

PROTECTING THE RIGHTS OF PERSONS WITH DISABILITIES: A PERSPECTIVE FROM ZAMBIA¹

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Introduction

The world is experiencing a fast-growing and transformative shift in the way that disability is viewed. Increasingly, disability is seen less as a charity and medical issue, and more as a human rights and social issue. In short, disability is moving from being viewed using the medical model to being viewed using the social model.

This paper explores the medical and social perspectives of disability, examines the principles provided for by the Convention on the Rights of Persons with Disabilities, and identifies areas for reform in Zambia.

The purpose of this paper is to bring to light the rights of persons with disabilities – especially the rights to dignity, equal protection under the law, legal capacity, and access to justice. The paper is aimed at individuals and institutions in the justice system, and is premised on the fact that the justice system in many countries is still characterised by many barriers to access to justice for persons with disabilities, including those persons with psycho-social and intellectual disabilities.

The UN Convention on the Rights of Persons with Disabilities

Medical and Social Models of Viewing Disability

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in December 2006, and came into force in 2008. Persons with disabilities the world over consider the CRPD to be a milestone in the struggle to officially recognise disability as a human rights issue.

The CRPD symbolises a radical paradigm shift in conceptualising disability – from a medical and charity model to a human rights and social model. It demands a move from viewing persons with disabilities as ‘objects’ of charity needing medical treatment and requiring institutional rehabilitation, towards viewing persons with disabilities as being ‘subjects’ with rights who have the agency to claim these rights and to make meaningful decisions for their lives as active members of society.³

The CRPD is considered the first internationally binding human rights instrument to comprehensively address the rights of persons with disabilities. However, it does not create any

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3 Office of the High Commissioner for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors*, Professional Training Series No. 17 (2010) 9.

new rights for persons with disabilities. It simply clarifies the applicability of existing human rights law in the specific context of disability. In so doing, it interrogates the existing human rights law and shifts it towards addressing the attitudinal and environmental barriers faced by different persons with disabilities in society.⁴

The CRPD interprets disability as resulting from the interaction between persons with impairments and the various barriers that hinder their full and active participation in society on an equal basis, as compared with others who do not have disabilities. This places the CRPD strongly within a rights-based approach, which is the social model. It completely avoids a charity and a health-based approach, which is the medical model. The CRPD stresses that it is not the fault of the person with an impairment that he or she cannot fully and effectively participate in all social, economic, cultural, civil, and political activities of society. It is on this premise that the rights of persons with disabilities should be articulated.

Key Provisions of the CRPD

Article 3 of the CRPD outlines the principles of the Convention and should constitute the lens through which all the rights in the CRPD are considered. These principles include:

- a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices and independence of persons;
- b) Non-discrimination;
- c) Full and effective participation and inclusion in society;
- d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e) Equality of opportunity;
- f) Accessibility;
- g) Equality between men and women; and
- h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

These general principles should premise the thinking, planning, and implementation of systems and processes in the justice field. They should also influence the development of laws and regulations and their interpretation. It must be emphasised that these general principles apply to all persons with disabilities, including those with psycho-social and intellectual disabilities.

The CRPD avoids defining 'disability', but instead, in its Preamble, recognises it as "an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".⁵ This absence of a definition of disability fits within the social model of disability.

⁴ *Id* 8.

⁵ Preamble of the CRPD at para. (e).

The CRPD does attempt to ensure that disability is viewed as broadly as possible, and, in article 1, it specifically states that persons with disabilities “include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Clearly, this is not an exhaustive list.

The CRPD then looks at how the barriers which cause exclusion and participation in society lead to discrimination. Article 2 defines “discrimination on the basis of disability” as:

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

The inclusion of “denial of reasonable accommodation” as a form of discrimination should be applauded, since it is so often overlooked. In the CRPD, “reasonable accommodation” is defined as:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

This requirement to provide reasonable accommodation should also be taken into account by people working in the justice system – and should form the basis for reforms, whether administrative or legislative. Notably, the requirement of reasonable accommodation does not require measures which would impose a disproportionate or undue burden on the person who has to make the accommodation.⁶ However, since denial of reasonable accommodation constitutes discrimination, a failure to provide reasonable accommodation should be objectively and reasonably justifiable.⁷

Articles 5(1) and (2) of the CRPD provide for non-discrimination, equality before the law, and “effective legal protection against discrimination on all grounds”. Article 5(3) further requires that states “shall take all appropriate steps to ensure that reasonable accommodation is provided”.

The United Nations Committee on the Rights of Persons with Disabilities (the Committee), created per article 34 of the CRPD and tasked in part with monitoring compliance with the CRPD, has emphasised that the duty to prohibit discrimination and provide reasonable accommodation is “immediately applicable and not subject to progressive realisation”.⁸ This is significant, as the Committee has accordingly made recommendations regarding reasonable accommodation in the education setting – an area which is traditionally seen as subject to progressive realisation.⁹

It must be stated that the whole justice system should provide reasonable accommodation to

6 Article 2 of the CRPD.

7 *HM v Sweden* CRPD/C/7/D/3/2011 at para. 83. The case concerned a complaint to the Committee on the Rights of Persons with Disabilities. A woman with chronic connective tissue disorder had been unable to leave her home for eight years. She had applied, but was denied permission, to extend her home to include a hydration pool, which is the only therapy available to her for her condition. The Committee found that the refusal to grant a building permit violated various articles under the CRPD.

8 Committee on the Rights of Persons with Disabilities, Concluding Observations (Spain), CRPD/C/ESP/CO/1, 19 October 2011 at para. 44.

9 *Id.* See also *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa* 2001 (5) SA 87 (HC) which dealt with reasonable accommodation to ensure access to education for children with disabilities.

all categories of persons with disabilities, including those with psycho-social and intellectual disabilities. In addition, the justice system, including its buildings, should be accessible, as required by article 9 of the CRPD:

There can be no effective access to justice if the building in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities.¹⁰

The Committee has noted that “accessibility is related to groups, whereas reasonable accommodation is related to individuals”.¹¹ Thus, states should not wait to receive a request from a person with a disability before acting to make services and institutions more accessible to persons with disability, and, further, they cannot rely on resource arguments to avoid ensuring progressive accessibility for persons with disabilities.¹²

Article 12 of the CRPD deals with equal recognition before the law. This article is interesting because it emphasises that persons with disabilities have the right to recognition everywhere as persons before the law. The Committee has emphasised that the right to equality before the law is subject to immediate realisation.¹³

Article 12(2) provides that states “shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. Article 12(3) says that states “shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Article 12(4) requires that states ensure that safeguards are provided to avoid abuse:

Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person ... apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.

The exercise of legal capacity applies to all persons with disabilities, including those with psycho-social and intellectual disabilities. This includes ensuring someone has access to the support they may require in exercising their legal capacity. This may be in circumstances where the decision-making capability of a person with a disability is restricted, but it should not in any way be interpreted as a test for legal capacity. Recognition of legal capacity is an inherent right, and is essential for access to justice on an equal basis with others.¹⁴

Article 13(1) of the CRPD provides for access to justice:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

10 Committee on the Rights of Persons with Disabilities, General Comment No. 2 at para. 37.

11 *Id* at para. 25.

12 *Id*.

13 Committee on the Rights of Persons with Disabilities, General Comment No. 1 at para. 30.

14 *Id* at para. 38.

Access to justice includes providing appropriate training for those working in the field of administration of justice, and includes police and prison staff.¹⁵ This would include alerting judicial officers and law-enforcement personnel of the rights of persons with disabilities, including the right to liberty and security of person (article 14) and the right to freedom from cruel, inhuman, or degrading treatment or punishment (article 15).

The above-cited articles are not the only ones affecting the justice system and it is essential to study the CRPD in order to appreciate all of its text.

The case of Zambia

As explained above, the principles of the CRPD are based on the social model of looking at disability. Persons with disability often experience discrimination, exclusion from society, and restriction in participating on an equal basis with other people. This discrimination, exclusion, and restriction is unfortunately found in some of our laws, regulations, and in the interpretation of such laws and regulations.

The Zambian government domesticated the CRPD through the enactment of the Persons with Disabilities Act.¹⁶ The rights of persons with disabilities is elaborated in Part 2 of the Act. Section 5 states that “[e]very person has a duty to uphold the rights of persons with disabilities and respect and safeguard the dignity of persons with disabilities”.

Section 8(1) of the Persons with Disabilities Act provides that “a person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life”. Section 8(2) requires that “the judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination”. Section 8(3) states that:

Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities to enable the person with disability to access justice and participate effectively in the proceedings.

This part of the law still needs to be tested in order to determine how ready the judiciary in Zambia is to enforce these provisions. It should be noted that persons with psycho-social and intellectual disabilities and those who are deaf-blind are catered for by this law and that their rights must be upheld and protected. Arguably, the law requires the provision of sign language for people who are deaf throughout the justice system. The law further requires the provision of Braille for people who are blind and that the built environment around courtrooms should be accessible.

Despite domestication of the CRPD, several of Zambia’s laws still require reform. For example, section 163(1) of the Criminal Procedure Code of Zambia still provides for detention, at the president’s pleasure, in a “mental institution”. Persons with a mental disability – who are required to undergo psychiatric assessment in order to ascertain whether or not they can stand trial – have been known to be incarcerated for protracted periods of time in prisons like the Chainama East

15 Article 13(2) of the CRPD.

16 Act No. 6 of 2012.

Prison in Lusaka. Similar concerns can be raised regarding section 166 of the Criminal Procedure Code, which is vague.¹⁷ These laws and practices do not conform to the principles and rights set out in the CRPD.

Section 75(1) of the Constitution of Zambia provides that anyone who is registered can vote in the elections unless that person is disqualified by parliament. Section 7(1)(d) of the Electoral Act¹⁸ disqualifies from voting, any person “who, under any law in force in Zambia, is adjudged or otherwise declared of unsound mind or is detained under the Criminal Procedure Code during the pleasure of the President”. Given that persons with a mental disability can and have been detained in a mental institution under the Criminal Procedure Code, there is a risk that persons with a mental disability would be disqualified from voting in violation of their rights. Clearly, there is a need to revise legal provisions that are outdated in their conceptualisation of disability.

The High Court of Zambia has weighed in on the rights of persons with disabilities in *Brotherton v Electoral Commission of Zambia*.¹⁹ In September 2011, the Court passed judgment in a case in which persons with disabilities – through the Zambia Federation of Disability Organisations (ZAFOD) – sued the Electoral Commission of Zambia for discrimination in the electoral process. The complaint by ZAFOD was that most of the polling stations in Zambia were not accessible to people with disabilities and that the services did not adequately cater for their needs. They further argued that there was a statutory obligation on the Electoral Commission to initiate legislation to ensure that people with disabilities were able to participate equally in the elections. ZAFOD argued that these shortcomings amounted to unlawful discrimination against persons with disabilities, in violation of article 23 of the Constitution of Zambia, and a limitation of the right of people with disabilities to exercise their franchise freely, fairly, in secret, and with dignity – as protected by article 75. ZAFOD argued that the Electoral Commission therefore violated its legislative duties to ensure equal participation of all persons, to make provisions for a special vote for persons who are unable to vote at the designated polling stations, and to relocate inaccessible polling stations to ensure that all people can access polling stations on election day.

The Court held that ZAFOD had demonstrated that the Electoral Commission had unlawfully discriminated against people with disabilities, and had unlawfully limited the rights of people with disabilities to exercise their franchise, by not providing premises and services accessible to people with disabilities. The Court emphasised that “all eligible citizens must be free to cast their vote [and] [t]hey must thus, not be hindered in any way”.²⁰ This decision is significant because disability is not specifically included as a prohibited ground of discrimination in article 23(3) of

17 Section 166 states: “The question whether:

- a) While before the subordinate court an accused person is by reason of unsoundness of mind or of any other disability incapable of making a proper defence; or
- b) At the time of the act or omission in respect of which an accused person is charged, such person was by reason of unsoundness of mind incapable of understanding what he was doing, or of knowing that he ought not to do the act or make the omission;

shall not be determined in any preliminary inquiry held under Part VII and, for the purposes of any decision whether an accused should be committed for trial, the accused shall be deemed to have been at all material times free from any such disability.”

18 Act No. 12 of 2006.

19 2011/HP/0818 (HC).

20 *Id* J24.

the Constitution of Zambia. The Court read the prohibition against discrimination in article 23 to include disability, after taking into account the provisions of the Persons with Disabilities Act, which does include such a prohibition against discrimination based on disability.²¹

The Court held that the applicants had proved their entitlement to a remedy, but declined to postpone the elections, which were to take place the next day. Instead, the Court ordered that the Electoral Commission – an autonomous body – should put in place measures, by the next election, to ensure that persons with disabilities are not disadvantaged in exercising their right to vote. These measures had to include erecting temporary ramps, ensuring that polling booths are located on ground floors at polling stations, and providing a tactile ballot guide for voters who are blind or partially sighted, but who do not wish to be assisted in casting their vote. In addition, the Court ordered that the Electoral Commission formulate and issue a detailed plan and budget aimed at ensuring equal participation by persons with disabilities in the electoral process.²² The Court, however, stopped short of ordering that the detailed plan be submitted to the Court or that the Electoral Commission periodically report to the Court on progress made in implementing the order.²³

Conclusion and recommendations

The CRPD has underlined that people with disabilities are entitled to fundamental rights. It is thus incumbent on the whole justice system, including the judiciary, to ensure the realisation of the following rights, at minimum:

- Respect for inherent dignity, autonomy, and independence of person;
- Full and effective participation in society;
- Respect for difference;
- Accessibility to the built environment, and to information, communication, and technology;
- Equal protection under the law;
- Right to life;
- Right to decide (exercise legal capacity) – despite any form of disability, including psycho-social and intellectual disability;
- Liberty and security of person, including the liberty of persons with psycho-social disabilities who are kept in psychiatric institutions while awaiting mental-health assessment at the request of the judiciary;
- Protection from torture, inhuman and degrading treatment – including protection of persons with psycho-social disabilities who undergo elective convulsive therapy, which causes pain;
- Mental and physical integrity;
- Independent living and being included in society;
- Privacy;
- Family life, including maintenance of fertility;

21 *Id* J25.

22 *Id* J28.

23 Compare with the structural, supervisory interdict ordered in *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa* 2001 (5) SA 87 (HC).

- Education and training;
- Health;
- Work and employment;
- Participation in public and political life. This should include exercising the right to a secret ballot by people who are blind.

Many countries in southern Africa – including Malawi and Zambia – have ratified the CRPD and have put in place disability laws that adopt some of the principles of the CRPD. This is only the beginning. In addition, the justice system should absorb the principles of the CRPD with their foundation – the social model – and use this to overhaul the system to ensure it is considerate of all persons with disabilities, including those with psycho-social and intellectual disabilities.

Specifically in relation to Zambia, the following recommendations are made to ensure compliance with Zambia's existing laws:

- The justice system should carry out a disability inclusion audit to assess the gap that exists in terms of equal access to justice for persons with disabilities. This audit should include legislation scoping, accessibility assessments, and disability awareness.
- The justice system should incorporate training for all staff who administer justice – including police, prison officers, lawyers, and judiciary personnel.
- The government should move with urgency to enact the new Constitution of the Republic of Zambia. Persons with disabilities made progressive submissions to the constitutional process to ensure the inclusion of the rights for persons with disabilities and to include disability as a prohibited ground for discrimination. It is hoped that these provisions will be included in the final draft Constitution.
- The government should repeal the Mental Disorders Act of 1951²⁴ and replace it with a new Mental Health Act that conforms to the principles of the CRPD.
- The government should amend those sections in the Penal Code and Criminal Procedure Code that require that persons with mental disabilities, who undergo psychiatric assessment, be detained in a prison like Chainama East Prison. In their current format, these provisions have led to the imprisonment of persons with mental disabilities for prolonged periods of time.
- The state should progressively allocate funds towards such reforms – as informed by the findings of the disability inclusion audits.

Finally, it should be emphasised that of essence in any development is the need to consult with, and actively involve, persons with disabilities through their representative organisations.²⁵

24 Cap 305 of the Laws of Zambia.

25 Article 4(3) of the CRPD.