



MINISTRY OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

DRAFT

DISCUSSION PAPER ON ALIGNING

THE

DISABLED PERSONS ACT CH [17:01] TO THE CONSTITUTION OF

ZIMBABWE

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**INTER-MINISTERIAL TASK-FORCE ON THE ALIGNMENT OF LEGISLATION
TO THE CONSTITUTION (IMT) TECHNICAL COMMITTEE**

LIST OF ACRONYMS

AU	African Union
CP&EA	Criminal Procedure and Evidence Act
CRPD	United Nations Convention on the Rights of Persons with Disabilities
CWDS	Children with Disabilities
DPA	Disabled Persons Act
DR	Declaration of Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
NDB	National Disability Board
PWDS	Persons with Disabilities
SADC	Southern African Development Community
UN	United Nations
UDR	Universal Declaration of Rights
VFC	Victim Friendly Courts
WWDS	Women with Disabilities

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1. BACKGROUND

In 2013, Zimbabwe adopted a new Constitution that contains a comprehensive Declaration of Rights that provides for, among others, the rights of persons with disabilities (PWDs). The Constitution also contains provisions on the application of international human rights agreements that Zimbabwe is party to. As a result of these developments, the questions that must be answered are:

- What does the Constitution say about PWDs and related matters?
- Which are the international agreements that Zimbabwe is party to that impose obligations with regard to the treatment of PWDs?
- To what extent is the current legal framework aligned with the Constitution and with relevant international agreements?
- Where are the legislative gaps?
- How may those gaps be addressed through legislative action

While the above legal questions are clear, what is perhaps less clear are the practical challenges experienced by PWDs as a result of the existing legal framework. Below are some practical and real experiences of PWDs that also need to be considered when discussing law reform processes aimed at improving the well-being of PWDs. Some of the questions that arise from these experiences include: Does the current legal framework address the challenges being faced by PWDs? If not, how should the law be crafted to provide viable and practical solutions for the multitude of predicaments that PWDs face?

Case 1. Simba Bwanya: Male: Age: 6

Maria and Temba Bwanya are communal farmers who live in Mutoko communal lands with their three children. The third child, Simba, is a boy born on Christmas day in 2009. When by his third birthday, the boy still could not speak, a worried Maria took him to the mission hospital where the doctor performed some tests and informed Maria that Simba was deaf. Further tests suggested that Simba had become deaf due to Rubella that Maria had contracted while she was eight weeks pregnant. Simba's deafness is part of "Rubella" syndrome. Apart from the hearing impairment, the Rubella syndrome has also left Simba with impaired intellectual and social development.

In 2015, Simba needed to start grade 1 but the nearest school which the local children attend does not have special classes for deaf students. The nearest school that caters for deaf students is Musami Mission School which is 90Km away from Mutoko and the fees for which the Bwanys find unaffordable. The school has also informed them that even if they could afford the fees, the school does not accept students with intellectual impairment.

Case 2. Dorothy Benn: female: age 20

Dorothy Benn is a hearing impaired girl of 20 years of age. She used to work as a domestic helper in the Smith household in Mount Pleasant. Last year she was raped by the Smith's teenage son. Her Mother helped her to make a report to the Police but the case has been dragging on because the court appointed sign language interpreter finds it difficult to communicate with Dorothy. Dorothy's mother explained that Dorothy only attended a few years at a deaf school so she never became proficient in the official sign language. Over the years the family has developed a unique way of communicating with her using informal signs. She has asked the court if she or a family member could be allowed to translate in court. The magistrate is at a loss she is very sure that this "informal" way of doing things is unprocedural.

Case 3. Peter Chitima: male: age 25

Peter Chitima is a 25 year old man. He is a paraplegic who relies on a wheel chair. He recently graduated from CUT with a degree in computer science. Last month he saw an advertisement by a local Company for a software administrator. He applied and he was called for an interview. In his application he did not mention that he was a PWD He arrived slightly late for his allotted time because when he arrived at the building all the parking space in the nearest parking lot had been taken up so he had to park his car at another parking lot which was much farther. Further he could not wheel his wheelchair up the steps to the entrance of the building and had to ask a newspaper vendor nearby to assist him. During the interview he could sense the discomfort of the panellists especially the chairman over his disability but no one asked him any questions relating to his disability. He knew in his heart that they would not give him the job even if he had been the best candidate.

Case 4 Christina Hove: female: age 35

Christina Hove is an albino with two children who are also albinos. She has been warned by her doctor that she and her children are at risk of developing skin cancer and prescribed a regimen of skin care which includes avoiding being in direct sunlight for long periods at a time and using large amounts of lotion contain a special sunscreen. The special lotion is not available in Zimbabwe so every few months she has to travel to South Africa to buy large quantities for her and her children. Recently the import duty for cosmetics has doubled and the customs officers insist that her ointment should be classified as a cosmetic and subject to the usual import duty for cosmetics. She cannot afford it.

Each of the above cases is illustrative of the practical challenges that people with disabilities have to face in life. There is a story of marginalisation, denial and exclusion. This paper seeks to discuss how the law can be made to work for PWDs. It does so by discussing the issues in relation to the standards set out in the Constitution and international law and suggesting how, based on the Constitution, the law can be framed to best respond to the challenges faced by PWDs.

2. FRAMEWORK OF PRINCIPLES

This section discusses the principles relating to PWDs that are found in the Constitution of Zimbabwe and in international treaties relating to PWDs. It identifies key provisions and discusses their interpretation, application, and how they can be incorporated in legislation.

2.1 Constitution of Zimbabwe and Disability

As a starting point, the Constitution of Zimbabwe is the supreme law of the land. This means that all laws must be in full compliance with the Constitution. Laws that were in existence before the promulgation of the Constitution must be amended to bring them in alignment with the Constitution. New laws may also need to be enacted to ensure regulatory outcomes that are aligned to the Constitution in specific areas of activity.

2.1.1 Founding Values and Principles – Chapter 1 of the Constitution

Section 3 of the Constitution provides for the founding values and principles of the State, one of them being the recognition of the inherent dignity of all people.¹

Implications for legislative reform

The recognition of the inherent worth of all human beings means that the dignity of people with disabilities must be ensured and protected by the law. This is especially important because it is well documented that PWDs are often marginalised and excluded from activities which are important for personal development and self-worth. Such activities include employment, leisure and recreation. They are sometimes exposed to attitudes which erode their sense of self-worth, attitudes which reflect and communicate discrimination, stigma and abuse.

The law must therefore contain an unequivocal statement on the recognition of the inherent dignity of PWD, and also create a regulatory environment that

- Facilitates participation by PWD in mainstream human economic and social activity
- Facilitate access to social amenities and services by PWDs
- Facilitate participation by PWD in decision making
- Enables PWD to take advantage of opportunities on an equal footing as everyone else.
- Prohibit discrimination against PWD and punish abusive conduct against PWD

¹ Section 3(1) (e)

-The terminology of the law should be respectful to PWDs

2.1.2 National Objectives – Chapter 2 of the Constitution

Chapter 2 of the Constitution sets out national objectives which are supposed to guide the state and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just free and democratic society in which people enjoy prosperous, happy and fulfilling lives².

Section 22 sets out the national objectives relating to PWDs as follows:

- (1) The State and all institutions and agencies of 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 dignity.
- (2) The State and all institutions and agencies of government at every level 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.
- (3) In particular, the State and all institutions and agencies of government at every level must:
 - a. develop programmes for the welfare of persons with physical or mental disabilities, especially work programmes consistent with their capabilities and acceptable to them or their legal representatives;
 - b. consider the specific requirements of persons with all forms of disability as one of the priorities in development plans;
 - c. encourage the use and development of forms of communication suitable for persons with physical or mental disabilities; and
 - d. foster social organisations aimed at improving the quality of life of persons with all forms of disability.
 - e. The State must take appropriate measures to ensure that buildings and amenities to which the public has access are accessible to persons with disabilities.

Implications for legislative reform

One of the most salient features of the provisions on national objectives is its clear

² Section 8

imposition of obligations on not only central government but on all institutions and agents of government at every level. The implications of the provisions of section 22 on legislative reform are as follows:

The laws on PWDs must do the following;

- a. place obligations on all state institutions at every level, including local government. Decentralisation of obligations has particular importance for PWDs because it means that obligations will be placed on accessible institutions that are responsible for making decisions that have a bearing on their day to day lives.
- b. create a regulatory framework which deliberately caters to PWDs needs by recognising the barriers they face in accessing opportunities and putting in place measures to ameliorate those barriers
- c. create the conditions necessary for PWDs to recognise and achieve their full potential
- d. Facilitate the creation and sustenance of a social environment where PWDs and treated with respect and included in all spheres of life
- e. Where necessary, adopt affirmative action for the benefit of PWDs
- f. Promote the special mechanisms for communication used by PWDs such as hearing aids and cochlear implants, braille equipment and literature.
- g. Provide for and enforce building standards favourable to the needs of PWDS to access to public spaces.

2.1.3 The Declaration of Rights – Chapter 4 of the Constitution

The Declaration of Rights (DR) consists of sections 44 to 87 of the Constitution. It sets out the fundamental human rights and freedoms which every person in Zimbabwe is entitled to as well as the corresponding obligations of the state and in appropriate circumstances, the obligations of private individuals.

2.1.4 The Duty Bearer

A discussion of PWDs as rights holders under the Constitution requires identification of the duty bearers because the law dealing with the rights of PWDs must necessarily place obligations on those persons responsible for ensuring the fulfilment of the rights of PWD's. The duty bearers identified under the Constitution should be the same duty bearers provided for in legislation.

Traditionally, the duty bearer of fundamental human rights and freedoms was and still remains, primarily, the State. But it is important to note that under the current Constitution, private individuals are also recognised as possible duty bearers under appropriate circumstances [section 45(2)]. This is important because addressing the rights of PWDs requires a holistic, multisectoral and integrated approach which recognises disability as a condition which results from failure by the environment to respond to impairments. Seen from this perspective, then every member of the society has a duty to act within their spheres of influence to refrain from creating barriers and to dismantle them. These barriers exist in every aspect of the Life of the PWDs and in their interactions with all people and not only the State and its agents. This is known as the horizontal, as opposed to vertical application of rights.

The implication for legislative reform

The formulation of legislative provisions must be informed by the horizontal application of rights. The law must address the role of private individuals such as family members, community members, caregivers and the private sector as duty bearers to PWDs.

2.1.5 The Nature of the Obligations owed to PWDs

Legislative reform should be informed by a correct understanding of the nature of the obligations of the duty bearer under the DR. Any law that is passed to give effect to the rights of PWDs as provided for under the Constitution, must fully incorporate each aspect of the obligations of the duty bearer. Section 44 of the Constitution provides that the duty bearer must respect, protect, promote and fulfil the rights and freedoms set out in the DR. what exactly do these words mean and how should they shape the content of the law?

To **respect** means to refrain from doing anything or taking any action that would violate or diminish the rights of PWDs. Legislation should therefore not contain any provisions whose direct or indirect effect would be to impair the rights of PWDs.

To **protect** means to defend PWDs from harm that may be caused by the actions of third parties. In this regard, the obligation of the duty bearer would consist of enacting laws to discourage or punish other people from violating or impairing the rights of PWDs.

To **fulfil** means that the duty bearer must take positive action to create the conditions for the practical enjoyment of the rights of PWDs. Such action would include facilitating the right to education of children with disability by building special schools for them and ensuring that they have access to equipment and amenities that improve their quality of life.

To **promote** means that the duty bearer must take delicate action to publicise and advertise the right of PWDS. The subject of disability is shrouded in myths and misunderstandings which often leads to the ostracism and abuse of PWDs. The duty bearer has an obligation to put in place measures, including laws, to educate the public on the medical and genetic causes of disability and destroy the myths that surround disability.

The implications for legislative reform

Aspects of the obligations of the duty bearer must be reflected in the law

2.1.6 The Right to Equality and Non-discrimination

Section 56 of the Constitution provides that all people are equal before the law and have the right to equal protection and benefit of the law and that everyone has the right not to be treated in an unfairly discriminatory manner on a list of ground which include disability's.

Implications for legislative reform

The principle of non-discrimination must be fully incorporated in the law through various measures and mechanisms. In particular, The law must contain an unequivocal statement on non-discrimination. The state should identify the spheres of life where PWDS are most likely to face discrimination and deliberately legislate for measures that facilitate the inclusion and participation of PWDs. These spheres of life include access to civic rights such as the right to vote and be voted for, access to social amenities

2.1.7 Rights of Person with Disabilities³

Part 3 of the DR recognises the existence of certain disadvantaged and vulnerable groups in society whose rights require elaboration. One of these groups is PWDs. Section 83 of the Constitution provides as follows:

³ Section 83

The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realise their full mental and physical potential, including measures—

- (a) to enable them to become self-reliant;
- (b) to enable them to live with their families and participate in social, creative or recreational activities;
- (c) to protect them from all forms of exploitation and abuse;
- (d) to give them access to medical, psychological and functional treatment;
- (e) to provide special facilities for their education; and
- (f) to provide State-funded education and training where they need it.

Implications for legislative reform

The law must:

- create an environment for PWDs to achieve self-reliance and become less dependent on others
- facilitate the creation of support structures for the families and communities of PWDs
- define abuse and exploitation of PWDs and punish it
- create an obligation on the state to avail affordable and good quality medical and psychosocial support for PWDs
- create an obligation on the state to provide special education and recreation facilities for PWDs
- Obligate the State to provide free education to PWDS.
- In crafting the law, the drafters should not be limited by the provisions of Section 83.
- There must be understanding that every right provided for in the DR is applicable to PWDs and must be expressly provided for in the law, in addition to the rights elaborated on in section 83.

2.1.8 Designation of sign language as an official language

Section 6 of the Constitution identifies 16 official languages, including sign language.

Implications for legislative reform

The law should put in place measures to facilitate the development of sign

language, including its standardisation. The education Act should facilitate the teaching of and examination on sign language in mainstream schools. The law should mandate Public institutions including schools to promote the art forms that use sign language as the primary means of communication.

2.2 Relationship between the Constitution and international law

Aligning the law to the Constitution requires special consideration of international human rights law. This is because the Constitution itself is very explicit of its aspiration and vision to create a Governance framework that conforms to international law and to foster a Zimbabwean society that respects universal standards of human rights protection. This desire is both explicit and implicit in the language of the Constitution.

Section 34 of the Constitution provides that it is one of Zimbabwe's national objectives to ensure that all international agreements to which Zimbabwe is a party are incorporated into domestic law.

Section 46(1) (c) of the Constitution provides that when interpreting the provisions of the Declaration of Rights, every court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party.

Section 326 of the Constitution provides that when interpreting any legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law over applicable in Zimbabwe over an alternative interpretation inconsistent with that law.

Section 327(2) of the Constitution empowers Parliament to domesticate international agreements that Zimbabwe has ratified.

Section 327 (6) provides that when interpreting any legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international agreement that is binding on Zimbabwe over an alternative interpretation inconsistent with that agreement.

These explicit references to international law show a clear Constitutional commitment to ensure that Zimbabwean laws conform to international legal norms. In particular, Zimbabwe should be seen to fulfil her international obligations through a variety of measures, including legislative measures.

The Constitutional alignment process therefore requires identification of all the applicable international law standards in dealing with disability issues, particularly the rights of PWDs, and ensure that these are fully incorporated into the law.

International human rights are universal and inalienable in nature and so all the rights protected under the key human rights instruments of a general application such as the Universal Declaration of Rights (UDR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) are applicable to PWDs.

Like the Constitution, international law also recognises the special vulnerability of PWDs and the need to separately elaborate their rights in a separate special agreement, the International Convention on the Rights of people with Disabilities (ICRPD).

2.2.1 Disability in key human rights instruments which recognise PWD's

This section will discuss the key human rights instruments that Zimbabwe is a party to which recognise and protect the rights of PWD's.

The African Charter on Human and People Rights (Banjul Charter)

Article 18 (4) of the Banjul Charter provides that the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

The Convention on the Rights of the Child (CRC)

Article 2 of the CRC obligates States to ensure that the rights protected under the convention are accorded to every child without distinction on the basis of specified conditions and circumstances, including disability of the child.

The African Convention on the Rights and Welfare of the African Child (ACRWAC)

Article 13 of the ACRWAC provides that;

(1) Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

(2) State Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

(3) State Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

Protocol to the African charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol)

Article 23 of the Maputo protocol provides for the special protection of women with disabilities as follows:

The States Parties undertake to:

(a) Ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;

(a) Ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

The African Youth Charter

Article 15(4) (a) on sustainable livelihoods and youth employment provides that States Parties shall take all appropriate measures with a view to achieving full realisation of this right to gainful employment and shall in particular, ensure equal access to employment and equal pay for equal work or equal value of work and offer protection against discrimination regardless of several grounds which include disability.

Article 16 (2) (n), on health, provides that (the State shall provide technical and financial support to build the institutional capacity of youth organisations to address public health concerns including issues concerning youth with disabilities”.

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)

Article 9 (2) (c) provides that the State shall provide special protection for and assistance to internally displaced persons with special needs, including persons with disabilities.

SADC Protocol on Gender and Development

Article 19 of the SADC Protocol on Gender and Development provides that States Parties shall, in accordance with the SADC Protocol on Health and other regional and international instruments relating to the protection and welfare of people with disabilities to which Member States are party, adopt legislation and related measures to protect persons with disabilities that take into account their particular vulnerabilities.

SADC Protocol on Health

Article 15 of the SADC protocol on health provides

State parties shall co-operate and assist one another to:

- (1) promote effective measures to prevent and manage disabilities;
- (2) increase access to improved technology related to assistive devices, and the creation of a barrier free environment for the equalisation of opportunities for persons with disabilities; and
- (3) promote community-based rehabilitation programmes.

Implications for Law Reform

Zimbabwe’s obligations to protect the rights of PWDs are contained in a number of instruments dealing with different groups, women, children, youths, displaced persons. The law should therefore make an effort to comprehensively domesticate these provisions by making specific reference to these agreements and by ensuring that the provisions dealing with these groups conform to the standards set out in the corresponding instruments.

The law must provide that the interpretation of the law should be influenced by the provisions of these instruments where appropriate.

2.3 International Convention on the rights of people with disabilities (CRPD)

The CRPD is the main international agreement that deals with the rights of PWDs.

Article 1 of the Convention sets out its purpose, which 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.” It gives a broad definition of disability and sets out the conceptual basis and approach for treatment of disability issues by state parties. It also articulates the specific rights of PWDs and defines the content of the rights in the specific context of disability. Below is a discussion of the key aspects of the CRPD for incorporation into national legislation

2.3.1 The duty to domesticate the CRPD

Zimbabwe ratified this agreement on 13 September 2013. While the Constitutional alignment process provides an opportunity to domesticate the provisions of this agreement in keeping with sections 34 and 327 of the Constitution, the convention itself makes it clear that implementation of the convention by state parties requires legislative measures to a very significant extent, Article 4 (1) (b) of the Convention obliges State parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

In addition, States undertake to adopt appropriate legislative and administrative measures and, in article 4 (1) (c), to take into account the protection and promotion of the human rights of persons with disabilities in all policies. Consequently, an important step in implementing the Convention is to review the national legislation and policy framework comprehensively so as to:

- Modify or abolish discriminatory laws
- Adopt new legislative measures to ensure future implementation.

2.3.2 The Conceptual Framework of Disability Underlying the Convention

The formulation of laws to give effect to the CRPD should be informed by a correct understanding of the concept of disability which, in turn, informs the provisions of the Convention. The traditional approach is to see disability as a condition that is inherent in the

person—for example, a medical condition that requires the person to be in a wheelchair or to take medication.

However, the modern concept of disability that informs the provisions of the convention perceives disability as an interaction between an individual's personal condition (such as being in a wheelchair or having a visual impairment) and environmental factors (such as negative attitudes or inaccessible buildings) which together lead to disability and affect an individual's participation in society. For example:

- Being in a wheelchair (personal factor) combined with living in a city with accessible buildings (environmental factor) leads to participation in the community on the same terms as someone who is not in a wheelchair: there is little or no disability.
- Having an intellectual impairment (personal factor) combined with a belief in the community that persons with intellectual disabilities lack the capacity to vote (Negative environmental factor) leads to exclusion from society and denial of the right to vote: there is a disability.

Personal factors are multilayered and can be both physical and socioeconomic. For example, a deaf child whose parents can afford to procure cochlear implants for him may never have to experience the disabling effects if his disability (economic factor). An intellectually impaired woman may be more at risk of sexual abuse than a man who is similarly impaired (personal factors).

Because of this approach, the notion of “disability” cannot be rigid but rather depends on the prevailing environment and varies from one society to the next. While the Convention recognizes disability as an evolving concept, it clearly endorses the understanding of it as a social construct, when it states that disability “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.

In line with this understanding, the Convention does not provide a closed definition of persons with disabilities, but states that they “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.

The convention also rejects the definition of disability as a medical problem but as an interaction between an impairment and the surrounding environment. For the Convention, persons become disabled when they clash with an unwelcoming or inaccessible environment. Persons with disabilities do not require to be “fixed” before accessing an environment (society); it is instead the environment that needs to be uniformly open to all its members. It does so by dismantling attitudinal and environmental barriers so that everyone can actively participate and enjoy the full range of rights.

The implications for law reform

-Any law seeking to domesticate the provisions of the CRPD must be informed by this same conception of disability and seek to address the totality of the factors that interact to lead to or worsen disability.

-The law must adopt a definition of disability which is informed by the understanding of disability as an evolving concept

-The law should focus on addressing the attitudinal and environmental barriers that hinder PWD’s full and effective participation in society on an equal basis with others

2.3.3 The Approach to Dealing with Disability Issues in the CRPD

Linked to the conceptual framework, is the approach in dealing with disability issues. There are several approaches to dealing with disability.

2.3.3.1 The Charity Approach

The charity approach treats persons with disabilities as passive objects of kind acts or of welfare payments rather than as empowered individuals with rights to participate in political and cultural life and in their development. What characterizes this approach is that persons with disabilities are not considered able to provide for themselves because of their impairment. Consequently, society provides for them. No environmental conditions are considered under this approach; disability is an individual problem. From this perspective, persons with disabilities are the target of pity and they depend on the goodwill of society.

Under this model, persons with disabilities are disempowered, not in control of their lives and have little or no participation. They are considered a burden on society. Because charity comes from goodwill, the quality of “care” is not necessarily consistent or even important. If

society's responses to disability are limited to care and assistance for persons with disabilities through charity and welfare programmes, opportunities for advancement are very limited. The risk is that persons with disabilities will remain at the margins of society. This approach does not support their participation. Further, the charity approach increases the distance between persons with disabilities and society rather than promoting equality and inclusion.

2.3.3.2 The Medical Approach

Under the medical model, the focus is very much on the person's impairment, which is represented as the source of inequality. The needs and rights of the person are absorbed or identified with the medical treatment provided to (or imposed on) the patient. In the medical model, individuals can be "fixed" through medicine or rehabilitation to get back to society. Particularly for persons with mental impairments, the medical treatment can be an opportunity for a "bad" patient (persons with mental disabilities are often considered dangerous) to become a "good" patient. To be considered able to provide for themselves, persons with disabilities have to be "cured" of the impairment or at least the impairment has to be reduced as much as possible. No environmental conditions are considered under this approach and disability is an individual problem. Persons with disabilities are sick and have to be fixed to reach normality.

If disability is handled primarily as a medical problem, experts such as doctors, psychiatrists and nurses have extensive power over persons with impairments; the institution's staff take decisions for the patients, whose aspirations will be dealt with within a medical framework. If complete rehabilitation is not possible, persons with disabilities will not be able to go back to society and will remain in institutions.

Achievements and failures experienced within the walls of the institution will be understood as related to the impairment and, as a result, justified. In the worst cases, such an approach can legitimate exploitation, violence and abuse. This model is often mixed with the charity approach. For example, charities raise funds for and run rehabilitation facilities. The duty bearers in this model are the medical industry and the State. When combined with a charity approach, charity houses, homes, foundations and religious institutions also play an important role. Under this model, persons with disabilities are disempowered, not in control of their lives and have little or no participation. The medical industry, professionals and charities

usually represent the interests of persons with disabilities as they are seen as possessing the knowledge of what is in the best interests of their patients.

2.3.3.3 The Social Approach

The social approach introduces a very different thinking: disability is recognized as the consequence of the interaction of the individual with an environment that does not accommodate that individual's differences. This lack of accommodation impedes the individual's participation in society. Inequality is not due to the impairment, but to the inability of society to eliminate barriers challenging persons with disabilities. This model puts *the person* at the centre, not his/her impairment, recognizing the values and rights of persons with disabilities as part of society.

Moving from the medical to the social model does not in any way deny the importance of care, advice and assistance, sometimes prolonged, provided by medical experts and medical institutions. In many cases persons with disabilities require medical treatment and care, exams, constant monitoring and medicines. In the social model, they continue going to hospitals and centres providing specific treatment if required. What is different is the overall approach to treatment: it responds to the expectations of the patient, not those of the institution.

The social model attributes to nurses, doctors, psychiatrics and administrators new roles and identities. Their relation with persons with disabilities will be based on a dialogue. The doctor will not be on a pedestal, but on the side of the person with disabilities. Equality starts in the hospital, not outside. Freedom, dignity, trust, evaluation and self-evaluation are all features of the social model.

With the social model, disability is not a “mistake” of society but an element of its diversity. Disability is a social construct—the result of the interaction in society between personal factors and environmental factors. Disability is not an individual problem but the outcome of a wrong organization of society. As a consequence, society should restructure policies, practices, attitudes, environmental accessibility, legal provisions and political organizations and therefore dismantle the social and economic barriers that prevent full participation of persons with disabilities. It opposes the charity and medical approach by establishing that all policies and laws should be designed with the involvement of persons with disabilities.

The duty bearers under this model are the State—involving all ministries and branches of Government—as well as society. Under this model, persons with disabilities are empowered, in control of their lives and enjoy full participation on an equal basis with others. The burden of disability is not on them but on society.

2.3.3.4 The human rights approach

The human rights approach to disability builds on the social approach by acknowledging persons with disabilities as subjects of rights and the State and others as having responsibilities to respect these persons. It treats the barriers in society as discriminatory and provides avenues for persons with disabilities to complain when they are faced with such barriers. Consider the right to vote. A person who is blind has the right to vote just as anyone else in society. Yet, if voting material is not in accessible formats such as Braille and the person cannot take a trusted individual into the voting booth to help indicate her preferred candidate, the person who is blind cannot vote.

A human rights approach to disability recognizes the lack of voting material and the inability to have assistance in voting as discriminatory, and places a responsibility on the State to ensure that such discriminatory barriers are removed. If not, the person should be able to make an official complaint.

A rights-based approach to disability is not driven by compassion, but by dignity and freedom. It seeks ways to respect, support and celebrate human diversity by creating the conditions that allow meaningful participation by a wide range of persons, including persons with disabilities. Instead of focusing on persons with disabilities as passive objects of charitable acts, it seeks to assist people to help themselves so that they can participate in society, in education, at the workplace, in political and cultural life, and defend their rights through accessing justice.

The human rights approach is an agreement and a commitment by persons with disabilities, States and the international human rights system to put into practice some primary aspects of the social approach. This approach is binding on all States that have ratified the Convention on the Rights of Persons with Disabilities.

States must eliminate and prevent discriminatory actions. The human rights approach establishes that all policies and laws should be designed with the involvement of persons with disability, mainstreaming disability in all aspects of political action. Following this model, no “special” policies should be designed for persons with disabilities, notwithstanding the particularities needed to comply with the principle of full participation.

The main duty bearer under this model in which society delegates the policies on disability, is the State involving all of its ministries and branches. There are certain provisions that involve the private sector and there is a specific role for civil society, in particular persons with disability and the organizations that represent them. Under this model, persons with disabilities have rights and instruments that can empower them to claim their rights. They have the tools to be in control of their lives and fully participate on equal terms with others. The human rights approach provides that persons with disabilities are closely involved in policymaking by law.

Implications for legislative reform

As the discussion above clearly shows, the welfare and medical approaches to disability are incompatible with letter and spirit of the Constitution as they treat PWDs as objects of pity and not as rights holders. It perpetuates the marginalisation of and discrimination against of PWDs and disempowers them instead of treating them as full human beings entitled to preservation of their rights and dignity to the same extent as everyone else. The perception of PWDs as special which is inherent in the welfare and medical approaches leads to the creation and legitimation of special programmes which in reality lead to further entrenchment of exclusion and isolation of PWD.

-The provisions of the envisaged law on disability should therefore be informed by the social and the rights based approaches and avoid the welfare and medical approaches except where strictly appropriate.

-The duty bearer must be clearly defined in keeping with the social and human rights approach as including public as well as private actors.

2.3.4 Principles of the CRPD

Article 3 of the CPRD sets out a set of 8 principles which underlie the provisions of the Convention. These are:

- Respect for inherent dignity and individual autonomy;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference;
- Equality of opportunity;
- Accessibility;
- Equality between men and women; and
- Respect for the evolving capacities of children.

These principles reflect the values of principles set out in section 3 of the Constitution. This is important because it affirms the relationship between the Constitution and international human rights norms. The principles also lay the basis for a value laden interpretation of the convention, allowing its provisions to be given an interpretation in every situation which is most likely to promote these principles.

Implications for legislative reform

The Constitution, to which the law should be aligned is a document that is value based. It sets out the values and principles underlying the legal system in the opening provisions of the Constitution, making clear the value system that Zimbabweans aspire to.

- All laws should therefore be made and interpreted to promote these values and principles,
- The value coherent approach to interpretation is therefore now an integral part of the interpretive regime mandated by the constitution and this is explicitly mandated in section.
- The law on disability should therefore restate these principles at the outset and explicitly provide that the provisions of the Act should be interpreted in light of these principles in addition to those provided for under the Constitution and that the application of any law to PWDs should also take these principles into account.

3. SUBSTANTIVE PRINCIPLES FOR INCLUSION IN THE LAW ON PWD's

Informed by the Constitution and International human rights law, particularly the CRPD, the following are the issues which should be considered for inclusion in the law.

3.1 Discrimination

The prohibition of discrimination on the basis of disability is a fundamental principle that should be clearly defined and articulated in the law. The CRPD defines discrimination on the basis of disability as

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

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

Discrimination against PWDs is prohibited by both the Constitution and the CRPDs. Despite this prohibition in Zimbabwe, as in any country in the world, PWDs continue to face discrimination. Discrimination is both a cause and result of the stigma, which serves to further entrench the exclusion and marginalisation of PWDs. Myths and misconceptions about PWDs abound. For example, mentally ill people are often perceived as dangerous and unpredictable, people with physical disabilities are said to be intemperate and possessing super human strength. Myths about the causes and effects of albinism persist and sometimes disability is perceived as a curse from God. All this serves to legitimise and perpetuate discrimination against PWDs.

One of the obligations of the duty bearer as provided for under section 44 of the Constitution is the obligation to promote. Fulfilling this obligation involves promoting the rights of PWD by “advertising” them and communicating positive messages to the public. It also involves awareness raising and public education.

Implications for legislative reform

-The law must adopt a comprehensive definition of discrimination against PWDs, such as that provided in the CRPD

- Discrimination against PWDs should be punishable
- Discrimination is notoriously difficult to prove so the law could consider reversing the onus in appropriate cases where discrimination is alleged
- The duty holder of the right to be free from discrimination must be defined widely to include family members, community members and the private sector.
- The law should provide for affirmative action to countervail the effects of discrimination
- The Labours Act should provide for incentives to employers of PWDs.
- The law should provide the framework for public education and awareness on disability issues in order to destroy myths and correct misconceptions about PWDs

3.2 Gender

The CRPD recognizes that women with disabilities often face multiple forms of discrimination on the basis not only of disability but also of sex (Art. 6). Consequently, specific attention might be needed to develop programmes taking into account gender aspects as well as the rights of persons with disabilities, e.g., to boost the percentage of girls or women with disabilities enrolled in the school system in view of their right to education.

A critical area of concern and where women and girls are highly vulnerable is gender-based violence. The United Nations Population Fund (UNFPA) estimates that persons with disabilities are up to three times more susceptible to physical and sexual abuse and rape. Women and children with disabilities are more likely to be victims of violence than their male counterparts.

Implications for legislative reform

- The disability law should contain a distinct section addressing women and gender aspects
- The domestic violence Act should be amended to provide special protection to women with disabilities
- The criminal procedure and evidence Act should be amended to address the needs of vulnerable witnesses with disabilities,

3.3 Children with Disabilities (CWDs)

Children, that is to say boys and girls below the age of 18, are recognised as full rights holders under the Constitution as well as under various international agreements that

Zimbabwe is party to. Generally, children are vulnerable and in need of special protection and consideration. Children with disabilities are even more vulnerable and disadvantaged. Failure to take special measures to respect, protect and fulfil the rights of any child will often mean that the perpetuation of disadvantage into the adulthood of that child. This is even more true of children with disabilities.

3.3.1 Education

Children with disability have as much right to an education as every other child, yet there are many barriers that can hinder a child with disabilities from accessing quality education. These barriers include the scarcity of schools and facilities that cater for children with disabilities, the poor quality of education available, unmotivated education practitioners, unskilled education practitioners, and unavailability of learning aides, family and social environments that are not supportive to the learner, scarcity of support services such as psychologists, occupational therapy and physiotherapy.

The approach to education should also be informed by the understanding of disability as an evolving concept. Zimbabwe has special schools for children with disabilities as well as special units for disabled children in mainstream schools. Current thinking on approaches in educating children with disabilities lean towards integration. Putting children in special schools may be unsatisfactory because the expectations for excellence are lower and this may reinforce stigma and discrimination. The thinking may however evolve over time as disability becomes a better understood phenomenon and the body of knowledge around best practices grows. It would be unwise for the law to be prescriptive about any particular model for educating children with disabilities but there should be put in place a framework to enable ongoing research and evidence gathering and constant monitoring and evaluation of the different approaches and methods applicable to children with various disabilities in different circumstances. The law should be flexible enough to allow the responsible Minister to make decisions informed by the evolving knowledge.

Implications for legislative reform

The law should create the various administrative structures with a mandate to constantly monitor and evaluate the education of children with disabilities and recommend appropriate policies and strategies in keeping with the evidence base and international best

practices. Such a structure could be a Council for the education of children with disabilities, consisting of PWDs, parents, education experts CSO representatives and other relevant stakeholders, with the statutory mandate to make recommendations to government on the education of CWDs

3.4 Access and mobility

The definition of disability in the CRPD makes it clear that disability is caused primarily by external factors that fail to respond favourably to an impairment and not so much the impairment itself. In other words, inherent in this definition is the acknowledgement that the focus of the law and other policy measures should be on addressing the barriers that hinder PWDs from participating fully in society on an equal footing with others.

One area in which PWDs face a most formidable barrier is in physically accessing places and forums. For example, a person in a wheelchair may fail to access a polling station because the station is situated in an area where a wheelchair cannot reach physically. The effect is that the PWD's right to vote has been denied. The same would be true of any service that is inaccessible to a PWD.

Similarly, a deaf person may fail to access a particular service if the service provider is not proficient in sign language or if there is no sign language interpreter available. A blind person may also fail to access services if braille services are not available to enable the blind person to fill in a form or even write out an application.

Implications for legislative reform

The law should:

- Provide that persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility.
- Empower the appropriate authority to prescribe measures to ensure that public buildings are accessible to PWDs and
- Place an obligation on proprietors of public buildings to adapt them to suit persons with disabilities in such manner as may be specified
- Place an obligation on operators of public service vehicles to adapt them to suit persons with disabilities in such manner as may be specified.

3.5 Health

Both the Constitution (section 83) and the CRPD (Article.25) recognises the right to health of PWDs. Be that as it may, PWDs face several barriers in accessing health services. These barriers include the high cost of services, unavailability of services, discrimination and negative attitudes towards PWDs by health workers. PWDs may also face special challenges with regard to their sexual and reproductive health and rights such as forced sterilisation or pressure to be sterilised.

Implications for legislative reform

The law should:

- Articulate the right to health of PWDs
- explicitly require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent
- Promulgate ethical standards for public and private health care;
- Mandate Government and local authorities to take necessary measures to provide to persons with disabilities:
 - health care within a reasonable distance from their location, especially in rural areas; which shall be free in case of persons with disability, whose family income is below such limit as the appropriate government may notify;
 - barrier-free access in all parts of the hospitals and other healthcare institutions and centres run or aided by them; and
 - priority in attendance and treatment.
- Mandate government and local authorities to make schemes and programmes with participation and involvement of persons with disabilities and care-givers that inter-alia makes provision for:
 - minimization and prevention of further disabilities with requisite education, training, information and intervention;
 - health care of persons with disabilities during times of natural disasters and other situations of risk ;
 - disability specific equipments and accessible infrastructure at all health care centres; public buildings and places; and all other such places that may be notified by the appropriate government from time to time;
 - ‘essential medical facilities’ for all lifesaving emergency treatment and procedures;

- sexual and reproductive health especially for women with disabilities;
- pre-natal, pre-natal and post-natal care of mother with disabilities and their children;
- nutritional intervention for children with disabilities

4. ADMINISTRATION AND ENFORCEMENT

4.1 Need for Effective Enforcement

It would not be enough for the law to contain substantive provisions on the rights of PWDs. In order for the legal provisions to make a real difference in the lives of PWDs, there must be effective implementation mechanisms. This requires a framework for administration, execution and enforcement of the law which should include an element of monitoring progress and challenges as well as establishing a complaints mechanism.

A monitoring mechanism is desirable not only because it makes sense from a practical point of view, but the CRPD also explicitly provides for national and international monitoring mechanisms.

4.2 Models of implementation mechanisms

At the national level, the Convention proposes three types of mechanisms to be established

- a focal point or focal points within the Government to ensure coordination among different branches of the Government and different ministries and levels, i.e., local, provincial and federal, to progress on the implementation of the Convention;
- a coordination mechanism within the Government to facilitate action in different sectors and at different levels;
- a framework, such as a national human rights institution or ombudsperson's office, to promote, protect and monitor the Convention. This framework should conform to the Paris Principles, which set out the standards for independence as well as the functions for such monitoring institutions as agreed by the General Assembly.

However, each of these mechanisms has its advantages and disadvantages:

Focal points and coordination mechanisms potentially have strong and transformative roles in the promotion of the Convention. Traditionally, in Zimbabwe, disability issues have been within the remit of one ministry, Ministry responsible for social welfare. This can result in some issues (eg education) being placed outside the ministry dealing with the general issue.

This can create parallel approaches and segregation. For example, the social welfare ministry might deal with the education of children with disabilities and not the ministry of education, thus placing children with disabilities outside the general education system. The cross-cutting nature of disability rights means that they involve many other issues, including justice, education, labour, foreign affairs, housing, finance, sports and culture. The focal points and coordination mechanisms provide a means to ensure that:

- There is one governmental body, or several, with responsibilities for disability rights (focal points);
- Various ministries and departments (and others) are coordinating their work (coordination mechanism).

The Convention provides significant flexibility as to the form of these mechanisms and States can adapt them to national circumstances. For instance, a coordination mechanism might also have civil society participation, as is already the case under the Disabled persons Act. A national framework for implementation and monitoring that is compliant with the Paris Principles is very important as it provides an independent means of assisting and also verifying the implementation of the Convention. Independent national human rights institutions can play many roles:

- Monitoring the Government's implementation of its commitments under the Convention;
- Making recommendations to the Government on steps to improve implementation
- Reviewing and promoting the harmonization of national laws related to disability;
- Submitting opinions on legislative bills and proposals related to disability to ensure they are consistent with the Convention;
- Encouraging the ratification of disability- related instruments, for example, encouraging the Government to ratify the Optional Protocol to the Convention.
- Raising awareness about disability rights and about combating disability discrimination;
- Receiving complaints from individuals and groups alleging breaches of the Convention;
- Formulating human rights education programmes;
- Contributing to reports to the Committee on the Rights of Persons with Disabilities;
- Cooperating regionally and internationally with other NHRIs.

It is important to note that these mechanisms are not mutually exclusive. Depending on perceptions of what the needs of the Country are, it may be possible to adopt a hybrid

mechanism with features from all three. Institutions and mechanism of implantation and oversight must be adequately resourced

4.3 Funding

It goes without saying that an effective implementation mechanism requires adequate resources. These resources will be applied towards hiring qualified and motivated staff and service providers and developing their skills; carrying out monitoring activities, commissioning studies to develop better knowledge and gather evidence for the design of effective interventions

Implications for reform

-The law should provide for effective administrative structures and mechanisms to oversee the implementation of the law. The choice of appropriate structures and mechanisms should be informed by the need for inclusivity and multi-sectoral considerations.

-The law should provide mechanisms for adequate funding of administrative structures and mechanisms including the introduction of a disability levy and the creation of a disability fund.

5. GAPS IN THE CURRENT LEGISLATIVE FRAMEWORK

This section borrows extensively from an Article by P. Manatsa titled: “*Are Disability Laws in Zimbabwe Compatible with the Provisions of the United Nations Convention on the Rights of People with Disabilities?*” (CRPD) which appears in the *International Journal of Humanities and Social Science Invention* ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714 www.ijhssi.org Volume 4 Issue 4 || April. 2015 || PP.25-34

In Zimbabwe currently, there are several laws that deal with disability issues either directly or indirectly. All these laws however predate the current Constitution and ratification of the CRPD. Below is a description of these laws and an assessment of how they fare when tested against the Constitution and international law standards.

5.1 DISABLED PERSONS ACT⁴

The primary law that addresses disability in Zimbabwe is the Disabled Persons Act, (DPA) which provides for matters related to the welfare of PWDs and establishes the National Disability Board (NDB), setting out its functions. The Act creates the office of the director for Disabled Persons Affairs whose duties include liaising with ministries and local authorities to ensure the implementation of the policies and measures promulgated by the Disability Board and co-ordinating the activities of organisations which work with PWDs.

It has already been pointed out that the DPA predates both the Constitution and the CRPD. This presents shortcomings when testing it against the standards set out in either of the instruments. Below are some of its shortcomings:

-The terminology used by the DPA, namely “Disabled persons”, outdated and demeaning. Such terminology, focusing on the individual as it does, reflects the medical and diagnostic approach to disability which ignores the imperfections and deficiencies of the surrounding society.

-The Act does not reflect a human rights based approach to disability generally and fails to include a statement on the fundamental rights and freedoms of PWDs and to define the duty bearers of these rights

-The definition of a disabled person in the DPA is inadequate. 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. This definition is now archaic in that it focuses on personal factors and fails to reflect the fact that disability is not only limited to individual impairments but also to barriers caused by both attitudinal and environmental factors.

-While the NDB is empowered to issue and serve adjustment orders to ensure access by all persons with disabilities (PWDs) to mainstream public services and 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, these powers may not be exercised against the state. The NDB is ineligible to give adjustment orders to State hospitals, clinics, nursing homes, schools

⁴ [Chapter 17:01]

or educational training centres without the consent of the relevant Minister of the institution concerned. Consequently, this has resulted in many government workplaces, magistrates' offices and State recreational facilities being inaccessible to PWDs. 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. 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.

-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. This is in contrast with Article 27 of the CRPD, which enjoins States Parties to recognize the right of persons with disabilities to work, on an equal basis with others. The lack 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 employment rights of PWDs in the DPA does not come as a surprise considering that the Act predates the CRPD.

- 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 about us, concerning us"*. Moreover, the Act has no formal policies, strategies and agreed standards to monitor its implementation. 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.

5.2 MENTAL HEALTH ACT ⁵

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 Board which is tasked with the treatment, rehabilitation and general welfare of mental patients; the Special Boards

⁵ [Chapter 15:12]

which make reports in relation to mental patients detained in various institutions and the Mental Health Review Tribunal 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. The Mental Health Act can also be commended for its provision for the care and rehabilitation and after care of persons with mental disorders 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 as is the case with the DPA, the language is demeaning, when referring to persons with mental impairments. Such words are at variance with the terminology like “persons with disabilities”, used by the CRPD. It is recommended that when calling a PWD, a person must be put first before the disability. 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. 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.

5.3 WAR VICTIMS COMPENSATION ACT ⁶

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.

-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. It appears such a definition makes reference to physical disability

⁶ [Chapter 11:16]

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. 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.

5.4 THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT⁷

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. 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 and people with hearing impairment. 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

⁷ [Chapter 9:23]

aggravating factors to be considered by the judge or magistrate when meting out sentence to the accused under the Act. 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.

5.5 CRIMINAL PROCEDURE AND EVIDENCE ACT (CP&EA)

Part XIVA of the CP&EA deals with the protection of vulnerable witnesses and Victim Friendly Courts (VFCs) have been set up pursuant to this portion of the Act. The VFC and its system protects vulnerable witnesses including children and young people by making special provisions to facilitate the gathering of testimonies from them in a non-threatening environment. An area of vulnerability which the Act does not seem to be specifically alive to, is the communication needs of witnesses with hearing impairments.

Sign language in use in Zimbabwe is not standardised. Further, because of scarcity of education opportunities for hearing impaired children, many deaf people develop “informal” systems of sign language which they use to communicate with family and friends but which may not be known to the official court appointed sign language interpreter. A rigid application of the rules of procedure precludes the possibility of a family member acting as the interpreter which can lead to a breakdown in communication between the witness (often also the victim) and the court. Such a breakdown in communication is to the detriment of the victim.

5.6 SOCIAL WELFARE ASSISTANCE ACT ⁸

This Act makes provision for the granting of social welfare assistance to destitute or indigent persons. 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. 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

⁸ [Chapter 17:06]

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.

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.

5.7 THE STATE SERVICE (DISABILITY BENEFITS) ACT ⁹

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. 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. 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

⁹ [Chapter 16:05]

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.

6. CONCLUSION

It can be seen from the discussion above that the regulatory framework is misaligned with the Constitution and the CRPD in its failure to incorporate a rights based approach to disability. This is not surprising given that the regulatory framework predates both the Constitution and the CRPD. It has also been noted that the regulatory framework is fragmented with various pieces of legislation addressing different aspects of disability in a manner that shows limited co-ordination. This presents the risk of wastage of resources through duplication, competition between different agencies and lack of accountability for results.

Accordingly, it is recommended that there be an overhaul of the regulatory framework by enacting one framework law addressing all aspects of disability, and informed by the provisions of the Constitution and of CRPD.