled Persons Affairs and constitutes the National Disability Board (NDB, hereinafter the Board)³⁰. The Director formulates proposals and other measures that are submitted to the Board. The Board then develops measures and policies that concern PWDs in the country as provided for in terms of sections 5 (b) (i) to (xiii) of the DPA. The Board is also responsible for registration of PWDs and associations, institutions and organizations including state institutions dealing with the welfare of PWDs. The Board submits its reports to the responsible Minister in terms of section 6 of the DPA. This is in summary, the composition and *modus* of the NDB as established under the DPA.

In the years of its inception, the DPA was hailed by PWDs and disability organisations as a great landmark in terms of furthering the rights of PWDs³¹. With the passage of time however, the DPA morphed into a subject of debate in the disability rights discourse, with concerns being raised that the Act is now a liability and should be consigned to the trash bin and be replaced with an entirely new Act addressing disability in the modern context. What follows are some of the reasons why the author feels the DPA should be scrapped from our statutes.

First, the terminology used by the DPA, namely "Disabled persons", is pejorative and unpleasant. As noted by Mandipa, such terminology "reflects a medical and diagnostic approach to disability which ignores the imperfections and deficiencies of the surrounding society"³². Nyirinkindi³³ further opines that terms and labels become significant in colouring perspectives and determining what rights may be attached to PWDs. It is argued that the DPA has been overtaken by events at the international level as its terminology is now at variance with that used in the CRPD which is "persons with disabilities." Hence, it can be said without gainsay that the DPA is not in conformity with the CRPD.

Second, the definition of a disabled person as proffered by the DPA leaves a lot to be desired. According to the Act, a disabled person is a person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability, which give rise to physical, cultural or social barriers inhibiting him or her from participating at an equal level with other members of society in activities, undertakings or fields of employment that are open to other members of society.³⁴ This definition is now archaic in that fails to capture the fact that disability is not only limited to individual impairments but also to barriers caused by both attitudinal and environmental factors.³⁵

The DPA can however, be commended for establishing a National Disability Board (NDB).³⁶ Among other functions, the NDB is mandated to achieve equal opportunities for disabled persons by ensuring, so far as

²⁷ See Article 3 of the CRPD on general principles.

²⁸ Mandipa E (note 21 above at 73).

²⁹ Mwalimu C (2003) *International Disability Rights Compendium* page 251 at 268.

³⁰ See Sections 3 and 4 of the Disabled Persons Act.

³¹ Considering that Zimbabwe was one of the first countries to enact disability legislation by 1992, the DPA was therefore welcome and progressive as it provided a model for disability legislation.

³² See an article by E Mandipa entitled "Disabled Persons Act defective, The Standard of January 22, 2012.

³³ Nyirinkindi L (2006) "A critical analysis of paradigms and rights in disability discourses" 12 East African Journal of Peace and Human Rights at 49.

³⁴ See section 2 of the DPA.

³⁵ Mandipa E (note 21 above).

³⁶ See section 4 of the DPA.

possible, that they obtain education and employment, participate fully in sporting, recreation and cultural activities and are afforded full access to community and social services. Furthermore, the NDB is empowered to issue and serve adjustment orders to ensure access by all persons with disabilities (PWDs) to mainstream public services. The NDB may serve an adjustment order requiring the owner of the premises to which members of the public are ordinarily admitted to or the provider of public services to undertake action at his/her own expense to secure reasonable access by PWDs. In addition, the DPA criminalises the failure by the owner of the premises to comply with an adjustment order. Such was a bold step taken by the DPA and it is compatible with Article 9 of the CRPD which mandates State parties to promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the members of the public.

However laudable the issue of adjustment orders may be, it should be pointed out that there is a fundamental weakness exhibited by the DPA. This is the fact that the NDB is ineligible to give adjustment orders to State hospitals, clinics, nursing homes, schools or educational training centres without the consent of the relevant Minister of the institution concerned.³⁷ Consequently, this has resulted in many government workplaces, magistrates' offices and State recreational facilities being inaccessible to PWDs.³⁸ As an example, it is very difficult if not impossible for PWDs to access government offices in some parts of the country given the fact that there are no guiding rails, the elevators have no recorded voices for persons with visual impairments and are too narrow to accommodate wheelchairs.³⁹ It is submitted that the situation would have been better had the DPA adopted a similar provision like Article 9 of the CRPD, which provides for the identification and the elimination of obstacles and barriers to accessibility of all buildings or facilities open to the public.⁴⁰

With respect to work and employment, it is noteworthy that there is no mention of the right of PWDs to work throughout the entire DPA. All it does is to proscribe discrimination at the workplace.⁴¹ This is in contrast with Article 27 of the CRPD, which enjoins States Parties recognize the right of persons with disabilities to work, on an equal basis with others. Dearth of an explicit provision on the right to work by PWDs in the DPA strongly suggests that the DPA is not in conformity with the CRPD. Again, the non-inclusion of the right to work by PWDs in the DPA does not come as a surprise considering that the Act predates the CRPD. However, it is ideal that the DPA include the right to employment for the PWDs. To this end, it is submitted that the DPA should contain a specific provision which recognizes the right to work for PWDs.

The DPA can be further criticized for its failure to provide for the participation of PWDs in disability issues. In other words, the DPA ignores the clarion call of the disability movement that is "*nothing without us, concerning us*". Moreover, the Act has no formal policies, strategies and agreed standards to monitor its implementation.⁴² All this speaks volumes about how the DPA has been overtaken by events. Basing on the above, it may be argued that there is a strong case for replacing the DPA with an entirely new Act addressing disability issues in the modern context and at par with the provisions of the CRPD like Article 29 which calls for the promotion of participation in public life by PWDs. From the foregoing, one can conclude that the DPA is incompatible with the provisions of the CRPD.

The Mental Health Act [Chapter 15:12]⁴³

This Act governs the care, detention and after care of the mentally impaired in Zimbabwe. The Act also provides for the establishment of the Mental Hospital Board⁴⁴, which is tasked with the treatment, rehabilitation and general welfare of mental patients; the Special Boards⁴⁵ which make reports in relation to mental patients detained in various institutions and the Mental Health Review Tribunal⁴⁶ which primarily hears applications and appeals made by or on behalf of mental patients detained in institutions.

The care, detention and after care of persons who are mentally disordered or intellectually handicapped as advocated for by the Mental Health Act is appreciated in so far as it assists in the realisation of the right to the highest attainable standard of health without discrimination on the basis of disability and is accordingly in line with the best standards recognized at the international level under the CRPD.⁴⁷ The Mental Health Act can also be commended for its provision for the care and rehabilitation and after care of persons with mental disorders

³⁷ Mandipa E (note 21 above).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ See Article 9 of the CRPD.

⁴¹ See section 9 of the DPA.

⁴² Mandipa E, (note 21above).

⁴³ The Mental Health Act was enacted in 1996 through Act No. 15 of 1996.

⁴⁴ See sections 68-72 of the Mental Health Act.

⁴⁵ See section 73 of the Mental Health Act.

⁴⁶ See Part X of the Mental Health Act.

⁴⁷ Mandipa E, (note 21 above).

and this is in harmony with Article 25 of the CRPD which also stresses the need for State Parties to take all appropriate measures to ensure access for PWDs to healthcare services, including health-related rehabilitation.

However, it should be pointed that there is a fundamental weakness exhibited by the Act. This is the fact that it uses pejorative language like, ‘mentally disordered’ and ‘intellectually handicapped’, when referring to persons with mental impairments. Such words are at variance with the terminology like “persons with disabilities”, used by the CRPD.⁴⁸ It is recommended that when calling a PWD, a person must be put first before the disability. Mandipa accordingly notes that the terms such as mentally disordered and intellectually handicapped should be discarded in favour of terms like “persons with a mental disability” and “persons with an intellectual disability” respectively.⁴⁹ Furthermore, it should be remembered that terms like “mentally disordered”, “intellectually handicapped” and “mental patients” demean, degrade and stigmatize PWDs and they are now regarded as disempowering which is the reason why they should be removed from the Mental Health Act.⁵⁰

The War Victims Compensation Act [Chapter 11:16]⁵¹

As its name so suggest, this Act is meant to provide for the payment of compensation in respect of injuries to or the death of persons caused by war. Thus a war victim with a disability which is war related in accordance with the Act is eligible to claim compensation of course after an assessment by the Commissioner of War Victims compensation.⁵²

A crucial point to note about this Act is the fact that like the DPA, the definition of a disabled person leaves a lot to be desired. The War Victims Compensation Act defines a “disabled person” as a person suffering from disablement in respect of which compensation is payable in terms of the Act.⁵³ It appears such a definition makes reference to physical disability only and it fails to capture that war and its aftermath may result in other forms of disabilities, which are not necessarily physical in nature. For instance, the trauma of war may also lead to mental disabilities in the aftermath of the war. The definition of who is a person with a disability under the War Victims Compensation Act is thus at variance with the open-ended definition of who can be a person with a disability under Article 1 of the CRPD.

Although the War Victims Compensation Act can be criticised for the above mentioned shortcoming, sight need not be lost as to the fact that it is the only Act which embodies special provisions for women with disabilities (WWDs) and Children with Disabilities (CWDS). Such are commendable provisions which are in tandem with the spirit and ethos of the CRPD.⁵⁴ It is trite that women and children with disabilities suffer double marginalization, first as women and children in a subordinate position and second as persons with disabilities. Thus the War Victim Compensation Act can be commended for trying to address the aspect of double marginalization for WWDs and CWDS. However, there is need for the Zimbabwean legislature to consider amending the Act so much that it captures other forms of disabilities apart from physical disabilities as provided for in terms of Article 1 of the CRPD.

The Criminal Law (Codification and Reform) Act [Chapter 9:23]⁵⁵

Although this Act does not so much fit well into the category of disability related statutes, it nevertheless criminalizes sexual intercourse with a mentally incompetent adult.⁵⁶ It is an indisputable fact that women with mental disorders are common victims of rape and other sexual offences since they cannot positively identify their assailants and may not even be in a position to remember what could have transpired to them after the sexual assaults. To this end, the Criminal Law (Codification and Reform) Act is highly commended for criminalizing sexual conduct with a mentally challenged person.

However, a point of weakness presented by the Act is that it does not extend the same protection of the law to the visually impaired. Yet women or visually impaired adults can be victims of sexual crimes and are even in a precarious position since they may not be in a position to identify their perpetrators or assailants. To make matters worse, disability of the rape victim is not captured amongst the aggravating factors to be

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ The War Victims Compensation Act was enacted in 1980 so as to compensate war victims with disabilities that were occasioned by the war of liberation.

⁵² See section 12 of the War Victims Compensation Act.

⁵³ See section 2 of the War Victims Compensation Act.

⁵⁴ See Articles 6 & 7 of the CRPD on women and children with disabilities.

⁵⁵ The Criminal Law (Codification and Reform) Act was enacted in 2004.

⁵⁶ See section 64 of the Criminal Law (Codification and Reform) Act.

considered by the judge or magistrate when meting out sentence to the accused under the Act.⁵⁷ Hence, the Act needs to be aligned with Article 16 of the CRPD, if all PWDs are to be adequately protected from sexual exploitation, violence and abuse.⁵⁸

The Social Welfare Assistance Act [Chapter 17:06]

This Act makes provision for the granting of social welfare assistance to destitute or indigent persons.⁵⁹ With regards to the issue of eligibility for social assistance, section 6 of the Act clearly states that physically and mentally challenged persons qualify as destitute and or indigent persons. It may be argued that the Social Welfare Assistance Act was promulgated alongside a misconception that disability is always associated with poverty. Yet this is not always the case as some PWDs are capable of self-support and are sometimes in economically better situations as compared to their non-impaired counterparts.⁶⁰ Thus, the Social Welfare Assistance Act can be criticised for making reference to the out-dated social model to the concept of disability, which model treats PWDs as objects of charity. It is in this light that the Act should be revised and be aligned with the human rights based approach to the concept of disability as per the spirit and ethos of the CRPD.

Lamenting the failure by the Social Welfare Assistance Act to capture the essence of human rights based approach to the concept of disability; Mandipa⁶¹ posited thus, *“As long as PWDs are portrayed as incapable of supporting themselves and are always made objects of charity or welfare, it becomes very difficult to talk of their human rights. This is a poor position which is the direct opposite of the principles underlying the CRPD like respect for independence of PWDs, individual autonomy, inherent dignity and, full and effective participation and inclusion in society.”* This therefore validates the conviction that the approach followed by the Act falls short of the human rights based approach as advocated by the CRPD.

Notwithstanding the above, it should be remembered that by making provision for the granting of social assistance in form of cash to physically and mentally impaired citizens, the Act is highly commendable in its quest to reduce poverty amongst PWDs. To an extent, social assistance in the form of cash will go a long way in reducing poverty. The only impediment to this goal, perhaps, has been the fact that, like the DPA, the Social Welfare Act, lacks a coherent enforcement mechanism. The situation is even exacerbated by the fact that the department responsible for administering both the Social Welfare Assistance Act and the DPA, namely the Department of Social Welfare, is one of the most impoverished Government departments. This has undermined the actual translation of the Act's provisions from paper into tangible reality. Thus, meaningful social assistance to PWDs who are in dire need of it remains a pipe dream notwithstanding the existence of this social welfare law.

The State Service (Disability Benefits) Act [Chapter 16:05]

This Act makes provision for the payment of compensation upon the death or disablement of members or former members of the Defence Forces, the Police Force and the Prison Services and also payment of compensation on the death or disablement of any person whilst assisting the mentioned forces.⁶² Although the rendering of such financial assistance is appreciated, a closer examination of the Act leads one to the conclusion that only persons who acquire physical disabilities whilst in the forces or whilst rendering assistance to the forces are eligible to receive compensation. This leads to the hypothesis that when the Act was enacted, the draftsmen only had physical disability in mind to the exclusion of any other forms of disability. To this end, the Act can be criticised for its failure to capture that a persons may also acquire other types of disabilities like mental disabilities, whilst rendering assistance to members of the Defence forces, Police force and or Prison services.

Furthermore, disablement for the purposes of this Act has been defined as permanent injury or disfigurement.⁶³ What this entails is that those who acquire short term disabilities or even long term disabilities which are not of a permanent nature will not qualify as beneficiaries under the Act. Hence it can be argued that the Act is limited in its scope as the right to claim compensation is either diluted or watered down by the enumeration of disabilities as permanent or non-permanent in nature. It is submitted that the situation would have been better had the Act simply made provision for the granting of compensation to all and sundry regardless of whether the injury is or is not of a permanent nature. Further, the Act must also be revised to include other forms of disability as per Article 1 of the CRPD.

⁵⁷ Mandipa E, (note 21 above). See also section 65(2) of the Criminal Law (Codification and Reform) Act.

⁵⁸ Article 16 which of the CRPD mandate State Parties to take all appropriate measures to protect PWDs from all forms of exploitation, violence and abuse. Thus, sexual abuse can be inferred from the terminology, “all forms of exploitation.”

⁵⁹ See section 2 of the Social Welfare Act, which defines a destitute or an indigent as a person who lacks means of subsistence.

⁶⁰ Mandipa E, (note 21 above).

⁶¹ Ibid.

⁶² See section 37 of the State Services (Disability Benefits) Act.

⁶³ See section 2 of the State Services (Disability Benefits) Act.

The Constitution of Zimbabwe Act No. 20 of 2013

In 2013, Zimbabwe adopted a new Constitution to replace the old Lancaster House Constitution.⁶⁴ This was a great landmark considering the shortcomings of Lancaster House Constitution. As has been stated, the Lancaster House Constitution did not prior to 2005, have anything to do with disability rights. The Lancaster House Constitution was then amended in 2005 to include physical disability as a ground upon which discrimination could be prohibited amid wide criticisms from disability rights activists who raised concerns as to whether the draftsmen thought carefully about other types of disability recognized at the international level.⁶⁵ The new Constitution appears to have remedied this gap as it specifically provides for disability as a prohibited ground of discrimination⁶⁶ without enumerating the forms of disability.⁶⁷ Such an equality and non-discriminatory provision (which does not enumerate the forms of disability) is highly commendable as it conforms to Article 1 of the CRPD which provides for all forms of disabilities including physical, mental, intellectual and or sensory disabilities. With such a seemingly open-ended provision in the new Constitution of Zimbabwe, the Constitution could go a long way in protecting and promoting the rights of PWDs as discrimination against any person with any form of disability could be regarded as falling foul of the Constitution.

Apart from the equality and non-discriminatory clause, the Zimbabwean Constitution now provides for founding principles and values upon which Zimbabwe is built.⁶⁸ Recognition of the rights of PWDs is also captured in section 3 of the Zimbabwean Constitution as one of those principles.⁶⁹ Such founding principles are of utmost significance in that they bind the State and all institutions of government at every level. More significantly, these are non-derogable principles which give guidance to anyone interpreting and enforcing the Constitution. The relative significance of section 3 of the Zimbabwean Constitution need not be underestimated, especially in so far as it applies to persons with mental disabilities who are normally treated as if they are less human than other human beings.

The inclusion of the recognition of the rights of persons with disabilities among the founding values and principles is commendable in that there is at least recognition of disability rights and an appreciation of the equal worthy of all human beings in Zimbabwe as opposed to the erstwhile Lancaster House Constitution which did not provide for the rights of persons with disabilities in any section. Further, the inclusion of the formal recognition of rights of PWDs is in line with Articles 3 and 5 of the CRPD on inherent dignity of human beings and equality and non-discrimination, respectively.

Moreover, section 6 (4) of the Constitution now obliges the State to promote and advance all languages used in Zimbabwe, including sign language and must create conditions for the development of those languages. By making provisions for the recognition of sign language as an official language, the new Constitution will go a long way in addressing the communication barriers that persons with speech functional and hearing disabilities have been facing in Zimbabwe.⁷⁰ As an example, the prosecution of matters involving perpetrators and victims of crime with speech functional disorders in Zimbabwe has not been without challenges as there has always been a shortage of court personnel with expertise in sign language. Now that the new Constitution mandates the State to create conditions for the development of sign language, this provision is in tandem with the CRPD which mandates that State parties promote “... *full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.*”⁷¹

Furthermore, the new Constitution provides that all institutions and agencies of the Government at every level must recognise the rights of persons with physical or mental disabilities, in particular their right to be treated with respect and dignity⁷². This is a great improvement in that the provision reinforces the equal worthiness of all human beings. However, a fundamental weakness exhibited by the new Constitution is that it makes reference to persons with physical and mental disabilities without alluding to other forms of disabilities like sensory disabilities. This is in sharp contrast with Article 2 of the CRPD which provides for all forms of disabilities including physical, mental, intellectual and or sensory disabilities. Hence by referring to physical and mental disabilities to the exclusion of sensory and intellectual disabilities, the new Constitution of Zimbabwe is not in conformity with Article 2 of the CRPD.

⁶⁴ See note 19 above.

⁶⁵ Other types of disability include sensory and intellectual disabilities which the old Lancaster House Constitution through its Amendment No. 17, Act No.5 of 2005 has left out.

⁶⁶ See section 56 (3) of the new Constitution of Zimbabwe.

⁶⁷ Mandipa E (note 17 above).

⁶⁸ See section 3 of the Constitution of Zimbabwe.

⁶⁹ See section 3 (2) (i) of the Constitution of Zimbabwe.

⁷⁰ Mandipa, E (note 17 above).

⁷¹ See Article 3 (d) of the CRPD.

⁷² See section 22 (1) of the Zimbabwean Constitution.

In addition, it should also be noted that section 22 (2) of the Zimbabwean Constitution provides that the State and all institutions of Government must within the limits of the resources available to them assist persons with physical or mental disabilities to achieve their full potential and to minimise the disadvantages suffered by them. Whilst this provision can be commended to a greater extent, it can be argued that the inclusion of a claw back clause in section 22 (2) can operate to water down or dilute the rights of PWDs. Put differently, the government may hide behind the provision to plead poverty arguing that it does not have resources. In the end, this may render the rights of PWDs essentially nugatory as there will be no actual translation of the dreams and aspirations of PWDs from paper into actual reality. The above notwithstanding, this is not to say the new Constitution is not progressive.

The new Constitution also mandates the State and all its institutions to consider the specific requirements of persons with all forms of disabilities as one of the priorities in development plans.⁷³ This appears to be a bold step forward in attempting to alleviate poverty among PWDs in Zimbabwe and to ensure their inclusion and participation in society. It is an indisputable fact that PWDs are amongst the world's poorest and PWDs in Zimbabwe are no exception. To this end, Zimbabwe can be commended for adopting a constitutional provision that gives priority to PWDs in its developmental plans.⁷⁴ This is in tandem with the preamble to the CRPD which highlights the fact that the majority of persons with disabilities live in conditions of poverty.⁷⁵

To add on to the above, section 83 of the Zimbabwean Constitution shows a constitutional commitment to address and alleviate the plight of PWDs in the country in that it is a dedicated section on the rights of persons with disabilities. More importantly, it is for the very first time in history that Zimbabwe has had a specific provision in the Bill of Rights dedicated to the protection of the rights of PWDs.⁷⁶ The provision mandates the State and all its agencies to take appropriate measures, within resources available, to enable persons with disabilities to become self-reliant, to live with their families and participate in social, cultural or recreational activities, to protect them from all forms of exploitation and abuse, to give them access to medical, psychological or functional treatment, to provide special facilities for their education and to provide State-funded education and training. This confirms that Zimbabwe has begun to embrace a human rights approach to disability and that the country has largely conformed to most provisions of the CRPD.⁷⁷

Notwithstanding the above, it should be noted that section 83 makes the realization of rights of PWDs contingent upon the State's available resources. This can pose some serious problems as the Government can rely on the provision to plead poverty. It is submitted that section 83 should have stated that the State has a duty to progressively realize the rights of PWDs.⁷⁸ Furthermore, it was also necessary to include in the provision a minimum core obligation to ensure that PWDs' rights are fulfilled. Yacoob J in the South African case of *The Government of the Republic of South Africa and Others v Grootboom and Others*⁷⁹ defined a minimum core obligation as the minimum essential level that must be fulfilled by the State in relation to any socio-economic right. What is more, the minimum core represents a ceiling beneath which the conduct of the State must not drop if compliance with the obligations provided for under the CRPD is to be achieved.⁸⁰

Over and above all, the new Constitution provides for the right to political participation by PWDs. Pursuant to section 155 of the Constitution, the State is now under a constitutional obligation to ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote and the State must facilitate voting by persons with disabilities.⁸¹ Unlike in the past years in which a myriad of factors like lack of accessible polling stations, lack of voting materials in accessible formats, lack of accessible campaign literature and inaccessible transportation to and from polling stations rendered the right to vote by PWDs hollow, the Constitution now explicitly provides for a right to vote by persons with disabilities.⁸² The inclusion in the Zimbabwean Constitution, of the right to political participation by PWDs is progressive as it falls on all fours with Article 29 of the CRPD which mandates all State parties to actively promote an environment in

⁷³ See Section 22 (3) (b) of the Constitution of Zimbabwe.

⁷⁴ Mandipa E (note 17 above).

⁷⁵ See the Preamble to the CRPD, particularly at (h).

⁷⁶ Mandipa E (2013) *African Disability Yearbook* Vol 1 page 73 at 78.

⁷⁷ Compare section 83 of the Constitution of Zimbabwe with Articles 16, 19 and 24 of the CRPD.

⁷⁸ Mandipa E (note 40 above).

⁷⁹ Case CCT 11/00 Para 31.

⁸⁰ Ibid.

⁸¹ Mandipa E, (note 17 above).

⁸² Ibid.

which persons with disabilities can effectively and fully participate in the conduct of public affairs, including political participation.⁸³

Other than political participation, the new Constitution also provides for political representation of PWDs.⁸⁴ In particular, the Constitution provides that the Senate shall consist of two representatives for persons with disabilities.⁸⁵ Although the Constitution is silent on whether or not the two representatives have to be persons with disabilities, the fact that PWDs are now guaranteed political representation in Zimbabwe is undeniable.⁸⁶ To an extent, these representatives will influence law and policy that could be in the interests of PWDs. This is a commendable step which is in conformity with Article 29 of the CRPD which calls for State Parties to promote the right to participation in political and public life by PWDs.

From the above, one can conclude that the Zimbabwean Constitution is indeed a progressive document in terms of advancing the cause for PWDs in the country. The picture that has emerged is that Zimbabwe now subscribes to the human rights approach to disability, which recognizes PWDs as persons who should enjoy rights at par with the non-impaired counterparts. Hence, it can be said that the Zimbabwean Constitution has largely adopted most of the provisions of the CRPD.

CONCLUSION

From the foregoing, one can discern that apart from the Constitution of Zimbabwe; other laws addressing disability in the country have more weaknesses than strengths. The picture that has emerged above is that almost all of Zimbabwe's disability laws make reference to physical and mental disability to the exclusion of other types of disabilities which are currently recognized at the international level under Article 1 of the CRPD. It has also been shown that most statutes addressing disability rights in Zimbabwe predates the CRPD. For that reason, they subscribe to the medical model of disability and treat PWDs as objects of charity and in need of financial and medical assistance. However, as has been argued above, such an approach is flawed and has been overtaken by new developments and discourses. Perhaps, the era in which PWDs were viewed as objects of charity is over. Time has come for PWDs to be treated as holders of rights with full human rights and entitlements. To this end, the author underscores the need of overhauling some of the laws or at least aligning them with the provisions of the CRPD. This will go a long way in promoting, protecting and fulfilling the rights of PWDs in Zimbabwe and assist in the practical implementation of the CRPD now that Zimbabwe is a State Party to the Convention.

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⁸³ Article 29 of the CRPD is geared towards the promotion of the right to political participation by PWDs by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use. Furthermore, the provision is aimed at protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation.

⁸⁴ See section 157 (1) (e) of the Constitution of Zimbabwe.

⁸⁵ See section 120 (1) (d) of the Constitution of Zimbabwe.

⁸⁶ Mandipa, E (note 17 above).

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