



MIDLANDS STATE UNIVERSITY



FACULTY OF LAW

**AN ANALYSIS OF THE LEGISLATIVE PROTECTION OF LEGAL CAPACITY
FOR PERSONS WITH MENTAL AND INTELLECTUAL DISABILITIES IN
ZIMBABWE**

BY

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*This dissertation is submitted in partial fulfilment of the requirements of the Bachelor of
Laws Honours Degree*

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DEDICATION

This one is for you my uncle and “brother” Qinisani P. Bhebe, thank you most heartily for the love, support you gave me and most importantly for the sacrifices you made in order for me to obtain this degree. May God bless you and may all the odds be forever in your favour.

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“Uebert Angel- Remember those who helped you in difficult times, those who left you in the difficult times and those who put you in difficult times ...”



ABSTRACT

*The Constitution of the Republic of Zimbabwe has an equality and non-discrimination clause that prescribes non-discrimination and proscribes any disability based discrimination. Zimbabwe, as a party to the Convention on the Rights of Persons with Disabilities, is obligated to construct its equality clause in line with the standards set out therein as the clause acquires a special meaning in relation to persons with mental and intellectual disabilities. The denial of legal capacity to persons with mental and intellectual disabilities under the prevailing legislative framework is at variance with Article 12 of the Convention on the Rights of Persons with Disabilities. There are multifarious statutes within Zimbabwe's legislative framework which expressly and/or implicitly deny persons with mental and intellectual disabilities their legal standing and legal agency. Legal capacity is the *conditio sine qua non* for the realization of the rights of persons with mental and intellectual disabilities under any Constitution or human rights instrument. Accordingly, its denial renders any rights of persons with mental and intellectual disabilities nugatory. Zimbabwe is encouraged to emulate the legislative framework of the Republic of Ireland which has put into effect the presumption of legal capacity of persons with disabilities, a time and issue specific functional approach to legal capacity, moved towards the "will and preferences" paradigm and adopted supported decision making mechanisms for persons with mental and intellectual disabilities. It is recommended that Zimbabwe amends its Constitution to comprehensively capture its obligations under the Convention on the Rights of Persons with Disabilities, repeal its major pieces of legislation which deal with the legal capacity of persons with disabilities as well as amend a plethora of statutes which presume the legal incapacity of persons with mental and intellectual disabilities.*



ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ADMA	Assisted Decision-Making (Capacity) Act 2015
ACRWC	African Charter on the Rights and Welfare of the Child
AD	Appellate Division
ADRY	African Disability Rights Yearbook
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
ALL ER	All England Law Reports
CEMIRIDE	Centre for Minority Rights Development
CP & EA	Criminal Procedure and Evidence Act
CRPD	Convention on the Rights of Persons with Disabilities
DCJ	Deputy Chief Justice
DPA	Disabled Persons Act
ECtHR	European Court of Human Rights
GC	General Comment
HH	High Court Harare
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MHA	Mental Health Act
MSULR	Midlands State University Law Review
NASCOH	National Association of Societies for the Care of the Handicapped
NDB	National Disability Board
PWDs	persons with disabilities
SA	South Africa
SADC	Southern African Development Community
SAFOD	Southern Africa Federation of the Disabled
SERAC	Social and Economic Rights Action Centre
UDHR	Universal Declaration of Human Rights



UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
VLT	Vienna Convention on the Law of Treaties
WCC	Western Cape High Court
ZHRC	Zimbabwe Human Rights Commission



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CHAPTER ONE

1.1 Introduction:

The right to equality is a fundamental human right which is indispensable for the exercise of other human rights in any given human rights instrument or Constitution.¹ It is a right that acquires some special significance in relation to persons with disabilities (PWDs) as they have been historically marginalized. This chapter introduces the right to equality for PWDs within Zimbabwe's legal discourse. The chapter gives a background of the right to equality from the existing international human rights instruments to which Zimbabwe is a ratifying party and how legal capacity is an important subsidiary to this right in relation to persons with mental and intellectual disabilities. The chapter also outlines the problem which this dissertation seeks to address. It outlines research objectives, methodology of research and the synopsis of chapters. The chapter provides the delimitation of the project as well.

1.2 Background to the study:

The United Nations General Assembly (UNGA) on the 13th of December 2006 adopted the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD is an international human rights treaty aiming to protect, promote and fulfil the rights of PWDs.² The CRPD provides for the right to equality for persons with disabilities and ascribes a special meaning of this right in relation to persons with mental and intellectual disabilities.³ The right to equality under the CRPD has an important subsidiary which is legal capacity.⁴ The CRPD therefore has far-reaching consequences in as much as it recognizes the right to legal capacity for PWDs especially those with mental and intellectual disabilities. Zimbabwe ratified the CRPD and its Optional Protocol on the 23rd of September 2013 without any

¹A Smith "Equality constitutional adjudication in South Africa" (2014) 14 *African Human Rights Law Journal (AHRLJ)* 609.

² Article 1 of the CRPD.

³ Article 12 of the CRPD.

⁴ Committee on the Rights of Persons with Disabilities "Equal recognition before the law" (2014) General Comment No 1 (CRPD/C/GC/1) at paragraph 8.



reservations but has not yet domesticated the two disability rights instruments.⁵ The only piece of legislation that Zimbabwe enacted after the adoption of the CRPD is the Constitution Amendment (No. 20) of 2013. This Constitution guarantees the right to equality to all persons and proscribes discrimination on the ground of disability in terms of Section 56.

René Descartes (1596-1650) once wrote in his *Meditations of First Philosophy* that:

“I am, I exist that is certain. But for how long? For as long as I am thinking. For it could be that were I totally to cease from thinking, I should totally cease to exist”.⁶

This quotation can be summarised as saying “I think and therefore I am” which means that mental capacity is equated to existence and subsequently to personhood which in legal terms is legal capacity. This misconception is in itself problematic in that mental capacity and legal capacity are not synonymous.⁷ One of the leading Roman Dutch Law jurists, Johannes Voet (1647-1713) developed such a misconception and stated that persons with mental and intellectual disabilities should be placed on the same footing with children because they are incapable of managing their own interests without the knowledge and assistance of their guardians.⁸ The Appellate Division in the seminal case of *Lange v Lange* reiterated Voet’s position by holding that persons with mental and intellectual disabilities are incapable of managing their own affairs without the assistance of their guardians or curators.⁹ In light of the foregoing, there is a prevailing debate on whether or not persons with mental and intellectual disabilities should have legal capacity as envisaged by Article 12 of the CRPD.

⁵ Zimbabwe is a dualist state as it subscribes to the policy that international law has no direct domestic effect unless there is domestication as submitted by AM Polinsky & S Shave in *Handbook of Law and Economics* 1 (ed) (2007) 780.

⁶ J Feinberg & R Shaffer-Landau *Reason and Responsibility: Readings in some basic problems of Philosophy* (2010)164.

⁷ See note 4 *supra* at paragraph 12.

⁸ S van Leeuwen *Commentaries on Roman-Dutch Law* (1923)13.

⁹ *Lange v Lange* 1945 AD 332 at 342.



Article 12 of the CRPD provides for an emblematic paradigm shift in the Convention as it challenges the dominant societal and legal norms.¹⁰

1.3 Statement of the problem:

Article 12 of the CRPD provides for the right to equal recognition before the law. This right implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must consequently be upheld for persons with mental and intellectual disabilities on an equal basis with others.¹¹ In Zimbabwe, the Constitution Amendment (No.20) of 2013, the Mental Health Act [Chapter 15:12], the Criminal Procedure and Evidence Act [Chapter 9:07], the Civil Evidence Act [Chapter 8:01] and the Rules of Courts are the main pieces of legislation that deal with the legal capacity of persons with mental and intellectual disabilities. It appears that these statutes and rules have preserved and perpetuated expressly and/or tacitly the common law position of blanketly denying persons with mental and intellectual disabilities their legal capacity.

1.4 Objectives of the study:

- ✚ To provide a background of Zimbabwe's equality legislation and its relationship to the concept of legal capacity and how this has a special meaning for persons with mental and intellectual disabilities.
- ✚ To analyse Zimbabwe's laws which deny persons with mental and intellectual disabilities their legal capacity using Article 12 of the CRPD as the benchmark.
- ✚ To explore the rationale, if any, behind the denial of legal capacity to persons with mental and intellectual disabilities in Zimbabwe.
- ✚ To carry out a comparative analysis between the laws of Zimbabwe on legal capacity and those of the Republic of Ireland.
- ✚ To suggest general and specific recommendations for Zimbabwe on how best can the right to legal capacity for persons with mental and intellectual disabilities be implemented.

¹⁰ D Msipa *Survivors of sexual Assault with Intellectual Disabilities: Accommodating Difference in the court room* (LLM thesis, McGill University, 2013) 48.

¹¹ See note 4 *supra*.



1.5 Significance of the study:

Scholars in Zimbabwe have been hesitant to analyse the significance of the right to equality for persons with mental and intellectual disabilities. This can be attributable to the fear of challenging the *status quo* that commodifies persons with mental and intellectual disabilities. There is a misconception that is informed by common law that persons with mental and intellectual disabilities cannot manage their own affairs. Mwayera J has held in the case of *Bhila v The Master of the High Court and Others* that the law must not be static but it must be dynamic and must resonate with the mutating social values.¹²

This project is dedicated towards critically analysing the laws that appear to deny persons with mental and intellectual disabilities their legal capacity. It is a project that discusses Zimbabwe's obligations under the CRPD in relation to legal capacity for persons with mental and intellectual disabilities and how best Article 12 of the CRPD can be implemented. This dissertation adopts a holistic approach to legal capacity for persons with mental and intellectual disabilities.

1.6 Delimitation of the study:

This dissertation focuses on persons with mental and intellectual disabilities only. This is so because the right to equality or its subsidiary of legal capacity acquires a special meaning in relation to these persons. It is indubitable that persons with sensory and physical disabilities as an example are recognized as having legal capacity but the same does not hold for persons with mental and intellectual disabilities.

Mandipa has identified two mechanisms for the realization of rights of PWDs in Zimbabwe which are legal and institutional frameworks.¹³ Dinokopila has identified a further mechanism which is policy framework for the realization of rights of PWDs.¹⁴ This dissertation shall be restricted to an analysis of the

¹² *Bhila v The Master of the High Court and Others* HH-549-15.

¹³ E Mandipa *A critical analysis of the legal and institutional frameworks for the realization of the rights of persons with disabilities in Zimbabwe* (LLM thesis, University of Pretoria, 2011) 38.

¹⁴ BR Dinokopila "The rights of persons with disabilities in Botswana: Policy and institutional frameworks" *Aspects of Disability Law in Africa* at 267.



legislative framework. The rationale for this is that the legislative framework is the backbone of both the policy and institutional frameworks. Having institutional and policy frameworks without a solid legislative framework is tantamount to putting something on nothing and expecting it to stand which will inevitably result in the collapse of the disability rights system in a given jurisdiction.¹⁵ This does not mean that the policy and institutional frameworks are nugatory for they are the vehicles used to realize what is provided for in the legislative framework. Accordingly, disability rights in the legislative framework without enforcement mechanisms are devoid of any substance.

1.7 Literature review:

There is generally a dearth of literature in Zimbabwe which specifically deals with the concept of legal capacity for persons with mental and intellectual disabilities. This may probably be attributable to the novelty of the phenomenon. However, there has been development of two schools of thought in relation to granting of the right to legal capacity to persons with mental and intellectual capacity. The conservatives or the antagonists of the granting of legal capacity to persons with mental and intellectual disability have reiterated that persons with mental and intellectual disabilities are incapable of managing their affairs.

Ward is one of the scholars who has asserted that granting the right to legal capacity to persons with mental and intellectual disabilities is problematic in that it gives room for the “so called support persons” to manipulate the persons with mental and intellectual disabilities.¹⁶ Kohn *et al* reinforce this argument by stating that manipulation of persons with mental and intellectual disabilities may arise through deliberate coercion and unconscious influence of the support person on the particular person with mental and intellectual disability.¹⁷

¹⁵ *Mac Foy v United Africa Co. Ltd* (1961) 3 ALL ER 1169 at 1172 I.

¹⁶ A Ward “Adults with Incapacity: Freedom and Liberty, Rights and Status: Part 1” (2011) 5 *Scots Law Times* 21.

¹⁷ NA Kohn, JA Blumenthal and AT Campbell, ‘Supported Decision-Making: A Viable Alternative to Guardianship?’ (2013) 117 *Pennsylvania State Law Review* 1111 at 1123.



Foucault has also expressed some scepticism by arguing that the granting of legal capacity to persons with mental and intellectual disabilities results in an unreasonable transfer of risk and uncertainty to persons with mental and intellectual disabilities.¹⁸ All the conservatives or the antagonists come to the same conclusion that the *status quo* should be maintained, that is to say persons with mental and intellectual disabilities should be regarded by the law as perpetual minors from the womb to the tomb.

Liberals or protagonists of the granting of the right to legal capacity for persons with mental and intellectual disabilities all come to the acceptance of the wheels of change set in motion by the CRPD. Msipa being one of them, has lamented over the provisions of the Criminal Procedure and Evidence Act (Chapter 9:07) which excludes persons with mental and intellectual disabilities from a group of persons that are competent witnesses in criminal court proceedings.¹⁹ Msipa argues that this is discriminatory and places persons with mental and intellectual disabilities at the risk of being violated without any recourse to the courts of law.²⁰

Kamundia, looking at the Kenyan legislative framework, outlines the vehicles that can be used by the Kenyan government to implement the right to legal capacity of persons with mental and intellectual disabilities.²¹ Dinerstein reinforces the view that persons with mental and intellectual disabilities should be allowed to exercise their rights by urging states to jettison guardianship laws and adopt supported decision making laws.²²

¹⁸ M Foucault, 'Security, Territory, and Population' in Rabinow (ed.), *Ethics: Subjectivity and Truth* (1997) 67.

¹⁹ See note 9 *supra* at 36.

²⁰ D Msipa "How assessments of testimonial competence perpetuate inequality and discrimination for persons with disabilities: An analysis of the approach taken in South Africa and Zimbabwe" (2015) *African Disability Rights Yearbook (ADRY)* Vol 3 at page 63.

²¹ E Kamundia "How to implement Article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya: A brief paper" (2014) <http://www.knchr.org/Portals/0/GroupRightsReports/BriefingPaper> (accessed 26 November 2015).

²² RD Dinerstein "Implementing Legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from Guardianship to Supported decision-making" (2012) *Human Rights Brief*.



1.8 Research methodology:

The author relied on the literature based or library based method of research. This method enabled the author to gather and analyse the statutes of Zimbabwe which deal with the legal standing and the legal agency of persons with mental and intellectual disabilities. This method enabled the author to embark on a critical and intensive analysis of the Constitution of Zimbabwe, Acts of parliament, international and regional human rights instruments, general comments, journals, case law, the internet and other relevant materials to the study. The author also conducted a comparative analysis between Zimbabwe's laws on legal capacity with those of the Republic of Ireland. The Republic of Ireland has been selected because it is the nation that has best provisions which comply with the provisions of the CRPD on the right to legal capacity for persons with mental and intellectual disabilities.

1.9 Synopsis of chapters:

Chapter One: This chapter contains the introduction, background to the study, statement of the problem, research objectives, literature review, research methodology and research materials and the synopsis.

Chapter Two: This is the background chapter to the right to legal capacity of persons with mental and intellectual disabilities. It contextualises this right as an important subsidiary of the right to equal recognition before the law. It also traces the right to equal recognition before the law in Zimbabwe's Constitutional dispensation.

Chapter Three: This chapter analyses the existing legal framework that governs the legal capacity of persons with mental and intellectual disabilities in Zimbabwe.

Chapter Four: This is a comparative analysis of Zimbabwe's laws on legal capacity with those of the Republic of Ireland.

Chapter Five: This is the conclusion and the chapter that outlines the recommendations.



CHAPTER TWO

2.1 **Introduction:**

Chapter One introduced the right to equality within Zimbabwe's legal discourse and how the author has structured this dissertation. "Nothing about us, without us" has been the clarion call of PWDs.²³ PWDs have been relegated to the margins of the society despite the existence of the equality clause in the Constitution. This Chapter is dedicated to defining concepts, outlining Zimbabwe's international obligations in relation to the right to equality and how Section 56 of the Constitution can be interpreted in relation to rights of PWDs. The Chapter is most importantly asserting that the CRPD provides a comprehensive interpretation of the equality clause to satisfy the needs of persons with mental and intellectual disabilities as it includes legal capacity as an important subsidiary of this right.

2.2 **Conceptual clarifications:**

Disability is an evolving concept and as such it is incapable of a fixed and precise definition.²⁴ Persons with disabilities include those with sensory, physical, mental and intellectual impairments.²⁵

a) Intellectual disability:

A condition where a person has significant difficulties both in intellectual functioning and adaptive behaviour caused by genetic and environmental factors during pregnancy (of that person's mother) or at birth (of the person).²⁶

b) Mental disability:

Refers to mental health conditions that affect thinking, mood and behaviour caused by biological, psychological and environmental factors.²⁷

²³ International Day of Disabled Persons "Nothing about Us, Without Us" (2004) <http://www.un.org/disabilities/default.asp?id=114> (Accessed 07 December 2015).

²⁴ See note 13 *supra* at 21.

²⁵ Article 1 of the CRPD.

²⁶ Mental Health Europe "Mental illness and intellectual disability" (2007) Cornell university Digital Commons <http://www.digitalcommons.ilr.cornell.edu/gladnetcollect> (accessed 26 November 2015).



c) Legal capacity:

The ability of a person to hold rights and to exercise them at law.²⁸

d) Mental capacity:

The decision-making abilities of a person.²⁹

e) Substituted decision-making:

The process of substituting as decision maker another individual known as the guardian or curator for a person with disabilities.³⁰

f) Supported decision-making:

The process where PWDs are allowed to make and communicate decisions to others concerning their lives subject to support persons giving them proper information to enable them to make such decisions.³¹

2.3 The placement of PWDs in Zimbabwe:

PWDs have been hidden from the mainstream society and subjected to widespread and un-redressed discrimination.³² Recent studies have estimated that Zimbabwe has about 1.4 million PWDs though such a figure does not give a breakdown of figures highlighting the different types of disabilities.³³ PWDs across different societies in the world have virtually been invisible and marginalized citizens.³⁴ Difference of disabilities has been perceived as a

²⁷ Anonymous "Causes of mental illness" <http://www.webmd.com/mental-health/mental-health-causes-mental-illness> (accessed 26 November 2015).

²⁸ See note 4 *supra* at paragraph 12.

²⁹ *Ibid.*

³⁰ See note 22 *supra* at 9.

³¹ *Ibid* at 10.

³² T Choruma *The forgotten tribe: People with disabilities in Zimbabwe* (2006) 6 http://www.africacampaign.info/uploads/media/forgottentribeprogressiozim_01.pdf (Accessed 07 December 2015).

³³ E Mandipa and G Manyatera "Country report on Zimbabwe" (2014) 288 *ADRY* Volume 2.

³⁴ G Quinn and T Degener *Human Rights and Disability: The current use and future potential of United Nations (UN) Human Rights instruments in the context of disability* (2002) 23.



ground for exclusion.³⁵ In Zimbabwe, the society's attitude towards PWDs has been dominated by paternalism where PWDs are perceived as incapable of making independent decisions and managing their own lives.³⁶ Once PWDs are deemed to lack the ability to make their independent decisions, they are inevitably thrown to the periphery and become spectators in their own lives rather than active participants.

There are various forms of disabilities in Zimbabwe and mental and intellectual impairments are amongst these prevalent forms of disabilities.³⁷ Persons with mental and intellectual disabilities rank among the country's most vulnerable population because their disabilities render them less able either to assert their rights or to protect themselves against patent discrimination.³⁸ Taking a glance at the laws governing legal capacity of persons with mental and intellectual disabilities, one can come to the conclusion that they occupy the same legal position as minor children in that decisions are made on their behalf, their so called "best interests" are considered and guardians and curators are appointed to perform various juristic acts on their behalf.

2.4 The International Bill of Human Rights and the right to equality:

The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols make up what is known as the International Bill of Human Rights.³⁹ The UDHR is not a binding instrument whilst the ICESCR and the ICCPR are binding, this is probably explained by the fact that the UDHR is just a declaration and the two instruments (ICESCR and ICCPR) *supra* are treaties. The UDHR in Article 7 provides that all human beings are equal

³⁵ See note 34 *supra*.

³⁶ See note 32 *supra*.

³⁷ See note 33 *supra*.

³⁸ See note 32 *supra*.

³⁹ Fact Sheet No.2 (Rev.1), The International Bill of Human Rights <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx> (Accessed 07 December 2015).



before the law and are entitled to equal protection of the law without discrimination. This Article is important as it provides for the principle of equality and non-discrimination which confirms that the two principles connote the positive and negative statement of the same idea as was held in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*.⁴⁰ In this dissertation, the two principles are henceforth used interchangeably as they refer to the same idea.

Even though the UDHR is not a binding document, most of the principles therein have metamorphosed into peremptory norms which bind the whole world.⁴¹ The right to equality and non-discrimination are such principles which have developed into *jus cogens* norms as was stated by the Inter-American Court of Human Rights (IACtHR), in its advisory opinion of *The Juridical Condition and the Rights of the Undocumented Migrants*.⁴² Since these principles are recognized as *jus cogens* norms, Zimbabwe is obliged to respect them.⁴³ The Vienna Convention on the Law of Treaties (VLT) in terms of Article 53 prohibits the conclusion of treaties which conflict with the principles of equality and non-discrimination. Furthermore, Zimbabwe is also bound by the provisions of Article 2 (2) of the ICESCR and Article 2 (1) of the ICCPR which provide for the right to equality and non-discrimination as the country acceded to the ICESCR and the ICCPR on the 13th of May 1991.⁴⁴

The United Nations Human Rights Committee (UNHRC) has also stated that the principles of equality and non-discrimination constitute the basic and

⁴⁰ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC) para 48.

⁴¹ AA Concado Trindade *Jus cogens: The determination and the gradual expansion of its material content in contemporary international case law* <http://www.oas.org/dil/3%20-%20cancado.LR.CV.3-30> (Accessed 07 December 2015).

⁴² Inter-American Court of Human Rights (IACtHR), Advisory Opinion (ser A) n. 18(2003), on *The Juridical Condition and the Rights of the Undocumented Migrants* paragraph 110.

⁴³ *Ibid.*

⁴⁴ G Linington *Constitutional Law of Zimbabwe* (2001) 279.



general principles relating to the protection of human rights which simply means there is no talk of human rights without mentioning these principles.⁴⁵

2.5 Zimbabwe's regional obligations under the right to equality:

There are various regional instruments which provide for the rights of PWDs in Africa and these include the African Charter on Human and Peoples' Rights (ACHPR), The African Youth Charter, the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa. Zimbabwe is party to the ACHPR, ACRWC and the Southern African Development Community (SADC) Treaty.⁴⁶ The SADC Treaty proscribes discrimination on the ground of disability in terms of Article 6 (2) which means that Zimbabwe has an obligation to prevent the discrimination of PWDs in the country. Though the ACHPR does not expressly mention disability as a prohibited ground of discrimination, the African Commission on Human and Peoples' Rights has held that discrimination on the ground of disability is prohibited by the ACHPR in the case of *Purohit and Another v The Gambia*.⁴⁷

The African Commission also held that the right to non-discrimination and equality (Articles 2 and 3 of the ACHPR respectively) are non-derogable and must be respected in all circumstances in order for anyone to enjoy all other rights under the ACHPR.⁴⁸ The African Commission has further held that the right to equality must be interpreted as including provision for affirmative action or positive discrimination in the case of *Centre for Minority Rights Development (CEMIRIDE) and Others v Kenya*.⁴⁹ This effectively means that Zimbabwe is also obliged to embrace the principle of substantive equality which includes affirmative action as opposed to formal equality especially in relation to PWDs. Formal equality means sameness of treatment whilst

⁴⁵ Human Rights Committee, *General Comment 18: Non-discrimination* (Thirty-seventh session, 1989), U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) para 1.

⁴⁶ See note 44 at 278-9.

⁴⁷ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR) para 54.

⁴⁸ *Ibid.*

⁴⁹ *Centre for Minority Rights Development (CEMIRIDE) and Others v Kenya* Communication 276/2003 para 196.



substantive equality requires the law to ensure equality of outcome and is prepared to tolerate difference in treatment to achieve this goal.⁵⁰ The right to equality in the ACHPR can also be interpreted to imply the right to legal capacity.⁵¹ It is also noteworthy to point out that the African Commission has developed a draft protocol on the rights of older persons and PWDs in Africa which is calculated at enhancing the realization of the rights of PWDs in the region.

2.6 **The history of PWDs and the equality clause in Zimbabwe:**

In 1992, Zimbabwe enacted the Disabled Persons Act [Chapter 17:01] (DPA) which signalled the confirmation of the recognition of PWDs by the legislature.⁵² The DPA however had its major flaw of not according any human rights to PWDs as it rather maintained and perpetuated their commodification.⁵³ The Constitution was amended a record number of six times from 1993 to 2000 (after the enactment of the DPA) but prohibition of discrimination on the ground of disability never found its way to the Declaration of Rights. PWDs continued to be discriminated against until the National Disability Board (NDB), the National Association of Societies for the Care of the Handicapped (NASCOH) and the Southern Africa Federation of the Disabled (SAFOD) successfully lobbied for the inclusion of disability as a prohibited ground of discrimination in the Declaration of Rights.⁵⁴

The result of this work was the Amendment Number 17 to the Constitution in 2005 which amended Section 23 (the non-discrimination clause) to include the proscription of discrimination on the ground of physical disability.⁵⁵ Though this provision implicitly placed other forms of disability outside the

⁵⁰ I Currie and J de Waal *The Bill of Rights Handbook* 5 ed (2006) 232-3; see also *S v Mashayamombe* HH-596-15.

⁵¹ Application of the doctrine of implied rights stated in *Social and Economic Rights Action Centre and Another (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR) para 60.

⁵² C Mwalimu "Country report on Zimbabwe" (2003) 268 *International Disability Rights Compendium*.

⁵³ E Mandipa "A critical analysis of the legal and institutional frameworks for the realization of the rights of persons with disabilities in Zimbabwe" (2013) 80 *ADRY* Volume 1.

⁵⁴ *Ibid* 76.

⁵⁵ Constitution of Zimbabwe Amendment (No.17) Act of 2005.



Constitutional protection,⁵⁶ it must be noted that it was the beginning of a “revolution” in disability rights issues in Zimbabwe. PWDs had to patiently wait for eight years until the 20th Amendment to the Constitution was signed by the President which brought about the recognition of PWDs as persons before the law and the proscription of discrimination based on all forms of disability in terms of Section 56.⁵⁷

2.7 **The CRPD and disability specific construction of the equality clause:**

The CRPD, being the first international instrument to specifically deal with disability rights, provides the comprehensive normative content of the right to equality for PWDs in general. It provides for a definition of discrimination on the basis of disability in Article 2 which is centred on the fact that it is exclusion on the basis of a disability which has the effect of nullifying the enjoyment of PWDs’ human rights on an equal basis with others.⁵⁸ The CRPD includes denial of reasonable accommodation as a form of disability based discrimination.⁵⁹ In Article 3 of the CRPD, there are eight general principles which inform the interpretation of all subsequent substantive rights.⁶⁰ Chief amongst these principles are the principles of non-discrimination and equality of opportunity.⁶¹ The equality clause is further provided for as a standalone substantive right in terms of Article 5 of the CRPD. Article 5 reinforces the idea that the right to equality and non-discrimination have the same effect and can be used interchangeably as they are provided for in the same Article.

The right to equality is further provided for under Article 12 (1) of the CRPD which provides that persons with disabilities have the right to recognition everywhere as persons before the law. The right to legal capacity is recognized as an important subsidiary of the right to equality.⁶² This effectively

⁵⁶ See note 53 *supra*.

⁵⁷ Constitution of Zimbabwe Amendment (No.20) Act of 2013.

⁵⁸ Article 2 of the CRPD.

⁵⁹ *Ibid*.

⁶⁰ United Nations Office of the High Commissioner for Human Rights *Disabilities: Handbook for parliamentarians* (2007) 14.

⁶¹ Article 3 (b) and (e) of the CRPD.

⁶² See note 4 *supra* at paragraph 8.



means that the denial of legal capacity to persons with mental and intellectual disabilities is a disability based discrimination and is prohibited under Articles 2, 5 and 12 of the CRPD. The right to equality and its subsidiary of legal capacity have been construed by the Committee on the Rights of Persons with Disabilities as immediately realizable rights that is to say the rights attach at the moment of ratification and are not subject to progressive realization.⁶³ The Committee on the Rights of Persons with disabilities has also rejected the notion of formal equality and accepted that of substantive equality in the case of *HM v Sweden* where it held *inter alia* that the right to non-discrimination is violated when states fail to treat differently persons whose situations are significantly different.⁶⁴

2.8 Legal capacity and its potency in disability rights discourse:

Persons with mental and intellectual disabilities have historically been denied their legal capacity on the ground that they are deemed to lack the capacity to make their own decisions.⁶⁵ This is so because mental capacity is equated to legal capacity as was asserted by Voet.⁶⁶ Legal capacity has been recognized as an important subsidiary of the right to equality on the basis that it is indispensable for the exercise of any rights under any human rights instrument or constitution.⁶⁷ Persons with mental and intellectual disabilities have historically been unable to assert their rights as they are deemed to be perpetual minors from the womb to the tomb. Without legal capacity, no human being can be recognized as a person before the law and as such, cannot hold or exercise any rights. The denial of legal capacity has resulted in many consequential violations of rights of PWDs. For example, persons with mental and intellectual disabilities have been denied the right to marry, to vote, their liberty and have been subjected to forced sterilization because they are not recognized as persons before the law.⁶⁸ Legal capacity therefore

⁶³ See note 4 *supra* at paragraph 26.

⁶⁴ *HM v Sweden* Communication No. 3/2011 paragraph 8.3.

⁶⁵ *Lange v Lange* 1945 AD 332 at 342.

⁶⁶ See note 8 *supra* at 13.

⁶⁷ See note 61 *supra*.

⁶⁸ *Ibid* paragraph 27.



becomes the *conditio sine qua non* for the realization of the rights of PWDs. Without legal capacity, PWDs are objectified and the paradigm shift provided for by Article 12 of the CRPD is rendered nugatory.

2.9 **An analysis of Section 56 of the Constitution of Zimbabwe:**

The recognition of PWDs in Section 56 and 83 of the Constitution as rights holders signals the departure of Zimbabwe from the Medical and Social Models of disability to the Human Rights Model. The Medical Model views PWDs as objects in need of clinical intervention whilst the Social Model defines disability as a social construct but does not go as far as awarding PWDs rights.⁶⁹ The Human Rights Model recognizes PWDs as rights holders on an equal basis with others.⁷⁰ The Constitution provides for both formal and substantive equality in terms of Sections 56 (1) and 56 (6) respectively.⁷¹ The concept of substantive equality is more applicable to PWDs as they are provided with affirmative action in terms of Section 56 (6) as they are a group of persons that have been historically disadvantaged by unfair discrimination.

Section 56 (1) which provides that all persons are equal before the law and have the right to equal protection and benefit of the law must be taken to include PWDs especially persons with mental and intellectual disabilities. When the Section provides for the concept of equal benefit, it means that the benefits of legal capacity accorded to other persons by the law must equally be accorded to PWDs including persons with mental and intellectual disabilities. Section 56 (3) prescribes non-discrimination and proscribes discrimination based on the existence of a disability. Discrimination based on disability must be taken to mean denial of reasonable accommodation and legal capacity as envisaged by the provisions of the CRPD. Section 56 (4) prohibits the direct and indirect discrimination of PWDs. Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation whilst indirect discrimination occurs when laws which appear

⁶⁹ See note 13 *supra* at 26.

⁷⁰ *Ibid* 28.

⁷¹ Section 56 (1) of the Constitution provides that all persons are equal and Section 56 (6) of the Constitution provides for affirmative action, a concept companionable with substantive equality.



to be neutral at face value affect a group of persons in a significantly more negative way in comparison to others in a similar situation.⁷² Lastly, it is important to note that equality and non-discrimination are also founding values in the Constitution which means they inform the interpretation of all rights in the Bill of Rights.⁷³

2.10 The disability specific construction of Section 56 of the Constitution of Zimbabwe:

Zimbabwe is a party to the ICESCR, ICCPR, CRPD and the ACHPR. This means that Zimbabwe must interpret its equality clause in accordance with these instruments as it is bound by their provisions. Section 327 of the Constitution on domestication cannot be used to defeat these obligations as a state is bound upon accession or ratification and not domestication of the provisions of international human rights instruments.⁷⁴ Domestication must only be understood as a means of implementation of the instruments and not an expression to be bound. It has been held that countries are bound by international instruments they sign as they do so voluntarily.⁷⁵ Section 56 of the Constitution must be construed as including the following principles for the realization of rights of PWDs in Zimbabwe:

- ✚ “All persons” in Section 56 (1) includes persons with mental and intellectual disabilities
- ✚ Disability based discrimination prohibited under Section 56 (3) includes denial of reasonable accommodation and legal capacity
- ✚ Substantive equality is the most applicable model of equality to PWDs under Section 56 (6)
- ✚ Sections 56 and 83 must be interpreted to signal a departure from the Medical and Social Model to the Human Rights Model of disability.

⁷² See note 1 *supra* at 612-613.

⁷³ I Nzero and P Mhodi “The new Constitution and the death penalty: a justified discrimination?” (2014) 1 *Midlands State University Law Review (MSULR)* 40; see also *Minister of Home Affairs v National Institution for Crime prevention and Re-integration of Offenders (NICRO) and Another* 2005 (3) SA 280 CC.

⁷⁴ Article 11 of the Vienna Convention on the Law of Treaties, domestication is not listed as a means of an expression to be bound.

⁷⁵ *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) paragraph 68.



- ✚ Direct and indirect discrimination of PWDs is proscribed under Section 56 (4)

2.11 Conclusion

The right to equality is an important right to persons with mental and intellectual disabilities. From the foregoing, it can be seen that by denying legal capacity to persons with mental and intellectual disabilities, Zimbabwe is violating its international obligations, regional obligations and national obligations (under Section 56 of the Constitution). Accordingly, the realization of the rights of persons with mental and intellectual disabilities can only be possible when they are recognized as persons before the law and their legal capacity is restored. This is so because legal capacity is the *conditio sine qua non* for the realization of their rights under the Constitution or any international human rights instrument.



CHAPTER THREE

3.1 Introduction:

Chapter Two, as the background Chapter, mainly discussed Zimbabwe's international obligations under the equality clause and highlighted that legal capacity is an important subsidiary of this right. This Chapter is dedicated to analysing the legislative framework of Zimbabwe which denies persons with mental and intellectual disabilities their legal capacity. Zimbabwe's legislative framework which denies PWDs their legal capacity is classified into two categories viz. those laws that deny PWDs their legal standing and those that deny their legal agency. The chapter also presents the conflicting views of two schools of thought in relation to the right of persons with mental and intellectual disabilities right to legal capacity.

3.2 Constitutive components of legal capacity:

Legal capacity, as already mentioned, is the ability of a person to hold rights and to exercise them at law.⁷⁶ Legal capacity consists of two strands which are legal standing and legal agency.⁷⁷ Legal standing refers to being viewed as a person before the law that is to say to be recognized as capable of holding rights.⁷⁸ Legal agency also known as active capacity refers to capability to exercise or act on those rights and to have such actions recognized by the law.⁷⁹ Laws in Zimbabwe which deny legal capacity are therefore divided into two categories informed by the two strands above. Accordingly, there are laws that deny PWDs their legal standing and those that deny them of their legal agency as shall be discussed *infra*.

3.3 Denial of legal standing of PWDs under Zimbabwe's legislative framework:

Despite the existence of Section 56 of the Constitution which provides for the equality of all persons before the law, persons with mental and intellectual disabilities are denied their legal standing which is the ability to hold certain

⁷⁶ See note 4 *supra* at paragraph 12.

⁷⁷ *Ibid* 12bis.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.



rights in the Constitution. This dissertation will not exhaust all the rights that are denied to persons with mental and intellectual disabilities but will analyse those that are much more important to them. The Constitution provides in neutral fashion for these rights but there are various statutes which then blatantly deny the persons with mental and intellectual disabilities such rights due to the presumption that they are incapable of holding them based on the engrained stigmatization. These rights are as follows:-

a) The right to privacy (Section 57 of the Constitution)

The Constitution protects everyone's right to privacy. It was held that the right to privacy protects the inner sanctum of the person in the case of *Bernstein and Others v Bester NO and Others*.⁸⁰ This means that the right to privacy is essential for persons with mental and intellectual disabilities to exercise their autonomy.⁸¹ However, the provisions in various statutes including Section 109 of the Mental Health Act (MHA) [Chapter 15:12] which allows for the appointing of *curators personae* for PWDs have an effect of taking away such right. This means that persons with mental and intellectual disabilities are not holders of the right to privacy and are therefore denied of their legal capacity to hold this right.

b) Property rights (Section 71 of the Constitution)

Section 71 (2) of the Constitution provides that every person has the right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose all forms of property. Various statutes however qualify this right in relation to persons with mental and intellectual disabilities. Persons with mental and intellectual disabilities cannot dispose of their property through testamentary disposition in terms of Section 4 (1) the Wills Act [Chapter 6:06] which was also confirmed in the case of *Matanga v Denhure and Another*.⁸² Chirawu states that the test for sufficient mental capacity to make a will is the following question: "Were his mind and memory sufficiently sound to enable him to

⁸⁰ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 paragraph 90.

⁸¹ G Richardson "Mental Disabilities and the law: From substitute to supported decision making?" (2012) Vol 65 Current Legal Problems 339.

⁸² *Matanga v Denhure and Another* HH-87-2008.



understand the business in which he was engaged at the time of executing the will?"⁸³ Accordingly, persons with mental and intellectual disabilities are presumed to lack testamentary capacity.

Part XI of the MHA provides for the care and administration of the property of persons with mental and intellectual disabilities who are institutionalised and those that are not. Sections 86 and 92 of the MHA provide for the appointment of a *curator bonis* who is entitled to exercise the property rights of the PWDs. These curatorship provisions are discriminatory as disability is used to deny persons with mental and intellectual disabilities their property rights. Section 88 of MHA empowers the *curator bonis* to sell, lease and exchange a PWD's property which means the individual PWD is deprived of his or her property rights. Section 51 of the Administration of Estates Act [Chapter 6:01] confirms the same position that persons with mental and intellectual disabilities cannot exercise property rights as property bequeathed to PWDs in terms of a will is to be transferred to the Master of the High Court who will further transfer such property to a curator. This means that persons with mental and intellectual disabilities are deemed to lack the capacity to hold property rights.

c) Right to personal liberty (Section 49 of the Constitution)

The Constitution provides that every person has a right to personal liberty. Every person here excludes persons with mental and intellectual disabilities as such PWDs are deprived of this right under the provisions of the MHA. The right to liberty was defined in the case of *Sudan Human Rights Organization and Another v Sudan* as simply a right to be free that is freedom from restraint or ability to do as one pleases provided it is done in accordance with the law.⁸⁴ Part II of the MHA provides for the institutionalization of persons with mental and intellectual disabilities. Once it is established that a person has a mental or intellectual disability, any relative or major person can make an

⁸³ S Chirawu *Principles of the law of succession in Zimbabwe: Incorporating the women's rights perspective* (2015) 72.

⁸⁴ *Sudan Human Rights Organization and Another v Sudan* (2009) AHRLR 153 at 180 para 172.



application to a Magistrate to have such a person committed to an institution.⁸⁵ The magistrate will issue a reception order in terms of Section 9 (1) of MHA which will result in the removal of the PWD and his or her detention. It is clear that persons with mental and intellectual disabilities are deemed to lack the capacity to hold the right to liberty.

d) Political participation (Section 67 of the Constitution)

Every citizen of Zimbabwe who is a major is provided with the right to vote and stand for public office under Section 67 (3) of the Constitution. However the fourth schedule to the same Constitution in terms of Section 2 (a) disqualifies persons with mental and intellectual disabilities from exercising such right to vote and to stand for public office. This is based on the misconception that persons with mental and intellectual disabilities are incapable of assessing the consequences of their decisions, incapable of making conscious and judicious decisions which is discriminatory.⁸⁶ This effectively means that such PWDs are recognized as incapable of exercising their right to political participation which is an infringement also of their right to legal capacity.⁸⁷

e) Marriage rights (Section 78 of the Constitution)

Every person including persons with mental and intellectual disabilities has a right to found a family. Malaba DCJ has held that entering into marriage is an exercise of the right to found a family.⁸⁸ But persons with mental and intellectual disabilities are denied such a right due to some entrenched stereotypes in terms of the provisions of the Matrimonial Causes Act [Chapter 5:13]. Section 4 (b) of the Matrimonial Causes Act [Chapter 5:13] states that the existence of a mental or intellectual disability on a spouse shall entitle the

⁸⁵ C Makwara *From institutionalisation to deinstitutionalisation of persons with mental and intellectual disabilities in Zimbabwe: A critical analysis of Zimbabwe's obligations* (LLB dissertation, Midlands State University, 2015) 26.

⁸⁶ *Alajos Kiss v Hungary*, Application no. 38832/06, Council of Europe: European Court of Human Rights, 20 May 2010 paragraph 25.

⁸⁷ Q Chimbo *A critical analysis of the role of independent commissions towards the realisation of the rights of persons with disabilities in Zimbabwe* (LLB dissertation, Midlands State University, 2015) 35.

⁸⁸ *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs* (N.O.) & Others CCZ-12-15.



other spouse to institute an action for divorce. The same Act further provides in Section 13 (1) (b) that a marriage entered into by a person with a mental or intellectual disability shall be voidable. Kamundia argues that using the existence of disability as a ground for divorce is discriminatory and objectionable.⁸⁹ Van der Riet J in the case of *Uys v Uys* explained this provision by holding that the marriage is set aside on the basis that though a person with a mental or intellectual disability can understand that he or she is entering into a marriage ceremony, such marriage is set aside because such a person does not appreciate the obligations which he or she will be undertaking.⁹⁰ This is based on the notion that persons with mental and intellectual disabilities occupy the same legal position as minor children and is in fact discriminatory. In light of the foregoing, persons with mental and intellectual disabilities are seen as lacking the capacity to hold marriage rights.

f) Freedom of profession, trade or occupation (Section 64 of the Constitution)

Every person has the right to choose and carry on any profession, trade or occupation. Persons with mental and intellectual disabilities are denied this right in various statutes either expressly or implicitly. The statutes with express provisions denying persons with mental and intellectual disabilities of this right maybe through prohibition of the assumption of the profession, trade or occupation and the disqualification of a PWD from holding the profession, trade or occupation once an intellectual or mental disability exists. All these laws equate existence of a mental or intellectual disability to incompetence or incapability of assuming the profession, trade or occupation. These statutes include:-

- ✚ Veterinary Surgeons Act [Chapter 27:15] in Section 27 (5) (a) provides that the Council of Veterinary Surgeons may refuse to register a person with mental and intellectual disability notwithstanding that the person is otherwise qualified.

⁸⁹ See note 21 *supra*.

⁹⁰ *Uys v Uys* 1953 (2) SA 1 (E).



- ✚ Traditional Leaders Act [Chapter 29:17] in terms of Section 47 states that once a traditional leader has a mental disability, the Minister may remove such a person from office.
- ✚ The Companies Act [24:03] in terms of Section 173 (1) disqualifies persons with mental and intellectual disabilities from becoming directors of companies.
- ✚ Health Professions Act [27:19] Section 86 (5) (a) disqualifies persons with mental and intellectual disabilities from being registered as medical practitioners.

g) Freedom of movement and residence (Section 66 of the Constitution)

The ability of persons with mental and intellectual disabilities to hold this right is thwarted by the provisions of part II of the MHA which provides for the institutionalization of persons with mental and intellectual disabilities.

h) Right to a fair hearing (Section 69 of the Constitution)

All persons, including persons with mental and intellectual disabilities have a right to a fair hearing which includes access to the courts or tribunals. However PWDs are denied access to the courts through the extant curatorship laws. An example is Order 32 Rule 249 of the High Court Rules of 1971 which allows only a *curator ad litem* to enforce the rights of a person with a mental and intellectual disability. This means that though the right is granted to every person, this excludes persons with mental and intellectual disabilities based on a misconception that they are incapable of enforcing their own rights. The CRPD Committee has stated that laws that deny access of PWDs to courts on their own are at variance with the provisions of the CRPD.⁹¹ In light of the foregoing, persons with mental and intellectual disabilities are deemed to lack the capacity to hold the right to a fair hearing.

⁹¹ Committee on the Rights of Persons with Disabilities, Concluding Observations on Hungary (U.N. Doc. CRPD/C/HUN/CO/1, 27 September 2012) paragraph 26.



i) Right to personal security (Section 52 of the Constitution)

Section 52 (b) of the Constitution provides that every person has the right to bodily and psychological integrity which includes the right to make decisions concerning their reproduction. The court in *Christian Lawyers Association of SA and Others v Minister of Health and Others* held that the right to personal security entails the right to make decisions concerning reproduction and to security in and control over one's body.⁹² Persons with mental and intellectual disabilities are denied the capacity to hold this right in terms of Section 110 A of the MHA which allows for their forced sterilization provided their parents, guardians, spouses or *curator personae* has given consent thereto. Section 109 of the MHA provides that a curator of the person of a PWD (*curator personae*) can be appointed by the High Court to make decisions concerning personal matters of a person with a mental or intellectual disability. Such curatorship provisions are premised on the misconception that PWDs are incapable of making their own decisions which is discriminatory and contrary to the provisions of the CRPD. Accordingly, persons with mental and intellectual disabilities are deemed to lack the capacity to hold the right to personal security.

j) Freedom from torture or cruel, inhuman or degrading treatment or punishment (Section 53 of the Constitution)

Every person is entitled to freedom from torture but the institutionalization or detention of persons with mental and intellectual disabilities that is provided for in terms of Section 9 of the MHA is an indication that these PWDs are seen as incapable of holding such a right. The institutionalization of PWDs may constitute torture as was stated by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment who stated that psychiatric intervention on the basis of disability alone should be abolished as it constitutes torture and ill- treatment.⁹³ Malaba DCJ held in the case of *Jestina Mukoko v The Attorney-General* that the prohibition against torture is

⁹² *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) at 1121 F.

⁹³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2013) UN General Assembly A/HRC/22/53.



non-derogable and has morphed into a *jus cogens* norm.⁹⁴ The CRPD Committee has also stated that the institutionalization of persons with mental and intellectual disabilities is contrary to the provisions of the CRPD and should be abolished by states parties.⁹⁵

3.4 Denial of legal agency of PWDs under Zimbabwe's legislative framework:

Zimbabwe has laws in existence which deny the right of persons with mental and intellectual disabilities to enforce or exercise their rights. The laws that deny persons with mental and intellectual disabilities their legal agency firstly conflate the two forms of disabilities. The MHA in Section 2 treats mental and intellectual disabilities as synonymous. This is the same position confirmed by Section 2 of the Disabled Persons Act (DPA) [Chapter 17:01]. Persons with mental and intellectual disabilities are denied their right to sue as well as giving testimony in their own cases by the various statutes and rules that deny them their legal agency.

The High Court Rules of 1971 in terms of Order 32 Rule 249 prevent persons with mental and intellectual disabilities from approaching the courts without a *curator ad litem*. The rules expressly divest PWDs of their *locus standi* and places it squarely on curators. This is the same position that prevails in the magistrates court as provided for in terms of Section 44 of the Magistrates Court Act [Chapter 7: 10] read with Order 7 Rule 1 of the Magistrates Court (Civil) Rules of 1980. These curatorship laws have the effect of denying persons with mental and intellectual disabilities their legal agency and consequently are contrary to the provisions of Article 12 of the CRPD.

Other PWDs such as those with sensory disabilities have the right to sue in their own right as evinced by the case of *Simon Mvindi and Others v The President of Zimbabwe and Others* where the PWDs sought to claim their

⁹⁴ *Jestina Mukoko v The Attorney-General* SC-11-12.

⁹⁵ CRPD Report on Tunisia (2011) UN-CRPD/C/TUN/CO/1.



right to a secret ballot.⁹⁶ It is also of great concern that whenever the statutes and rules mention persons denied of their legal agency, persons with mental and intellectual disabilities are mentioned together with minor children which means that PWDs are seen as occupying the same legal position as children. It is submitted that recognizing PWDs as perpetual minors despite their majority status is in itself discriminatory and at variance with the provisions of the CRPD which prohibit disability based discrimination.

Persons with mental and intellectual disabilities are deemed to be incompetent witnesses in courts in terms of Section 5 (a) of the Civil Evidence Act [Chapter 8:01] and Section 246 of the Criminal Procedure and Evidence Act (CP&EA) [Chapter 9:07]. Persons with mental and intellectual disabilities are considered incompetent witnesses due to the misconception that they are unreliable witnesses.⁹⁷ Testimonial capacity is about legal capacity and those who are deemed to lack legal capacity cannot testify in any court of law.⁹⁸ The inevitable consequence of this denial of legal agency is that persons with mental and intellectual disabilities can be violated with impunity as the perpetrators will be protected by the laws which do not value the evidence led by PWDs. In the case of *S v Ndiweni*, it was held that once it is alleged that a witness has a mental or intellectual disability, the court must conduct an inquiry in order to decide on competency of such a witness.⁹⁹ Accordingly, it is worth noting that these individualised assessments based on the existence of a disability have been held to be discriminatory by the CRPD Committee in the case of *Zsolt Bujdosó and Others v Hungary*.¹⁰⁰

3.5 Reconciling the “best interests” concept with the CRPD:

The welfare or “best interests” principle has been used to protect the rights of minor children as the law recognizes their incapability to make their own

⁹⁶ *Simon Mvindi and Others v The President of Zimbabwe and Others* SC-106-08.

⁹⁷ See note 10 *supra* at 46.

⁹⁸ *Ibid* 47.

⁹⁹ *S v Ndiweni* S-49-89.

¹⁰⁰ *Zsolt Bujdosó and Others v Hungary* Communication No.4/2011 paragraph 9.6



decisions.¹⁰¹ Once a person is deemed to lack capacity to manage his or her own affairs, decisions will be made on his or her behalf using the “best interests” principle.¹⁰² Section 110 A (2) of the MHA provides that curators and guardians authorise the forced sterilization of a person with a mental or intellectual disability if it is in his or her “best interests”. This provision is an epitome of the basis of how decisions are made by curators and guardians on behalf of PWDs in Zimbabwe. Applying the “best interests” principle in relation to persons with mental and intellectual disabilities brands them as perpetual minors which is discriminatory. Once the best interests concept is understood as an objective test reflecting the views of others on what is in the best interests of a PWD, it will be at variance with Article 12 (4) of the CRPD.¹⁰³ The CRPD Committee has stated that the “will and preference” paradigm must replace the “best interests” paradigm to ensure that PWDs enjoy their legal capacity.¹⁰⁴ The “best interests” concept renders persons with mental and intellectual disabilities spectators in their own lives whilst the “will and preference” concept puts them at the centre of managing their own lives.

3.6 Analysing substituted decision making under Zimbabwe’s legislative framework:

As indicated above, a number of statutes provide for curatorship or guardianship provisions which have an effect of empowering curators and guardians of persons with mental and intellectual disabilities to make decisions on their behalf. Such a system exhibited by Zimbabwe’s statutes is known as substituted decision making. The CRPD Committee has noted that substituted decision-making laws have the following characteristics: (i) PWDs are denied legal capacity, (ii) substituted decision-makers are appointed without consulting the PWDs and (iii) decisions made by the substituted decision-makers are based on what is objectively in the “best interests” of the

¹⁰¹ A Moyo “Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the best interests of the child” (2012) Vol 12 *AHRLJ*.

¹⁰² R Huxtable “Autonomy, best interests and the public interest: Treatment, non-treatment and the values of medical law” (2014) Vol 22 No 4 *Medical Law Review* 467.

¹⁰³ See note 81 *supra*.

¹⁰⁴ See note 4 *supra*.



PWDs.¹⁰⁵ Substituted decision-making does not recognize PWDs as rights holders which is at variance with Articles 12 (1) and 12 (2) of the CRPD as it presumes their legal incapacity. The CRPD Committee has stated that substituted decision-making regimes must be jettisoned and supported decision-making regimes adopted.¹⁰⁶ A supported decision-making regime allows PWDs to make their own choices with the assistance of support persons which is in compliance with Article 12 (3) of the CRPD.¹⁰⁷

3.7 The scholarly debate on PWDs' right to legal capacity:

There has been development of two schools of thought in relation to granting of the right to legal capacity to persons with mental and intellectual disabilities. There are conservatives or the antagonists of the granting of legal capacity to persons with mental and intellectual disabilities and liberals or protagonists of the granting of the right to legal capacity for persons with mental and intellectual disabilities whose arguments are discussed below.

a) In defense of the *status quo*:

There are various scholars that have expressed their displeasure to the provisions of Article 12 of the CRPD. Their major arguments have been directed towards the preservation of the denial of legal capacity to persons with mental and intellectual disabilities. The main issues addressed in defending the *status quo* are the advantages of curatorship laws, applying the "best interests" principle and denial of some specific rights to persons with mental and intellectual disabilities. It is beyond doubt that persons with mental and intellectual disabilities are vulnerable members of the society and are in need of care and assistance.¹⁰⁸ Curatorship laws are designed in such a way that a PWD's person and property are preserved through the appointment of a *curator personae* and a *curator bonis* respectively. The responsibility over vulnerable citizens is rooted in English common law, under the doctrine of

¹⁰⁵ See note 2 *supra* at paragraph 23.

¹⁰⁶ See note 2 *supra* at 24.

¹⁰⁷ J Cassidy "Restoration of rights in the termination of adult guardianship" (2015) Vol 23 No 1 *The Elder Law Journal* 118.

¹⁰⁸ See note 17 *supra*.



parens patriae (parent of the country) which allowed the courts to assume control of and appoint guardians for infants (minors) and incompetents (incapacitated adults).¹⁰⁹

Curatorship laws are not designed in a way that denies persons with mental and intellectual disabilities their rights, they are designed in such a way that someone else known as a curator can assist these persons to exercise their rights, for example a *curator bonis* is appointed to assist the PWD in exercising his or her property rights, a *curator personae* is appointed to assist the PWD in exercising personal rights and a *curator ad litem* is appointed to assist the PWD in enforcing his or her rights in a court of law.¹¹⁰ All these curators are appointed not to take away the rights of PWDs but to assist them in realizing such rights as there is an acceptance by the legislature that such persons are in need of assistance as vulnerable members of the society.¹¹¹

Curators are appointed to further the “best interests” of the PWDs because these are usually persons who spend more time with the particular PWD and will be aware of the will and preferences of the particular PWD.¹¹² The “best interests” principle assists where there is a severe mental or intellectual disability such that the particular person’s will or preference cannot be ascertained by the curator. Persons with severe mental disabilities in particular sometimes become a danger to the society and to themselves such that the need arises for them to be institutionalized that is to be deprived of their right to liberty and freedom of movement.¹¹³ The legislature sometimes through the realization that persons with severe mental and intellectual disabilities can be manipulated or abused by their curators may be denied of such rights such as the right to political participation.¹¹⁴

¹⁰⁹ See note 17 *supra*.

¹¹⁰ *Ibid*.

¹¹¹ See note 18 *supra*.

¹¹² *Ibid*.

¹¹³ See note 85 at pages 17-18.

¹¹⁴ See note 16.



b) Embracing the paradigm shift

The author fully associates himself with the submissions by the scholars that defend the provisions of Article 12 of the CRPD. Article 12 is emblematic in that it confirms the personhood of persons with mental and intellectual disabilities.¹¹⁵ Curatorship laws make a presumption of incapacity of persons with mental and intellectual disabilities thereby depriving them of their legal standing and their legal agency. The effects of the denial of legal capacity to persons with mental and intellectual disabilities are that, they are objectified, they become spectators in their own lives instead of being active participants and that they are deemed to have the same legal status as children which is discriminatory.

The argument that PWDs may not be capable of expressing their “will or preference” cannot stand on the basis that the CRPD provides that in severe disabilities then support persons can use the ‘best interpretation of will and preference’ of a PWD based on the PWD’s values and beliefs.¹¹⁶ The manipulation or undue influence argument can also be dismissed on the ground that all adults are subject to influence, manipulation, pressure, subtle coercion and undue influence by those close to them for example friends and relatives.¹¹⁷ This means such argument of undue influence cannot be used to deny PWDs their fundamental right of legal capacity. The liberal scholars in summary have accurately submitted that the granting of legal capacity to persons with mental and intellectual disabilities is an acknowledgement of their humanity and is consistent with the provisions of Article 12 of the CRPD.

3.8 Conclusion:

The existence of a mental or intellectual disability has been used in Zimbabwe’s legislative framework to deny persons with mental and

¹¹⁵ See note *supra* 34.

¹¹⁶ P Gooding Navigating the “Flashing Amber Lights of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns” (2015) *Human Rights Law Review* 53.

¹¹⁷ *Ibid* 56.



intellectual disabilities their legal capacity. Laws which deny PWDs' legal capacity are classified into two broad categories, namely, laws that deny legal standing and agency of PWDs. It is clear from the foregoing that legal capacity is the *conditio sine qua non* for the realization of all other rights by persons with mental and intellectual disabilities under any human rights instrument, Constitution and legislation.



CHAPTER FOUR

4.1 Introduction:

Chapter 3 was a critical analysis of the legislative framework of Zimbabwe which denies persons with mental and intellectual disabilities their legal capacity. This Chapter contains a comparative analysis between the legislative framework of the Republic of Zimbabwe and that of the Republic of Ireland in relation to the right to legal capacity of persons with mental and intellectual disabilities. The analysis will mainly focus on the presumption of legal capacity, the functional approach to legal capacity, the “will and preference” principle, supported decision-making and response to cases of profound mental and intellectual disabilities.

The Republic of Ireland has been selected as a comparator due to the fact that it recognizes the legal capacity of persons with mental and intellectual disabilities and that the Assisted Decision-Making (Capacity) Act 2015 is a landmark piece of legislation which postdates the CRPD. This chapter therefore informs Zimbabwe on how she can borrow from the Republic of Ireland.

4.2 An overview of Republic of Ireland’s legislative framework:

The Republic of Ireland followed the Medical Model of disability prior to 2015.¹¹⁸ The main pieces of legislation governing legal capacity of PWDs such as the Marriage of Lunatics Act of 1811, the Lunacy Regulation (Ireland) Act of 1871 and the Mental Health Act of 2001 gave effect to this Medical Model.¹¹⁹ These statutes objectified persons with mental and intellectual disabilities and denied them their legal capacity through the status approach to capacity, presumption of legal incapacity, application of the “best interests or welfare” principle, the wardship system applying substituted decision-making mechanisms through surrogates, trustees and guardians. In 2015, the Republic of Ireland enacted the Assisted Decision-Making (Capacity) Act

¹¹⁸ Z Latif *et al* “Mental Health legislation in Ireland: A lot done, more to do” (2012) Journal of the American Academy of Psychiatry Law.

¹¹⁹ *Ibid.*



2015 (which shall herein after be referred to as the ADMA of 2015) which had an effect of abolishing the wardship system and adopting supported decision making mechanisms in recognition of the PWDs legal capacity in line with Article 12 of the CRPD. It is unfortunate that unlike the Republic of Ireland, the main pieces of legislation in the Republic of Zimbabwe, in the form of the MHA and the DPA all predate the CRPD and follow the Medical Model of disability which commodifies PWDs.

4.3 The functional approach to legal capacity:

Zimbabwe's legislative framework adopts a "status approach" to legal capacity. This means that the existence of a mental or intellectual disability results in the automatic denial of legal capacity simply because the person in question has an ascribed status of a person with mental or intellectual disability.¹²⁰ The CRPD committee has stated that under this approach, a person's disability is taken as a legitimate ground for denying his or her legal capacity and lowering his or her status as a person before the law.¹²¹ It further stated that Article 12 does not permit such discriminatory denial of legal capacity, but rather requires that support be provided in the exercise of legal capacity.¹²² Mc Sherry has stated that Article 12 begins by presuming that PWDs have legal capacity and then goes on to state that should they require assistance in exercising their legal capacity, they must be given the support they require.¹²³ The status approach simply ascribes the status to justify an automatic denial of legal capacity.

Ireland's legislative framework avoids the automatic denial of PWDs right to legal capacity by adopting the "functional approach".¹²⁴ Section 3 (1) of the ADMA of 2015 provides that a person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be

¹²⁰ See note 4 at paragraph 13.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ B Mc Sherry "Legal capacity under the Convention on the Rights of Persons with Disabilities"(2012) *Legal Issues* at page 25.

¹²⁴ Assisted Decision-Making (Capacity) Act 2015 Explanatory Memorandum at page 2.



made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time. This provision is important in that it is a departure in the law from the “across the board/all or nothing status approach” to capacity to a flexible “functional approach”, whereby capacity is assessed only in relation to the matter in question and only at the time in question (issue and time specific).¹²⁵ Whereas the status approach in Zimbabwe leads to an across the board automatic denial of legal capacity, the functional approach in Ireland assesses the abilities of the individual to determine the type of support that the person would require. This accordingly means that Ireland’s legislative framework is in line with the provisions of the CRPD recognizing the legal capacity of PWDs whilst Zimbabwe’s legislative framework is at variance.

4.4 Presumption of legal capacity:

The CRPD provides in terms of Article 12 (2) that all PWDs enjoy legal capacity on an equal basis with others which means it presumes the legal capacity of PWDs.¹²⁶ Combrinck has submitted that this provision is neither conditional nor presumptive.¹²⁷ It would have been conditional if it provided that “All persons have legal capacity provided that they have the capacity to...” and it would have been presumptive if it provided that “All persons are presumed to have legal capacity until proved otherwise”.¹²⁸ The most important aspect of Article 12 of the CRPD which makes it the heart of the revolution in disability rights is its unequivocal starting point that all persons have legal capacity.¹²⁹ Section 8 (2) of the ADMA of 2015 presumes the legal capacity of persons with mental and intellectual disabilities in Ireland. On its part, Zimbabwe through its various statutes presumes the legal incapacity of persons once it is proved that they possess a mental or intellectual disability. This means that Zimbabwe’s legislative framework is at variance with the

¹²⁵ A Guy *Legal capacity in a mental health context in Ireland A critical review and a case for reform* (Social Sciences dissertation, Dublin Institute of Technology, 2011) 11.

¹²⁶ See foot note 123 at 22.

¹²⁷ H Combrinck “Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa ” (2014) *ADRY vol 2* page 85.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*



provisions of the CRPD. Presuming legal incapacity of persons with mental and intellectual disabilities is obnoxious as it is discriminatory and inevitably denies their recognition as persons before the law and their ability to hold and exercise their rights at law.¹³⁰

4.5 The “will and preferences” paradigm:

The CRPD provides for the recognition of the will and preferences of PWDs by states parties.¹³¹ The CRPD committee has stated that the “will and preferences” paradigm must replace the “best interests” paradigm to ensure that PWDs enjoy their legal capacity on an equal basis with others.¹³² Section 8 (7) (b) of the ADMA of 2015 provides that the past and present will and preference of a PWD must be given effect. This provision in line with the CRPD as it signals a seismic shift from overt paternalism and best interests approach to a human rights based approach of respecting the choice, control and consent of a PWD.¹³³ It is egregious to note that Zimbabwe still applies the best interests approach in relation to the rights of persons with disabilities.

A clear example is Section 110 A (2) of the MHA which provides that curators and guardians authorise the forced sterilization of a person with a mental or intellectual disability if it is in his or her “best interests”. The “best interests” principle is problematic as it is a corollary of substituted decision-making. It reduces PWDs to the perpetual minority status and deprives them of their ability to hold and exercise rights or more appropriately to exercise their autonomy and self-determination on an equal basis with others. The “best interests” always results in the imposition of ideas of others over PWDs which is contrary to the objects of the CRPD. The “best interests” concept must be understood as mutually exclusive to the “will and preference” approach such that applying them side by side in the same jurisdiction falls short of the required compliance with Article 12 (4) of the CRPD.

¹³⁰ See note 4 at paragraph 13.

¹³¹ Article 12 (4) of the Convention on the Rights of Persons with Disabilities.

¹³² See note 4 at paragraph 18bis.

¹³³ Anonymous “Assisted Decision-Making (Capacity) Bill 2013 finally published” <http://www.humanrights.ie> Accessed 9 January 2016.



4.6 Supported decision making:

Article 12 (3) of the CRPD obligates states parties to take appropriate measures to provide access by PWDs to the support they may require in exercising their legal capacity. The CRPD committee has stated that support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making.¹³⁴ Substituted decision-making is rampant in Zimbabwe as the “best interests” principle is applied by curators and guardians of persons with mental and intellectual disabilities. Ireland’s legislative framework complies with the provisions of the CRPD in that the ADMA of 2015 establishes a novel legal framework for a range of decision making supports.¹³⁵

The first level of assistance is “Assisted Decision-Making” where an individual, voluntarily appoints another person to assist with certain specified decisions relating to their personal welfare, property and affairs.¹³⁶ The second level of assistance is “Co-Decision-Making” where the Circuit Court Declares that an individual’s capacity is reduced for specific decisions but he or she would have capacity for those decisions if he or she voluntarily appointed a “Co-Decision-Maker” to share authority and responsibility for those decisions.¹³⁷ The third level of assistance involves “Decision-Making Representatives” such a person may be appointed by the Circuit Court when a Declaration is sought to establish, whether an individual has capacity to make a decision or needs assistance to do so.¹³⁸ It is clear from the foregoing that the development of supported decision-making systems in parallel with the preservation of substituted decision-making regimes is not adequate to comply with Article 12 (3) of the CRPD.¹³⁹ This effectively means that the two decision-making regimes are mutually exclusive.

¹³⁴ See note 4 at paragraph 15.

¹³⁵ Irish Human Rights Commission (IHRC) “Observations on the Assisted Decision-Making (Capacity) Bill 2013” <http://www.ihrec.ie> Accessed 9 January 2016.

¹³⁶ Part 3 of the Assisted Decision-Making (Capacity) Act 2015.

¹³⁷ Part 4 Chapter 4 of the Assisted Decision-Making (Capacity) Act 2015.

¹³⁸ *Ibid.*

¹³⁹ See note 4 at paragraph 24.



4.7 Cases of severe mental and intellectual disability:

Cases of severe mental and intellectual disability are the “hard cases” in disability rights discourse due to the challenges they pose in relation to practicability of the realization of the rights enumerated in the CRPD. The CRPD does not provide special provisions for these cases of severe disabilities where an individual would be incapable of formulating any “will or preference” as well as communicating such “will or preference”. The CRPD Committee has however provided for some interpretive guidance by stating that in cases of severe disabilities, ‘best interpretation of will and preference’ must be applied.¹⁴⁰ The legislative framework of Zimbabwe already responds to severe mental and intellectual disabilities by denying them legal capacity through application of the “best interests” principle and substituted decision-making mechanisms.

The ADMA of 2015 responds to cases of severe mental and intellectual disabilities by providing in part 5 for the court-based procedures that will apply when a person's capacity difficulties are sufficiently severe to prevent him or her from availing of the decision-making assistance or the co-decision-making options. If the person is found by the court to lack capacity, the court can appoint a decision-making representative to take specified decisions on the person's behalf, either on property and affairs or on personal welfare.¹⁴¹ The representative will be supervised by the Decision Support Service and will be required to report to it on the performance of the role.¹⁴² The provisions of part 5 of the ADMA of 2015 have sufficient safeguards to enforce the “best interpretation of will and preference” in line with the provisions of the CRPD.¹⁴³ In summation, the provisions of part 5 of the ADMA of 2015 comply with the Article 12 of the CRPD whilst Zimbabwe’s legislative framework does not.

¹⁴⁰ See note 4 *supra* at paragraph 18bis.

¹⁴¹ Part 5 of the Assisted Decision-Making (Capacity) Act 2015.

¹⁴² *Ibid.*

¹⁴³ S Doyle and E Flynn ‘Ireland’s ratification of the UN convention on the rights of persons with disabilities: challenges and opportunities’ (2013) 41 *British Journal of Learning Disabilities* at 175.



4.8 Conclusion:

It can be seen from the foregoing that Zimbabwe is lagging behind in fulfilling its obligations under Article 12 of the CRPD. Zimbabwe can learn from the Republic of Ireland which, through its ADMA of 2015 complies with the provisions of the CRPD. The starting point for Zimbabwe is through the repealing of the legislative framework that predates the CRPD as was done by Ireland and the second step is basing all laws on guiding principles which are in line with the CRPD as what Ireland has done through the guiding principles provided for in Section 8 of ADMA of 2015. These principles as already discussed *supra* include the presumption of legal capacity of persons with mental and intellectual disabilities, enforcing their will and preferences and applying supported decision-making mechanisms.



CHAPTER FIVE

5.1 Introduction:

This dissertation has analysed the legislative protection of legal capacity for persons with mental and intellectual disabilities in Zimbabwe. The dissertation has also discussed the right to equality and non-discrimination in the Constitution of Zimbabwe and introduced an interpretation of this right in line with Article 12 of the CRPD. The denial of legal capacity to persons with in various statutes in Zimbabwe is therefore a disability based discrimination which violates the provisions of the Constitution and the CRPD.

The first chapter centred mainly on introducing the concept of legal capacity within the legal discourse of Zimbabwe. The second chapter outlined the international obligations of Zimbabwe in relation to the right to equality and non-discrimination, interpreted the equality clause in a manner that recognizes the rights of persons with mental and intellectual disabilities as well as establish that the denial of legal capacity under Zimbabwe's prevailing legislative framework violates Article 12 of the CRPD. The third chapter discussed fully the concept of legal capacity analysing the various statutes that deny the legal standing and legal agency of persons with mental and intellectual disabilities either expressly or implicitly. The fourth chapter was a comparative analysis between Zimbabwe's legislative framework and that of the Republic of Ireland in relation to the right to legal capacity for persons with mental and intellectual disabilities.

5.2 SUMMARY OF FINDINGS OF THE STUDY:

After a critical and intensive analysis of various statutes in Zimbabwe, the author was able to come to a conclusion that Zimbabwe's legislative framework:

- ✚ Does not recognize persons with mental and intellectual disabilities as equal to their non-disabled counterparts
- ✚ Presumes the legal incapacity of persons with mental and intellectual disabilities
- ✚ Adopts a "status approach" to legal capacity



- ✚ Applies the “best interests” of the PWD principle
- ✚ Has curatorship or guardianship laws excluding substituted decision-making

5.3 RECOMMENDATIONS:

5.3.1 Constitutional Amendment:

It is recommended that the Fourth Schedule to the Constitution be amended as it uses derogatory phrases to refer to PWDs such as “mentally disordered” and “intellectually handicapped”. The Constitution must adopt the person first language which means the phrases “mentally disordered” and “intellectually handicapped” would be replaced by persons with mental disabilities and persons with intellectual disabilities respectively. It is also recommended that the blanket disenfranchisement and detention of PWDs in terms of the fourth schedule thereby denying PWDs their right to political participation and liberty should not find their way into the amended Constitution.

5.3.2 Domestication of the CRPD:

As already stated in Chapter One, Zimbabwe ratified the CRPD. The CRPD will become part of Zimbabwe’s law after domestication in terms of Section 327 of the Constitution. Accordingly, the author recommends that Zimbabwe domesticates the CRPD as expeditiously as possible. Experience has however shown that Zimbabwe has generally been ambivalent to domesticate human rights treaties which results in delay of the implementation of these treaties in our jurisdiction. The two senators elected in terms of Section 120 (1) (d) to represent PWDs are therefore encouraged to move a motion in the Senate for the domestication of the CRPD. There is also need to develop a culture of political will within the legislature to prioritise Disability issues in Zimbabwe. This can be done through sensitization programs for the Legislature which would make them understand the need to urgently domesticate the CRPD.



5.3.3 New Legislation on Disability:

It is recommended that Zimbabwe emulates countries like the Republic of Ireland, Malawi and Kenya by drafting a new piece of legislation called Persons With Disabilities Act to provide for the rights of persons with disabilities.¹⁴⁴ The statute drafted must provide for the following guiding principles which would assist in the interpretation of the whole Act:

- ✚ The first guiding principle is that a PWD is presumed to have legal capacity.¹⁴⁵
- ✚ The second guiding principle is that all practical steps have to be taken to support a PWD's decision-making capacity before a decision can be taken that he or she lacks capacity.¹⁴⁶
- ✚ The third is that a PWD cannot be deemed to lack decision-making capacity just because of a risk that he or she might make an unwise decision.¹⁴⁷
- ✚ The fourth principle is that interventions should be made only if absolutely necessary.¹⁴⁸
- ✚ The fifth principle is that interventions, where necessary, must be made in a way that is least restrictive of a PWD's rights and freedom of action. They must respect the PWD's right to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property.¹⁴⁹
- ✚ The sixth guiding principle is that the PWD must be permitted, encouraged and facilitated, as far as possible, to participate in these decisions.¹⁵⁰
- ✚ Finally, any intervention must give effect, as far as possible, to the PWD's current will and preferences.¹⁵¹

5.3.4 Presumption of legal capacity:

It has been established in chapter two and three that legal capacity is the *conditio sine qua non* for the realization of persons with mental and intellectual disabilities rights under any Constitution or human rights instrument. It is accordingly recommended that any legislation to be drafted in Zimbabwe must presume the legal capacity of PWDs. The presumption of

¹⁴⁴ Malawi has enacted the Disability Act No. 8 of 2012; Kenya has enacted the Persons with Disabilities Act [Chapter 133] of 2013.

¹⁴⁵ Part 2, Section 8 of the Assisted Decision-Making (Capacity) Act 2015 of the Republic of Ireland.

¹⁴⁶ *Ibid.*

¹⁴⁷ See note 145.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*



legal capacity must not be conditional as submitted by Combrinck.¹⁵² All statutes which expressly or implicitly presume the legal incapacity of PWDs must be amended accordingly, these statutes include the following: Administration of Estates Act [Chapter 6:01]; Companies Act [24:03]; Constitution of Zimbabwe Amendment (No. 20) of 2013; Civil Evidence Act [Chapter 8:01]; Criminal Procedure and Evidence Act [Chapter 9:07]; Disabled Persons Act [Chapter 17:01]; Health Professions Act [27:19]; High Court Rules of 1971; Magistrates Court Act [Chapter 7: 10]; Magistrates Court (Civil) Rules of 1980; Matrimonial Causes Act [Chapter 5:13]; Mental Health Act [Chapter 15:12]; Traditional Leaders Act [Chapter 29:17]; Veterinary Surgeons Act [Chapter 27:15]; Wills Act [Chapter 6:06].

5.3.5 Adopting a functional approach to legal capacity:

The current “status approach” to legal capacity adopted by various statutes in Zimbabwe should be abolished. It is recommended that Zimbabwe adopts the functional approach extant in Ireland provided for in terms of Section 3 (1) of ADMA of 2015. This functional approach should be issue and time specific which should be applied in order to determine the type and amount of support that a PWD would require.¹⁵³ This will be in line with Article 12 (2) of the CRPD.

5.3.6 Adopting the “will and preference” paradigm:

The paternalistic principle of the “best interests” of the PWD provided for in the MHA and implied in other statutes is at variance with the provisions of Article 12 (4) of the CRPD. It is therefore recommended that Zimbabwe adopts the “will and preferences” of the PWDs and in the cases of severe disability, the “best interpretation of will and preference” of the PWD must be ascertained and implemented.¹⁵⁴

¹⁵² See note 127 *supra*.

¹⁵³ See note 124 *supra*.

¹⁵⁴ See note 132 *supra*.



5.3.7 Abolition of guardianship or curatorship laws:

Whilst it may be argued that curatorship laws have various advantages which include the following: (i) they protect persons with mental and intellectual disabilities in a paternalistic or protective manner as they are vulnerable members of the society; (ii) they are designed in a manner that enables curators to make decisions in the best interests of persons with severe mental and intellectual disabilities and (iii) they are used to protect the public and the individual PWDs where they can be a danger to others and to themselves respectively. The author still submits that Zimbabwe is recommended to derogate from all curatorship or guardianship laws in order to move from substituted decision making to supported decision making which guarantees a PWD's autonomy, will and preferences in full conformity with Article 12 of the CRPD.¹⁵⁵ There is no single model of supported decision making but Zimbabwe can use the following models:

- ✚ Use of personal ombudsmen like the model extant in Sweden where the ombudsmen is a professional who works on the commission of the PWD and for the PWD only.¹⁵⁶
- ✚ Use of support groups which may be drawn from the PWD's family which would consist of a group of unpaid and voluntary persons to assist the PWD to make decisions in the areas where the PWD seeks support.¹⁵⁷
- ✚ Implementing British Columbia types of representation agreements where the PWD authorizes a third party to act on his or her behalf for a broad range of personal decisions.¹⁵⁸
- ✚ Application of Ireland's "Assisted Decision-Making", "Co-Decision-Making", and "Decision-Making Representatives" mechanisms already discussed in chapter four.

¹⁵⁵ Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain (U.N. Doc. CRPD/C/ESP/CO/1, 2011) paragraph 26.

¹⁵⁶ See note 21 *supra*.

¹⁵⁷ Office of the Public Advocate "Supported decision-making: background and discussion paper 2009" <http://www.publicadvocate.vic.gov.au> Accessed 9 January 2016.

¹⁵⁸ See note 17 *supra* at 1121.



Safeguards must be implemented to prevent the abuse of supported decision-making by the support persons such as:

- ✚ Registration of all support groups, personal ombudsmen, representation agreements to enable the Zimbabwe Human Rights Commission to monitor the models of supported decision-making.¹⁵⁹
- ✚ The Zimbabwe Human Rights Commission should also be granted power to investigate any allegations that a support group or support person is acting improperly or against the will and preferences of the PWD.

¹⁵⁹ Section 243 of the Constitution of Zimbabwe empowers the Zimbabwe Human Rights Commission (ZHRC) to monitor, assess, ensure observance of human rights as well as receive and consider complaints from the public.



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