

Recognition and Protection of the Rights of Persons Living with Mental Disability- A Critical Analysis of the Legal Framework in Zimbabwe

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ABSTRACT

The protection and enjoyment of rights of persons living with mental disabilities in Zimbabwe remains of paramount importance. Therefore, it becomes imperative to interrogate the existing legal framework and the reciprocal expectations of implementation of the existing legal framework for the full realisation of the rights of persons with disabilities. Such an endeavour obligates the assessment of the extant legal frameworks, seeking to understand whether the scope of application and utility is more of substance than form. By that, the legal framework ought to avail tangible results as far as rights enjoyment are concerned.

Key words: Persons living with mental Disability, Convention on the Rights of Persons with Disability, Zimbabwe.

INTRODUCTION

The Convention on the Rights of Persons with Disability (CRPD)[2], which is an international human rights treaty of the United Nations intended to protect the rights and dignity of persons with disabilities defines persons with disabilities as, “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder the full and effective participation in society on an equal basis with others”. Therefore, without doubt, mental disability exist and is recognised as requiring protection under International Disability law and best practices. In light of the above, it is the purpose of this article to explore the meaning and scope of mental disability, the legal provisions in Zimbabwe, their application and relevance to the protection of persons living with mental disabilities.

PERSONS LIVING WITH MENTAL DISABILITY

The debate on mental health matters continue to attract attention and encourage discourse around the globe leading to the declaration of the 10th of October as the World Mental Health day[3]. To date various scholars argue that mental health challenges are generally self-induced, thus cannot be considered as a disability. However, it is the writer’s considered view that, mental health challenges have been considered as a disability provided they are long-term and have an adverse effect on the well-being and life of the person living with the disability[4]. Hence, this article shall be premised on the understanding that mental health matters exist and can mutate into mental disabilities if they are long term and have a direct and long term effect on the equal enjoyment of rights by the person living with disability. Therefore, the condition of ‘substantial and long term effect on ability to carry out normal day to day activities’ remains germane and requires detailed elucidation as shall be done hereunder.

SUBSTANTIAL AND LONG TERM EFFECT ON ABILITY TO CARRY OUT NORMAL DAY TO DAY ACTIVITIES.

It is worth noting that mental health disorders are diverse and medically include but not limited depression, psychosis and bipolar disorders, child and adolescent disorders inter alia. Furthermore, medically some have been attributed to self-inducement.[\[5\]](#) However, this article shall address all-inclusive conditions as falling under persons living with mental disability, in order to interrogate the existing legal framework and if it renders any protection for persons living with mental disability.

The World Health Organisation estimates that one billion people (1 000 000 000) or 15% of the world's population live with some form of disability. In addition, a fifth of these face and live with mental disability.

For clarity purposes and for purposes of this article, a person living with mental disability, can be classified as a person who has a mental impairment, which is long-term and substantially limits his/her performance or enjoyment of major life activities such as learning, working and communicating with others.[\[6\]](#) Hence, mental impairment means a clinically recognised condition or illness that affects a person's thought process judgment and emotions.

In light of the above, when a person fits in the category of living with a mental disability, the CRPD automatically obligates the State and all relevant institutions to put in place measures including legislation to protect, promote, respect and proliferate the respect of the rights of persons living with disabilities in general and mental health issues in particular. This approach has enjoyed attention as being disability inclusive.[\[7\]](#) Such a framework is provided for in the CRPD, wherein discrimination is prohibited and State parties and individuals are required to put in place modalities for the full realisation of rights.[\[8\]](#)

It is thus the writers view that, as with any person living with disabilities, an inclusive approach without stigma and prejudices is necessary for persons with mental disabilities. Such an inclusive approach would address various misconceptions on disability including but not limited to considering disability as a form of punishment from God or a Superior Being. This fundamental submission was well articulated by Hendersen and Bryan[\[9\]](#), that some people if not many believe that some disabilities are the result of lack of adherence to social morality or religious proclamations that warn against engaging in certain behaviour. To further explain this model, some beliefs are based upon the assumption that some disabilities are the result of punishment from an all-powerful entity.

Such an appreciation and understanding of disability issues as abovementioned has been criticised for seeking to interpret the bible whilst excluding persons with disabilities directly or indirectly and equating blindness, mental illness with demonic possession and spiritual ineptitude.[\[10\]](#)

In addressing disability and appreciating the definition of a person with disability it is key to adopt a *human rights based approach*, which exalts the sanctity of life, non-discrimination, equality before the law and equality in general. The writer is of the firm view that if the human rights approach is implemented, formal and substantive equality becomes a reality.

Generally formal equality has been understood to refer to the notion that people must be consistently and equally treated at all times whereas substantive equality refers to the notion that equality goes beyond the mere "cosmetics" but identifies differences among groups of people with a long term goal of tangible equality and non-discrimination. [\[11\]](#) Hence the ultimate intention and objective of substantive fairness is the full realisation of both formal and substantive equality.

With such an appreciation of formal and substantive equality as abovementioned, various other models,

including but not limited to the medical model which views disability as a medical condition become undesirable and not consistent with the all-inclusive human rights approach.[\[12\]](#)

Wherefore, the human rights model appreciates the societal approach to disability, wherein any meaningful solution must be directed at societal change of attitudes and environments[\[13\]](#). In addition, the human rights model, apart from simply identifying the problem, seeks to provide a framework that emphasises and recognises human dignity and equality for the enjoyment of both first and second generational rights.[\[14\]](#)

In light of the above, it is the writer's considered view that a person with mental disability can only be concisely defined after taking into account the fact that, the definition ought to be understood in the contest of the human rights model or any other model that is all inclusive and alive to the realities of human rights protection. Thus, for purposes of this article, contemporary statutes such as the Equity Act in the United Kingdom become relevant and necessary as comparators for the all-inclusive recognition of human rights.

In attempting to embracing such a broad definition, it is important to interrogate the statutes that exist in Zimbabwe and their bearing (if any) on the protection or otherwise of the rights of persons with mental disabilities. For such an enquiry the writer shall make use of and shall be limited to the Zimbabwean Constitution, Disabled Persons Act, Labour Act, Public Service Regulations and the Mental Health Act.

CONSTITUTION OF ZIMBABWE

The 2013 Constitution of Zimbabwe unlike the previous Constitution[\[15\]](#) contains the National Objectives section and admirably the section incorporates the rights of persons with disabilities[\[16\]](#). For starters, without doubt, the inclusion of such clause, albeit not justiciable is progressive in the human rights dispensation. However, the provisions in the National Objectives have been criticised for placing condition precedents to the performance by the State parties and all institutions of their obligations towards persons with mental disabilities. The performance is subject to availability of resources or within the limits of resources. Hence such conditions precedents are peculiar to recognition of socio-economic rights, and ultimately it derogates the expected protection and recognition of rights of persons with mental disabilities and plays second fiddle to other generations of rights.[\[17\]](#)

It is worth noting that the inclusion of rights of persons with disabilities in the Bill of Rights remains praiseworthy. Section 56 of the Constitution, which forms part of the Bill of Rights addresses issues of non-discrimination and equality before the law and equal protection and benefits of the law. In terms of the Section unfair discrimination is proscribed on various basis including but not limited to disability. Therefore, the Constitution has incredibly maintained the prohibition of discrimination on the basis of disability, including mental disability.

Nevertheless, it is the writer's view that until subsidiary legislation is amended or aligned to be in sync with Section 56 of the Constitution, the right and recognition of persons with mental disability and prohibition of discrimination remain illusionary. This foregoing view is premised on the legal reality that the legal system does not operate in a vacuum and as long as a law of general application[\[18\]](#) limits the right or does not expressly protect the same, its recognition remains veiled and subject to derogation.

In light of the above, there is urgent need for the amendment of the various subsidiary statutes to be in alignment with the Constitution in order to protect persons living with disability[\[19\]](#). This also becomes relevant in light of Section 86 of the Constitution that provides for limitation of rights and freedoms. Although the Constitution of Zimbabwe is progressive regarding recognition of rights of persons with mental disabilities, Section 83 waters down the enthusiasm as it subjects the protection and enjoyment of the rights to availability of resources. Traditionally, persons with mental disabilities have been excluded in society, hence to anticipate them being taken serious without a firm legal provision (s) is akin to dreaming.

Hence, as a matter of form, the Constitution of Zimbabwe provides for the rights of persons with mental disabilities, but as a matter of substance, hypothetically “nothing really comes out of Nazareth”. To that extent, more needs to be done for the full realization and protection of persons living with mental disabilities.

LABOUR ACT

In terms of the CRPD, persons living with mental disabilities have a right to inclusive employment, thus an analysis of the Zimbabwe Labour Act is imperative. For employment rules and procedures, the Labour Act is the principal statute which governs the private sector and other specifies sectors.

In general the statute prohibits discrimination on the basis of disability in the workplace^[20]. Furthermore, the Labour Act subjects itself to the Disabled Persons Act (17:01) hence for purposes of definitions of disability including mental disability, such can be derived from the Disabled Persons Act.

Although the Labour Act prohibits discrimination on the basis of disability in engagement of employees, such remains a formalistic provisions which does not relate to the realities on the ground. Seldom do employers employ a person living with mental disability. Therefore, without a provision that goes beyond prohibiting discrimination by encouraging employers to employment persons with mental disabilities and offering tax credits, tax rebates inter alia, the provision remains with form but lacking substance.

Furthermore, the existence of Sections that mandate setting of Bodies to assess employees who are suspected of having developed mental disabilities remain archaic and backward. Section 14 which deals with Sick leave remains hazardous if not qualified in the context of persons living with mental disability. Thus, in circumstances when an employee develops a mental disability on the job, the Labour Act does not provide for expected international best practices, including but not limited to reasonable accommodation^[21] of the employee. Under disability law, reasonable accommodation, is defined as any means necessary and appropriate modifications which do not impose a disproportionate or undue burden in a particular case^[22]. The ultimate purpose of reasonably accommodating persons with mental disability is to enable persons with disabilities to enjoy the rights at the same level with their able bodied colleagues.

Hence, absolute failure to provide and guarantee the right to reasonably accommodate constitutes discrimination. According to Lawson^[23], the rationale and objective of reasonable accommodation is to remove the specific advantage to which a particular non-disabled individual would otherwise be exposed to.

The after effects of failing to reasonably accommodate is evident in that upon detection of such a mental disability, the employee is subjected to a Board of Inquiry and once found with a condition, employment can be terminated on such basis and invocation of the Mental Health Act. Therefore without doubt, the Labour Act as it stands does not incorporate best practices as mandated by the CRPD which include “support based assistance and not substitute based” to the employee. Hence Section 14 gives room to terminations of employment and rendering the right to inclusive employment nugatory.

In addition, Section14 mandates a subjection of the employee to a medical board to ascertain “*suitability*”.

Without doubt, with the absence of any legal provision in the Labour Act mandating fusion of reasonable accommodation and obligations as per the CRPD, the provision continues to proliferate discrimination of employee’s living with mental disabilities. An employee living with a disability remains a human being possessing rights and entitled to earn a living through employment. Thus, it is the writer’s view that the Labour Act yearns to be amended to include a non-discriminatory and exclusionary approach for employees with mental disabilities. Furthermore, it is worth appreciating that such employees remain human beings

deserving human dignity, equality and equal protection and benefits of the law. A disability is not a misconduct inviting separation, it is an impediment already and continued vilification (direct and indirect) suffocates formal and substantive equality.

In light of the above, without a specific provision to reasonably accommodate persons with mental disabilities in the workplace, the Labour Act fits into the adverse category as was noted by the Committee on the Rights of Persons with Disabilities in the *HM V Sweden* case, wherein it held that failure to reasonably accommodate or to provide for reasonable accommodation was a brazen violation of the fundamental right to equality and or discrimination.^[24] Therefore, such a gap requires to be plugged and such is possible through an amendment of the Labour Act and the alignment of the same with the Constitution and the CRPD.

DISABLED PERSONS ACT

The Statute was enacted in 1996, hence, it predates the CRPD which was enacted in 2008. At the time of its enactment, it was celebrated as progressive, however with the passage of time, it requires amendments. The first amendment required is the title of the Statute, which has been viewed as derogatory and contrary to the contemporary understanding of human rights. “Disabled persons” remain disparaging and uncivilized.

Furthermore, although Section 2 of the Act includes mental disability in its definition section, the Statute does not provide flesh to the rights of persons with disabilities in general and mental disabilities in particular. It scratches on the surface (form) and does not attempt to compound on the substantive fairness (substance).

In addition, the Statute locks the definition section and does not leave room for other forms of disability that might arise or be recognized. According to Mandipa E^[25], he posits that assigning a definition for persons with disabilities time locks the concept and fails to consider its dynamic nature to change with time. Hence, in the context of the Statute, there is need to adopt the CRPD approach of defining disabilities with the caption ‘including’ but not limited to’.

On substance and substantive rights of persons with mental disability, the Statute is undesirably silent. Apart from what is already provided in the Labour Act on non-discrimination, the Statute adds no value to the discourse.

For that reason, it is the writer’s view that the Disabled Persons Act deserves to be repealed and substituted with a detailed, comprehensive, useful and contemporary Statute, which is alive and takes into account the prerequisites of the Regional and International legal frameworks on disability law.^[26]

MENTAL HEALTH ACT Chapter 15:12

The Mental Health Act regulates persons with mental health conditions. The Preamble to the Act is telling and provides as;

‘AN ACT to consolidate and amend the law relating to the care, detention and after-care of persons who are mentally disordered or intellectually handicapped, whether for the purposes of treatment or otherwise; to provide for the establishment of various boards and the functions of such boards; to repeal the Mental Health Act [Chapter 15:06]; and to provide for matters incidental to or connected with the foregoing’

Clearly, the terminology of the statute is premised on the old and judgmental understanding of disability rights. The use of “Disordered” or “Intellectually handicapped” remain unwarranted within the human rights

dispensation. Hence, the principal statute that addresses rights of persons with mental disabilities ought to lead by example and sanitize through amendments the previously held perceptions of persons with mental disabilities[27].

Although the Statute establishes various Boards and Tribunals to deal with welfare and appeals by persons with mental disabilities, the rationale and purpose of the Board and Tribunal remain offside. Unlike the requirements of the CRPD, the established Bodies and Tribunals legalise involuntary treatment of persons with mental disability.

As an extension of such treatment, the persons are involuntarily placed in mental houses. In terms of the CRPD, such an approach is contrary to an inclusive, support based initiatives which detest substitute approaches wherein, a person with mental disability is considered a lunatic and not capable of giving consent or appreciation of events. In that respect, the Statute ought to include reasonable accommodation of persons with mental disabilities and allow for support decision making in serious mental disability cases. The recommended approach would reduce limitations in decision making capacity for persons with mental disabilities thus enabling supported decision making as a reasonable accommodation alternative[28]

It is worth noting that the writer is aware of the possible limitations to the full implementation of this alternative but it is worth implementing and addressing with each case dealt with on its own facts and circumstances[29],[30].

Furthermore, although placing persons within treatment institutions has been found to safeguard the highest attainable right health[31] if properly implemented, one cannot ignore the adverse effects on other interlinked rights of persons with mental disability to living independently and included in the community interalia[32].

Notwithstanding that the involvement of the Courts in placement of the persons under institutions is considered due process, there is urgent need for the Court to implement support based initiatives and not exclusion based methods. Thus, the Mental Health Act requires a holistic review and amendments to capture the contemporary discourse for the full realisation of the rights of persons with mental disabilities.

CONCLUSION

In Zimbabwe mental health issues remains topical and the legal protection framework remains behind in protecting and recognizing the rights of persons with mental disabilities.

The Constitution, Labour Act, Disabled Persons Act and the Mental Health Act require alignment with the CRPD. It is the writer's view that persons with mental disabilities deserve to be embraced through an intact and vibrant legal framework.

ENDNOTES

1. Convention on the Rights of Persons with Disability (CRPD) effective 3 May 2008.
2. The overall objective is to raise awareness of mental health issues around the world and mobilizing efforts in support of mental health issues around the world.
3. Munchausen Syndrome or factitious disorder, medical newstoday.com/article/167813
4. John Petril, Mental illness changing definitions of disability under the Americans with Disabilities Act.
5. Retief, M and Letsosa, R: 2018 Models of Disability: A Brief overview; HTS Theological Studies 74 (1), a4738

6. Preamble of the CRPD; Preamble of the African Charter on Human and Peoples Rights
7. Henderson & Bryan (2011:7)
8. Maclure (2007:23) and Henderson & Bryan (2011:7)
9. See. C Barnard and Bob Hepple, *The Cambridge Law Journal*, Vol 59, No. 3 (Nov 2000) Pp562-585, see also *R v Kapp 2008 SCC4*, See also S. Fredman, substantive equality Revisited, *Interaction Journal of Constitutional Law*, Volume 14, issue 3 July.
10. Olkin R, 1999, *what psychotherapists should know about disability*, Guilford Press, New York.
11. Utopians, *Fundamental Principles of Disability* 1976. Degener T, 2017, A new human rights model of disability; in V. Della Fina R. Cera & G Balmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities, A commentary*, pp 41-60, Springer, Chan, Switzerland.
12. Human rights are indivisible
13. Lanchester House Constitution
14. Section 3 of the Constitution entrenches founding values, principles and recognition of the Inherent dignity and worth of each human being (Section 3 (1) (e). In addition, section 3 (2) Recognises the rights of persons with disabilities in general. See also Section 22 of the Constitution.
15. Prof Christine Chinkin, *The Protection of Socio and Cultural Rights post conflict*, www.ohchr.org/english/issues/women/docs/Papaer-Protection/ESCR
16. On Principle of subsidiarity see; Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *Am. J. Int'l L.* 38 (2003)
17. On the existence of a legal system and respect of subsidiary legislation see *Zimbabwean case, Chawira and 13 others v Minister of Justice CCZ3/2017* which held that the Constitution does not operate in vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available remedies.
18. See Section 5 of the Labour Act 28:01.
19. On Inclusive employment <https://www.un.org/esa/socdev/documents/disability/Toolkit/Rights-Persons-with-DisabilitiestoWork.pdf>
20. Article 2 of the CRPD
21. *The United Nations Convention on the Rights of Persons with Disabilities, New Era or false Dawn?* (2007) 34.
22. United States of America Equal Employment Opportunity Commission (EEOC) Number 915/002.
23. A critical analysis of the legal and institutional framework of the realization of the rights of persons with disabilities in Zimbabwe, *African Disability Yearbook* 2013 (4).
24. C Ngwenya, 'Deconstructing the definition of disability' under Employment Equity Act: Legal deconstruction; Vol 23 *South African Journal of Human Rights*.
25. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, DSMS-Washington DC, American Psychiatric Publishing 2013.
26. W Mangezi and D Chibanda, *Mental Health in Zimbabwe*, [www.researchgate.net/publication/mental health in Zimbabwe](http://www.researchgate.net/publication/mental_health_in_Zimbabwe)
27. Blank P and Martinis JG 2015, 'The right to make choices'; *The national resources center for the supported decisions*.
28. Kohn NA, Blumenthal JA and Campbell, 2013, *Supported decision making, A viable*
29. *Alternative to guardianship? Penn State Law Review*, 117-1157.
30. E Mandipa supra
31. Article 16 of the CRPD.