

MIDLANDS STATE UNIVERSITY



FACULTY OF LAW

**THE RIGHT TO INDEPENDENT LIVING FOR PERSONS WITH PSYCHO-
SOCIAL DISABILITIES IN ZIMBABWE**

By

CHIPO MAHLANGU

**A DISSERTATION SUBMITTED TO MIDLANDS STATE UNIVERSITY IN
PARTIAL FULFILMENT OF THE REQUIREMENTS OF MASTER OF LAWS
(LLM) CONSTITUTIONAL AND HUMAN RIGHTS LAW**

2019

TITLE PAGE

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APPROVAL FORM
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This dissertation of Chipo Mahlangu is approved as fulfilling the requirements or partial fulfilment of the requirements for the award of the LLM (Constitutional and Human Rights Law) by the University.

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DEDICATION

To my brother, Christopher and all persons with psychosocial disabilities, this is for you.

To my son, Alvin Dumolwenkosi and daughter Bernice Sinokuthula, stay blessed.

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACC	African Charter on the Rights and Welfare of the Child
ADP	The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.
AWP	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DPA	Disabled Persons Act
ECtHR	European Court of Human Rights
PWDs	Persons with Disabilities
PWPDs	Persons with Psychosocial disabilities
SWAA	Social Welfare Assistance Act
TMHA	Tanzania Mental Health Act
TPDA	Tanzania Persons with Disabilities Act
ZMHA	Zimbabwe Mental Health Act
UN	United Nations

Abstract

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) to which Zimbabwe is a State Party guarantees the right to independent living for all persons with disabilities (PWDs). The CRPD reaffirms the fundamental right of persons with disabilities for inclusion, independence and equality. Zimbabwe has a history of providing for the support, housing and mental health care services and needs of people with psychosocial disabilities in large institutions and hospitals. The problem is that Zimbabwe's legal framework does not provide for a standalone right to independent living contrary to Article 19 of the CRPD. In the Zimbabwean Constitution, the right to independent living is absent contrary to provisions in the CRPD. On the other hand, the Disabled Persons Act is yet to be aligned to the Constitution and the CRPD, it predates the CRPD and embodies the Medical Model of disability. The Mental Health Act and the Social Welfare Assistance Act also do not contain a human rights-based approach in dealing with PWDs. The Disabled Persons Act does not have a provision for the right to independent living for PWDs and views PWDs from a medical and welfare perspective. The Mental Health Act governs the involuntary detention of PWDs and fails to provide for mental health care services outside hospitals and institutions in violation of Article 19 of the CRPD. On a comparative basis, despite the fact that the Tanzanian Constitution was enacted prior to the CRPD, Tanzania enacted a comprehensive disability law in terms of its Persons with Disabilities Act and the Mental Health Act. The right to independent living is expressly provided and promoted in the mentioned statutes in line with the CRPD. Given the gaps in the Zimbabwean legal framework, it is specifically recommended that the Constitution be amended to incorporate the right to independent living as a standalone right. Furthermore, the Mental Health Act and the Social Welfare Assistance Act should be amended while the Disabled Persons Act should be repealed and be replaced with a new Statute. Generally, it is recommended that the CRPD be domesticated into the Zimbabwean law. In addition, there is a need for awareness-raising regarding the right to independent living for PWDs. A National Disability Policy and general Regulations will also help in the implementation and realisation of this right. Once the implementation of the recommendations is put in place, PWDs in Zimbabwe will be able to enjoy their right to independent living on an equal basis with others.

CHAPTER 1

1.1.Introduction

Persons with disabilities (PWDs) make up the world's largest and most disadvantaged minority.¹The right to independent living for persons with psychosocial disabilities (PWPDs)² has animated debate and attention especially after the adoption of a new Constitution in Zimbabwe in 2013. Zimbabwe ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD)³ on 23rd September 2013. For the first time in the constitutional history of the country, the Constitution contains a dedicated section on the rights of PWDs. This together with the ratification of the CRPD that same year confirms that Zimbabwe has begun to embrace a human rights approach to disability and has assumed an obligation to fulfil the objectives of the CRPD. However, for many PWPDs, the right to independent living has remained a dream. Support, housing, and provision of mental health care services of people with psychosocial disabilities continue to be confined to large institutions and hospitals, thus forcing PWPDs to stay in these setups for life. The long-held perception that PWPDs do not have the legal capacity and decision making that is required for independent living has worsened their predicament.

The CRPD provides that all PWDs including PWPDs have the right to live independently in the residence of their choice with their families in the communities they come from.⁴The Constitution of Zimbabwe has no stand-alone provision for the right to independent living for

¹ United Nations, *From exclusion to equality: Realizing the rights of persons with disabilities: A handbook for Parliamentarians on the Convention of the Rights of Persons with Disabilities and its Optional Protocol* (2007) 1.

² Psychosocial disabilities are also known as 'mental health problems' or mental disabilities.

³The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the United Nations General Assembly on 13th December 2006 and entered into force on 3rd May 2008, available at <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf> (accessed 10th January 2019).

⁴Article 19 of the CRPD.

PWDs and PWPDs in particular. The right can only be inferred from the other general provisions in the Constitution.⁵ Those who manage to live with their families have received little support from the state and the communities they come from, thus making full inclusion and participation in the society very difficult if not impossible for PWPDs.

On the other hand, the Zimbabwe Mental Health Act (ZMHA)⁶ provides for the detention of PWPDs in some institutions involuntarily. The ZMHA was actually promulgated to further detention of PWPDs⁷ and the same can be indefinite.⁸ Its reference to ‘detention’ is actually in clear contrast with the right to independent living as provided for in section 19 of the CRPD. The CRPD provides that provisions of health care facilities should not be tied to particular environments. States Parties should always ensure that the will and preferences of PWDs with regards to residence and living arrangements are always considered and respected just like those of the other people.⁹

Also, while the CRPD views disability from a human rights perspective,¹⁰ the Disabled Persons Act (DPA)¹¹ does not contain a human rights-based approach in dealing with PWDs. It thus does not have a provision for the right to independent living for PWPDs. It views PWDs from a medical and social welfare perspective by providing for the welfare and rehabilitation of PWDs.

⁵ Section 66 (2) and 78(1) of the Constitution.

⁶ Mental Health Act [Chapter 15:12].

⁷ Preamble to the ZMHA.

⁸ Part II of the ZMHA.

⁹ Council for Europe Commissioner for Human Rights ‘The right of people with disabilities to live independently and be included in the community’ Issue Paper, available from <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2397433&SecMode=1&DocId=2076280&Usage=2> (accessed 10th September 2019) p. 21.

¹⁰ Article 1 of the CRPD.

¹¹ Disabled Persons Act [Chapter 17:01].

Furthermore, the Social Welfare Assistance Act (SWAA)¹² makes provision for the granting of social welfare assistance to ‘destitute or indigent persons.’ PWDs qualify in terms of the Act as ‘destitute’ and ‘indigent persons.’ Thus, the Act was promulgated with the misconception that disability is always associated with poverty. While it is a requirement in terms of Article 19 of the CRPD for States Parties to provide support services to PWDs, the assistance envisaged by the CRPD does not include treating PWDs as objects of charity.

Thus, apart from the Constitution, other laws addressing disability in Zimbabwe and in particular rights of PWDs predate the CRPD and they subscribe to the medical model of disability. They treat PWDs as objects of charity and in need of financial and medical assistance. Zimbabwe’s legislative provisions appear to be lagging behind in as far as realisation of the right to independent living for PWDs is concerned.

This research examines the right to independent living for PWDs. With the use of Zimbabwe as the setting, the research explores the extent, if any, to which the Zimbabwean legal framework has gone towards the realisation of the right to independent living for PWDs. This shall also include conducting a jurisdictional comparative analysis with Tanzania so that Zimbabwe may learn from other advanced legal frameworks. The problem identified is that whilst the CRPD to which Zimbabwe is a party expressly confers the right to independent living for PWDs, the current legislative framework appears to be significantly hindering the full realisation of this right for PWDs. Some of the legal provisions are still aligned with the medical model of disability.¹³

¹² Social Welfare Assistance Act [Chapter 17:06].

¹³E. Mandipa, ‘A critical analysis of the legal and institutional frameworks for the realisation of the rights of Persons with Disabilities in Zimbabwe’ (2013) Vol 1 *African Disability Rights Yearbook* 79.

1.2. Background

In every country in the world, PWDs often live on the margins of society, deprived of some of life's fundamental experiences.¹⁴ Many of them have no hope of going to school or getting a job, they have no homes and chances of getting a family are very slim. Choruma¹⁵ describes PWDs in Zimbabwe as a forgotten tribe. Whilst the human rights framework has changed lives everywhere, PWDs in general and PWPDs, in particular, have not reaped the same benefits.¹⁶ Thus for PWDs, after they realised that there was nothing to enable them to be self-sufficient they resorted to kindness or charity from others. However, in recent years there was a realisation that enough was enough, it was no longer possible to continue denying 650 million individuals their right hence the introduction of the CRPD.

The CRPD came into force in 2008 as a response to the international community's cries over a long history of discrimination and exclusion. The CRPD states that its purpose is to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all PWDs and to promote respect for their inherent dignity.¹⁷ The CRPD acknowledges the diversity of disabilities and hence refuses to define what disability is to avoid locking it. PWDs in terms of the CRPD 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.¹⁸ The CRPD covers those areas where PWDs have been discriminated against including access to justice, education, political participation and the right to live independently and being included in the community.

¹⁴United Nations (n 1 above) 1.

¹⁵ T Choruma *The forgotten tribe: People with disabilities in Zimbabwe* (2006) 5.

¹⁶ United Nations (n 1 above) 2.

¹⁷See Article 1 of the CRPD.

¹⁸ Article 2 of the CRPD.

By making reference to equality, choice and full inclusion and participation in the community, Article 19 invokes the “general principles” of the Convention which set out the Convention’s underlying philosophy set out in Article 3 of the CRPD. These include respect for inherent dignity, individual autonomy including the freedom to make one’s own choices and independence of persons, non-discrimination, full and effective participation in the society, equal opportunity, and accessibility amongst others. Article 19 is also linked to the right to equal protection before the law and legal capacity.¹⁹ Choice is upheld by recognising a person’s legal capacity to make choices and have them respected. Article 19 establishes that every person has a right to choose where and with whom they can live on an equal basis with others. Article 19 further obligates states parties to provide disability-specific services and to ensure that general public services are accessible to all PWDs.

Zimbabwe adopted a new Constitution in 2013 which for the first time in the history of the country provides for rights of PWDs.²⁰ The Constitution, however, does not sufficiently address the right to independent living of PWDs in general and PWPDs in particular . This is contrary to Article 19 of the CRPD.

Furthermore, the ZMHA still views persons with mental disabilities as people with no legal capacity. Persons with mental disabilities are viewed as “mentally disordered or intellectually handicapped.” Thus the Act makes no distinction between mental disability and intellectual disability. The Act provides for detention of PWPDs many times against their will in some institutions. This institutionalisation of PWPDs flies against the spirit of the right to independent living. It becomes very difficult for them to be integrated into the community on an equal basis with others. Kamundia²¹ opines that institutionalisation refers to placing PWDs

¹⁹ Council for Europe Commissioner for Human Rights (n 9 above)15.

²⁰ Section 22 and 83 of the Constitution.

²¹E. Kamundia, ‘Choice, Support and Inclusion: Implementing Article 19 of the Convention on the Rights of Persons with Disabilities in Kenya’ (2013) Vol 1 *African Disability Rights Yearbook* 55.

in a separate setting without access to the options and choices that are available to non-disabled people and in a way that detaches them from living in the community.

Kayess and French²² equate the right to liberty with the rights of PWDs to live in and be part of the community. The right to independent living is thus at the heart of disability rights and is arguably one of the most important rights in the Convention. Without freedom of movement and the actual choice, the exercise of the other rights is defeated and the purpose of the Convention compromised.

Realisation of Article 19 of the CRPD as a whole is not easy. The Convention challenges deep-seated attitudes and practices and seeks to change long-established understandings, structures, and identities.²³ In their place, the CRPD offers a re-description of the world where PWDs are no longer passive recipients of welfare but active, valued and equal rights holders and subjects as opposed to objects of clinical intervention.²⁴ According to Collingborne,²⁵ the exercise of other Convention rights and the purpose of the Convention itself will be compromised if there is no realisation of the right to independent living.

The right to independent living in the context of this study refers to PWDs being able to live in their local communities as equal citizens, with the support that they need to participate in every –day life.²⁶ This includes being able to live in own homes with their families, going to work, attending school and taking part in community activities on an equal basis with others.

²² R Kayess & P French ‘Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) Vol 8 *Human Rights Law Review* 1.

²³ T. Collingbourne ‘Administrative justice? Realising the right to independent living in England: power, systems, identities’ (2018) ,Vol 35 *Journal of social Welfare and Family Law* 476.

²⁴ BA Areheart ‘When disability isn’t “just right”: The entrenchment of the medical model of disability and the Goldilocks dilemma’ (2008) Vol 83 *Indiana Law Journal* 6.

²⁵T. Collingbourne (n 22 above) 475.

²⁶European Coalition for Community Living ‘Focus on article 19 of the UN Convention on the Rights of Persons with Disabilities’ (Focus Report 2009) <http://www.mhe-sme.org/assets/files/ECCL-Focus-Report-2009-final-high-res.pdf> (accessed 10 March 2019) 6.

1.3.Problem statement

As a State Party to the CRPD, Zimbabwe has the responsibility to fulfil the text and spirit of this Convention. The problem is that, despite the international obligations assumed under the CRPD, the Constitution does not provide for a standalone right to independent living contrary to provisions of Article 19 of the CRPD. Other Acts such as the Mental Health Act, the Social Welfare Assistance Act, and the Disabled Persons Act predate the CRPD and do not provide for the right to independent living for PWPDs. The research, therefore, seeks to analyse the extent, if any, to which the right to independent living for PWPDs is guaranteed by the legal framework of Zimbabwe.

1.4.Research Questions

1.4.1. Main Research Question

The main research question is:-

‘To what extent, if any, does the Zimbabwean legal framework guarantee the right to independent living for persons with psychosocial disabilities?’

1.4.2. Sub-research Questions

In answering the main research question, the following sub-research questions are considered:

- (i) What does the right to independent living entail in the context of persons with psychosocial disabilities?
- (ii) What are the international best practices and standards that Zimbabwe can learn from other jurisdictions with regard to the right to independent living for persons with psychosocial disabilities?

- (iii) What are the specific and general recommendations that can be made to Zimbabwe with regard to the right to independent living for persons with psychosocial disabilities?

In light of the above questions, this research, therefore, seeks to examine the extent, if any, to which the right to independent living for PWPDs is guaranteed by the legal framework of Zimbabwe.

1.5. Research Methodology

This research is primarily qualitative and non-empirical in nature. In order to answer all the questions of this dissertation, a doctrinal analysis of the legal framework in Zimbabwe is made. Both primary and secondary sources including the Statutes that deal with the concept of the right to independent living for PWPDs is considered using the CRPD as the benchmark. This calls for an adoption of a descriptive, in-depth discussion and analytical approach to desk, international and regional human rights instruments, internet sources, academic and developmental researches on the right to independent living for PWPDs.

The research uses facts and information to make a critical evaluation of the importance of the realisation of the right to independent living for persons with PWPDs. In addition, a functional comparative methodology is adopted where the international best practices on the right to independent living for PWPDs are explored. This means things of the same function being compared. A particular focus on the Tanzanian legal framework is made in order to map a way forward on how the same can be employed in Zimbabwe in an effort to make realisation of the right to independent living for PWPDs a reality.

1.6. Significance of the study

The ratification of the CRPD and the adoption of a new Constitution in Zimbabwe in 2013 gave hope to PWPDs to be recognised and be afforded their right to independent living.

Unfortunately, it appears this is not the case as PWPDs are still neglected in institutions. This research, therefore, is significant as it reviews the progress and alignment of the Zimbabwean laws to the CRPD and thus can contribute to legal reform. The right to independent living is fairly “new” locally and internationally and accordingly, this research can also assist in awareness-raising.

The research has the potential to contribute to legal and policy reforms in Zimbabwe especially considering that the issue under discussion is novel. Also, it is an area of serious scholarly debate and hence it is anticipated that the research will add value to scholarly contributions and jurisprudence in general. While a significant amount of literature exists on the meaning of independent living in the context of developed countries, little has been written from the perspective of developing countries and in particular in the viewpoint of PWPDs.

1.7.Delimitation of the study

Whilst the CRPD is being used as the yardstick of this study, the focus will be on the right to independent living as provided in Article 19 of the CRPD. Furthermore, this study limited itself only to the exercise of the right to independent living for PWPDs and not for persons with intellectual disabilities. In the same vein, the subject on the exercise of this right in the context of other persons with other forms of disabilities is not the subject of this discussion. It was important to narrow down to one form of disability for a thorough analysis. Further, this study is limited to the Zimbabwean jurisdiction only with the Tanzanian jurisdiction employed for comparative purposes. Tanzania has been chosen due to its proximity to Zimbabwe and the development of jurisprudence on the right to independent living in that African country.

1.8.Literature Review

The Constitution of Zimbabwe is silent in as far as the right to independent for PWDs is concerned. The ZMHA, the DPA, and the SWAA all predates the CRPD and still view disability from the welfare and medical model of disability. Zimbabwean legislative provisions are still lagging behind in as far as realisation of the right to live independently for PWDs is concerned. At the regional level, The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (the African Disability Protocol) expressly provides for this right to live in the community for PWDs with choices equal to others.²⁷

The CRPD which is the first legal instrument to categorically provide under Article 19 for the right of PWDs to live independently and being included in the community plays a fundamental role in this discussion.

Choruma²⁸ explores major impediments faced by PWDs in Zimbabwe and makes various recommendations. These impediments are seen mainly in the education and health sectors. The author opines that poverty is both a cause and consequence of poverty and notes that women and girls with disabilities are more affected as compared to their male counterparts. This work predates the CRPD and the right to independent living was not explored.

Mandipa²⁹ gave an appraisal of Zimbabwe's laws and institutions for protecting disability in the light of the provisions of the CRPD. Whilst Mandipa³⁰ mainly touches on the legislative and institutional framework which covers disability rights in general and in the broad sense, this research is going to zero in on the right of PWDs to live independently in communities.

²⁷Article 14 of the African Disability Protocol.

²⁸T. Choruma (n 15 above) 5.

²⁹E. Mandipa (n 13above) 73.

³⁰E.Mandipa (n 13 above) 73.

The research notes that nothing on the legislative front has been done to enable PWPDs to enjoy their right to live independently in their communities.

Rosemary Kayess and Philip French in their article³¹ explore the text of the CRPD, critically examining its potential contribution to the realisation of the rights of PWDs. This Dissertation will record that the right to live independently for PWPDs is key for the realisation of other rights and hence cannot be compromised. It will argue that the Government must provide the legislative framework, to enable PWDs to live independently and participate in their communities on an equal basis with others.

Five years after the adoption of the CRPD, Tobias Pieter van Reenen and Helene Combrinck³² make a follow-up and consider the potential impact of the CRPD on both the African regional human rights system and selected legal systems in southern and eastern Africa. While this piece of work gives a brief appraisal of the Tanzanian legal framework, the current study specifically discusses the extent, if any to which Zimbabwe's legal framework provides for the right to independent living for PWPDs using Tanzania as a comparator.

Janet Lord and Michael Ashely Stein³³ note that the CRPD did not create new rights for PWDs; they articulate how existing human rights obligations apply specifically to persons with disabilities. This work will show that without the right to live independently clearly provided for and further elaborated the right to community living by PWPDs will remain a fantasy.

³¹ R. Kayess and P. French (n 22 above) 1.

³² T.P van Reenen and H. Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' (2011) Vol 8 *SUR International Journal on Human Rights* 133.

³³ J Lord and MA Stein 'Prospects and Practices for CRPD implementation in Africa' (2013) Vol 1 *African Disability Rights Yearbook* 97.

Kamundia, in her article³⁴ examines the import of article 19, tracing its history and she concludes by giving content to the core of article 19 in the Kenyan setting. This current study will explore the nature and content of the right to live independently for PWPDs, in particular, using Zimbabwe as a setting.

This dissertation discusses the subject of independent living for PWPDs in Zimbabwe as a right in detail. Support for PWPDs is unavailable or is tied to particular living arrangements and resources are being invested in institutions instead of developing possibilities for PWPDs to live independently in the community. The current study provides a comparative analysis on the right to live independently and also proffers specific and general recommendations that may help Zimbabwe for PWPDs to realise their right to community living.

1.9. Chapter synopses

Chapter One

This Chapter contains the introduction, background of the study, problem statement, research questions, research methodology, the significance of the study, delimitations of the study, literature review and these chapter synopses.

Chapter Two

The Chapter examines the scope of the right to independent living for PWDs in the context of PWPDs by giving a broad overview of this right. It discusses the meaning of PWDs and disability rights, the models of disability and also defines psychosocial disabilities. It further discusses the normative content of this right and gives a basic conceptual framework on the justification and sources of the right to independent living as a centre of realisation of other rights.

³⁴E. Kamundia (n 21 above) 49.

Chapter Three

The Chapter analyses the extent to which the right to independent living is being provided for and enforced in Zimbabwe as provided for in the Zimbabwean legislative framework. Reference is made to the Constitution of Zimbabwe, the Mental Health Act, the Disabled Persons Act, the Social Welfare Assistance Act as well as the Persons with Disabilities Bill, 2019. The CRPD is used as the yardstick of the analysis.

Chapter Four

This Chapter is a comparative Chapter. It contains a comparative analysis of how other jurisdictions have grappled with the right to independent living. The jurisprudence developed in the Republic of Tanzania on the right to independent living for PWPDs is employed for this purpose. Tanzania has been chosen as it is one of the few countries especially in Africa that have developed legal frameworks on the right in question and its jurisprudence on the research topic is more advanced. Tanzanian legislation to be considered includes the Tanzanian Constitution, 1977, the Persons with Disabilities Act, 2010 as well as the Mental Health Act, 2008.

Chapter five

This is the concluding chapter of the research. Informed by the deliberations in the preceding chapters, the research provides a summary of the research findings. Drawing from international best practices discussed in Chapter four specific and general recommendations on how to make the right to independent living a living reality are proffered. The Chapter concludes the study.

CHAPTER 2

2.1. Introduction

PWDs have not been traditionally viewed as rights bearers but rather as recipients of charity and objects of pity rather than as authors of their own destiny.³⁵ PWPDs, in particular, have historically been denied their personal and individual choice and control across all areas of their lives.³⁶ PWPDs have been presumed to be unable to live independently in their self-chosen communities.³⁷ They have been forced to live in mental health institutions without much choice and support. There is also a view that mental health issues are linked to punishment from ancestors, evil spirits and witchcraft.³⁸

Disability is not easy to conceptualise since it is a highly complex and contested concept.³⁹ Be that as it may, paragraph (e) of the preamble to the CRPD provides that disability is a resultant of the interaction between impairments and barriers. Conceptualisation of disability is linked to models of which the major ones are the Medical Model, Social Model and the Human Rights Model of disability.

Independent living is a known right in disability studies. This right is important especially to persons with psychosocial disabilities as they are the ones mostly denied their right to live in the community. They are usually detained in hospitals or institutions against their will and sometimes for life after being denied legal capacity to make their own decisions on where and with whom to live. The term ‘psychosocial’ disability is used in this study to refer to the

³⁵ M.H. Rioux et al *Critical Perspectives on Human Rights and Disability Law* (2011) 17.

³⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 5, 29 August 2017 CRPD/C/18/1, para 1.

³⁷ CRPD Committee General Comment No. 5 (n 36 above) para 1.

³⁸ S Eshun & R.A.R. Gurung *Culture and Mental Health: Socio cultural Influences, Theory and Practice* (2009).

³⁹ SM Uromi & MI Mazangwa, ‘Challenges facing People with Disabilities and Possible Solutions in Tanzania’ (2014) Vol 1 *Journal of Educational Policy and Entrepreneurial Research* 159.

interaction between the psychosocial and social /cultural components of this disability. Psychosocial disability is not the same as intellectual disabilities.

The right to independent living refers to PWDs being able to live in their communities as equal citizens, with the support they need to participate in every-day life. Elements of the right to independent living include free choice of residence, the prohibition of forced institutionalisation and deinstitutionalisation, personalised support services as well as accessibility to mainstream community services.

At the international level, the CRPD is the first binding international treaty to protect the right to live in the community. Prior to the CRPD, the United Nations system tried to interpret and apply the core human rights instruments to PWDs and secondly a body of international interpretations and commentary, known as soft laws, began to emerge to protect the rights of PWDs in general including the right to independent living.

At the regional level, the right to independent living is expressly provided for in terms of the African Disability Protocol.⁴⁰ The disability rights regime in Africa remained fragmented and there was a need to harmonise the same. The Zimbabwean legislative framework, on the other hand, has no standalone provision for the right to independent living.

The realisation of the right to independent living is not without challenges. Many States Parties treat PWDs synonymously with persons with intellectual disabilities and thus deny them their right to legal capacity and subsequently their right to independent living. Tied to this is the inadequacy budget allocations aimed at providing personal assistance and individualised support. Notwithstanding that the CRPD and the African Disability Protocol provide for this right, Zimbabwe is yet to domesticate the provisions into its national legal

⁴⁰ Article 14 of the African Disability Protocol.

frameworks. Today, stigma, misconceptions and myths around psycho-social disabilities and independent living persist and the result is often discrimination and exclusion.

2.2. Conceptualisation of Disability

Conceptually, disability is broad and imprecise.⁴¹ It is a notion that is not liable to a rigid, unquestionable definition and much depends on the context. The drafters of the CRPD could not easily reach a consensus on how to define ‘disability.’⁴² In the end, by way of compromise, they acknowledged that ‘disability’ is an evolving concept⁴³ and thus they opted, instead, not so much for a definition but an explanation of who ‘persons with disabilities’ are. According to the CRPD, PWDs include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁴⁴ Thus, the CRPD firmly grounds the disability classification in the social model of disability.

It is estimated that over one billion people, 15 percent of the world’s population have a disability.⁴⁵ The World Health Organisation (WHO) further estimates that over 450 million people worldwide live with psychosocial disabilities,⁴⁶ a figure some experts believe to be a severe under- approximation.⁴⁷ PWDs are not only the world’s and by implication Africa’s largest minority group but also one of the world’s most disadvantaged minority groups. They are among the poor of the poorest.⁴⁸ Poverty in PWDs is linked to insufficient access to

⁴¹ Pretoria University Law Press (PULP) *Changing the landscape: Core Curriculum on Disability Rights for Undergraduate Law Students in Africa*. (2015)11.

⁴² Kayess and French (n22 above)23.

⁴³ Preamble to the CRPD, para (e).

⁴⁴ Article 1 of the CRPD.

⁴⁵ World Health Organisation (WHO) and World Bank, *World Report on Disability* (2011), 5 available at https://www.who.int/disabilities/world_report/2011/report/en/ Accessed on the 13th June 2019.

⁴⁶ WHO ‘Mental disorders affect one in four people’ http://www.who.int/whr/2001/media_centre/press_release/en/ (accessed 13th July 2019).

⁴⁷ D Vigo et al ‘Estimating the true global burden of mental illness’ (2016) 3 *Lancet Psychiatry* 171-178.

⁴⁸ J Biegon, ‘The Promotion and Protection of Disability Rights in the African Human Rights System’ in I Grobbelaar –du Plessis & PT Van Reenen (Ed) *Aspects of Disability Rights in Africa* 2010 at 53.

education, employment, health care and other social services that characterise the life of PWDs.⁴⁹

In Africa, psychosocial disabilities are considered as the product of witchcraft, supernatural possession or ‘feeble-mindedness.’⁵⁰ According to the 2017 Zimbabwe Inter-Censal Demographic Survey,⁵¹ the prevalence of disability in the country is estimated to be 9%, amounting to approximately 1, 175, 512 persons based on the total Zimbabwe population of 13, 061,239.⁵²

It is important to note that the CRPD does not create any ‘new’ rights for PWDs, but rather asserts that all existing human rights apply equally to PWDs.⁵³ Disability rights thus re-affirm PWDs as people entitled to respect of their inherent dignity and all human rights and fundamental freedoms on an equal basis with others.⁵⁴ Disability rights are rights that are intended to protect the human rights of PWDs.

The conceptualisation of disability is tied to various models. Views in disability have in the past years gone through a transitional phase by reason of a gradual shift of emphasis from a Medical Model to a Social Model of disability.⁵⁵ The human rights influence is undeniably evident in the Social Model of disability hence forming the third model which is the Human Rights Model of disability. These three models are discussed in turn.

⁴⁹SA Djoyou Kamga ‘A call for a Protocol to the African Charter on Human and Peoples’ Rights of Persons With Disabilities in Africa’ (2013) Vol 21.2 *African Journal of International and Comparative Law* 221.

⁵⁰F Mahomed and M A Stein ‘De-stigmatising Psychosocial Disability in South Africa (2017) Vol 5, *African Disability Rights Yearbook* 67.

⁵¹ 2017 Zimbabwe Inter-Censal Demographic Survey p. 7 available at http://www.zimstat.co.zw/sites/default/files/img/ICDS_2017.pdf accessed on the 9th July 2019

⁵²Zimbabwe 2012 Population Census.

⁵³J Lord & M A Stein (n 33 above) 100.

⁵⁴Preamble to the CRPD and Article 1 of the CRPD.

⁵⁵I Grobelaar –du Plessis & PT Van Reenen (Ed) *Aspects of Disability Rights in Africa* (2010) xxiii.

2.2.1. Medical Model of Disability

According to this model, disability is a property of the individual body rather than the social environment of anything else. Disability is seen as a medical condition that must be treated by doctors and rehabilitation specialists who are trying to provide better treatment and to bring about recovery.⁵⁶ The tendency thus is to ‘problematise’ the person with a disability as someone in need of clinical intervention.⁵⁷ As a result of viewing disability through the lens of the medical model, societies have sought to remove PWDs from society in order to protect society from them.⁵⁸ It is this model of disability that led to the development of institutions and other segregated residences for PWDs instead of including them in the community.

2.2.2. Social Model of Disability

According to this model, a person with a disability is not necessarily disabled because of a condition inherent in the individual concerned but because of a physical and social arrangement of the environment.⁵⁹ Disability is something that is caused by environmental and social barriers and thus a social construct through discrimination and oppression.⁶⁰ It is the failure of society to dismantle barriers that leads to disability.⁶¹ Discrimination against PWDs is viewed as synonymous with discrimination based on race or sex, a socially structured prejudice.⁶² Therefore, it is the community’s conception of “disability” that must be changed rather than focussing on the ‘treatment’ of the disability of the person.

⁵⁶R Traustadottir ‘Disability Studies, the Social Model and Legal Developments’ in OM Anardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities- European and Scandinavian perspectives* (2009) 5.

⁵⁷BA Areheart (n24 above) 6.

⁵⁸AS Kanter *The Development of Disability Rights Under International Law: From Charity to Human Rights*, (2015) 46.

⁵⁹I Grobbelaar –du Plessis & T Van Reenen (n 55 above) xxv.

⁶⁰V Della Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 42.

⁶¹ AS Kanter (n 58 above) 47.

⁶²M Jones & AB Marks *Disability, diversity-ability and legal change* (1999) 5.

2.2.3. Human Rights Model of Disability

This model is a follow-up or part of the Social Model of disability. It focuses on the inherent human dignity of PWDs.⁶³ The model emphasises that PWDs are equal citizens with equal rights and obligations. They should enjoy all human rights on an equal basis with others and hence disability is a human rights issue. Degener and Quinn⁶⁴ opine that the state is responsible for the removal of barriers that are created by the community in order to ensure total respect for human dignity and equal legal protection for all. Emphasis is on substantive equality as opposed to formal equality. Also, according to this model, the absence of impairment is not a prerequisite to be a subject of human rights.⁶⁵ The CRPD has further developed the social model into a human rights model of disability.⁶⁶

2.3. Defining psychosocial disability

The term “psychosocial” disability is used in this study to refer to the interaction between the psychological and social /cultural components of disability.⁶⁷ Psychosocial disability is also known as “mental disability”, “mental health problem”, “mental health issue” or psychiatric disability.⁶⁸ It is however certainly not the same with developmental disabilities although sometimes and wrongly some people would want to use the term “mental disability” to include both psychosocial disability and intellectual disability.⁶⁹ Most recently, the CRPD

⁶³V Della Fina (n 60 above) 43.

⁶⁴G. Quinn & T. Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

⁶⁵Preamble, para (c) of the CRPD.

⁶⁶See Article 1 of the CRPD and Concluding Observations on the initial report of Argentina as approved by the Committee at its eighth session (17-28 September 2012), CRPD/C/ARG/CO/1, 2012 paras. 7-8.

⁶⁷World Network of Users and Survivors of Psychiatry *Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities* (2008) 9.

⁶⁸H Combrinck ‘Everybody Counts: The Right to vote of persons with psychosocial disabilities in South Africa’ (2014) Vol 2 *African Disability Year Book* 76.

⁶⁹H Combrinck (n68 above) 76.

Committee⁷⁰ reminded Spain that the scope of the Convention includes all persons with mental health conditions as persons with psychosocial disabilities.

2.4. The right to independent living

Prior to the adoption of the CRPD, no binding international human rights treaty provided explicitly for the right to independent living and community living for PWDs on an equal basis with others.⁷¹ Article 19 of the CRPD reduces into normative terms and legal obligations one of the most elementary objectives of the CRPD. This is the full inclusion and effective participation in society of PWDs,⁷² to be achieved by respecting their freedom of choice and the principle of control by them over their own lives. Article 19 moves away from treating PWDs as objects of pity to be managed or taken care of towards treating them as human subjects and equal citizens deserving equal respect for equal rights.⁷³

Independent living describes the right of PWDs and in this case PWDs to live in the community and receive the support they need to participate in society as equal citizens.⁷⁴ This entails a range of services and support such as housing and supported employment. It also includes access to mainstream services such as health care.

Community living involves a process of deinstitutionalisation and hence the right is related to the enjoyment of other rights like employment and political participation. Institutionalisation results in serious human rights abuses.⁷⁵ In the case of *Ca'mpeanu v Romania*,⁷⁶ the European

⁷⁰ Concluding Observations on the combined second and third periodic reports of Spain as approved by the Committee at its twenty-first session (11 March- 5 April 2019), CRPD/C/ESP/CO/2-3 2019 pa 9.

⁷¹ AS Kanter 'There's No Place Like Home: The Right to Live in the Community for People with Disabilities, Under International Law and the Domestic Laws of the United States and Israel' (2012) Vol 45 *Israel Law Review* 187.

⁷² Article 3 (c) of the CRPD.

⁷³ V Della Fina (n60 above) 354.

⁷⁴ C Parker *A Community for All: Implementing Article 19: A Guide for Monitoring Progress on the Implementation of Article 19 of the Convention on the Rights of Persons with Disabilities* (2011) 2

⁷⁵ C Parker (n 74 above) 3.

⁷⁶ *Centre for Legal Resources on behalf of Valentin Ca'mpeanu v Romania*, Application No 47848/08.

Court of Human Rights (ECtHR) held that the Romanian government was accountable for violating the human rights of Ca'mpeanu, a young man with intellectual disability, who died seven days after being placed in an institution. The case is a groundbreaking disability rights case concerning both access to justice for PWDs and their ill-treatment in institutions.

Furthermore, Article 19 plays a distinct role as one of the widest-ranging and most intersectional articles of the Convention.⁷⁷ In addition, the right to independent living is deeply rooted in the international human rights law.⁷⁸ Article 19 of the CRPD also has roots in civil and political as well as economic, social and cultural rights.⁷⁹

2.4.1. Core Content of the right to independent living

The right to independent living requires States Parties to recognise the equal right of PWDs to live in the community with choices equal to others and to promote the full inclusion and participation of PWDs in the Community.⁸⁰ Community living, also known as independent living⁸¹ refers to PWDs being able to live in their communities as equal citizens, with the support that they need to participate in every-day life. Kamundia chose to call it community living arguing that “independence’ is not a particularly African idea.⁸²

The phrase “living independently’ in the title does not refer to an alleged right of PWDs to be absolutely independent, in the sense of living a highly individual and self-sufficient life on their own.⁸³ Independent living rather refers to personal autonomy, freedom to make choices concerning own life, and control over one’s life and decisions.⁸⁴ The right is also related to Article 12 of the CRPD which talks of the right to equal recognition before the law and legal

⁷⁷General Comment Number 5 (n36 above) para 6.

⁷⁸ Article 29 (1) of the Universal Declaration of Human Rights (UDHR).

⁷⁹ Article 12 of the International Covenant on Civil and Political Rights(ICCPR) and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁸⁰Kamundia (n 21 above)56.

⁸¹ European Coalition for Community Living (n26 above).

⁸²Kamundia (n 21 above) 54.

⁸³V Della Fina et al (n 60 above) 359.

⁸⁴See Preamble to the CRPD as well as Article 3(a) Of the CRPD.

capacity. In the case of *Prohit and Moore v The Gambia*⁸⁵, the African Commission on Human and Peoples' Rights (ACHPR) held that there was a violation of the rights of PWDs in one of The Gambian Psychiatric Institution. It was held that PWDs have the legal capacity to vote just like any other citizen.

Article 19 of the CRPD further picks up the principle listed in Article 3(c) of the CRPD which talks about 'full and effective participation and inclusion in society.' The core content of the right to community living thus is about neutralising the devastating isolation and loss of control over one's life. The full enjoyment of the right to independent living is both the result of and a precondition for, the combating of stereotypes and prejudices relating to PWDs and the promotion of awareness of their capabilities and contributions to society.⁸⁶

2.4.2. The Legal Recognition of the Right to Community Living

While it is appreciated that the CRPD does not establish new rights but rather applies existing human rights for the benefit of PWDs,⁸⁷ the right to live independently has no exact language in other human rights instruments. It cannot also be considered as a right established at the level of general international law.⁸⁸ Thus since this right is relatively a "new" right its recognition as a legal right by States Parties clearly assumes greater importance from the perspective of a proper application of the CRPD. States Parties should provide explicit and formal recognition of the right, principally by including it in their national legislation in a

⁸⁵ *Prohit and Moore v The Gambia* Communication No. 241/2001: 2002-2003.

⁸⁶ OHCHR (2014), *Thematic study on the right of persons with disabilities to live independently and be included in the community* available from <https://www.un.org/disabilities/documents/reports/ohchr/A.HRC.28.37AEV.pdf> (Accessed on the 1st October 2019). 4

⁸⁷ J Lord & M A Stein (n 33) 100.

⁸⁸ V. Della Fina et al (n 60 above)361.

legislative framework which clearly establishes it as a legal right with a remedy in case of violation.⁸⁹

According to Kanter,⁹⁰ unless and until the right to live in the community is enshrined and enforced in domestic law, Article 19's guarantees will remain intangible for millions of PWDs around the globe. The CRPD Committee in its concluding observations for Morocco⁹¹ recommended the State Party to recognise in its legislation the right of PWDs to live independently and be included in the community.

2.5.Elements of the Right to Independent Living

The main elements of this right are the right to choose with whom to live and where; prohibition of forced institutionalisation and deinstitutionalisation; the right to personalised services; and the right to have community-based services made accessible to PWDs.⁹²

2.5.1. Free Choice of residence

Article 19 (a) of the CRPD mandates States Parties to ensure PWDs “have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.’ This means that States Parties should always ensure that the will and preferences of PWDs with regards to residence and living arrangements are always considered and respected just like those of the other people. The fulfilment of this requirement is linked to the recognition of PWDs’ entitlement

⁸⁹OHCHR (2009) *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of persons with Disabilities*, available from <https://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf> (Accessed 10 October 2019) Para. 51.

⁹⁰AS Kanter (n 58)88.

⁹¹Concluding Observations on the initial report of Morocco as approved by the Committee at its eighth session (25 September 2017), CRPD/C/MAR/CO/1, 2017 para 39(a).

⁹²G. Quinn & S. Doyle ‘Marrying Principle with Power in the EU-the Test Case of the 3 EU Structural Funds Negotiations: Update’ (2013) Vol 11*The Equal Rights Review* 62.

to legal capacity on an equal basis with others.⁹³ In fact one needs both to be recognised as a person before the law and to be in a condition to actually exercise one's legal capacity, to be able to decide one's place of residence and where and with whom to live.⁹⁴

2.5.2. Prohibition of forced institutionalisation and deinstitutionalisation

The other crucial issue at stake in Article 19(a) concerns forced institutionalisation and deinstitutionalisation. Institutionalisation occurs largely in the context of mental health care. In the context of this discussion, PWDs are accommodated in some institutions in order for them to get mental health services away from their homes, families, and communities in different settings that provide health care to other people. It is well known that high numbers of people with mental disabilities are held against their will, in institutions across the world.⁹⁵

The European Coalition for Community Living defines institutionalisation as any place in which people who have been labelled as having a disability are isolated, segregated and/or compelled to live together. It is also any place in which people do not have, or are not allowed to exercise control over their lives and their day to day decisions.⁹⁶ Thus institutionalisation is not defined by the size of the institution in question. Small environments including group homes may still result in institutionalisation if the overall control remains with supervisors.⁹⁷

The CRPD mandates States Parties to ensure that PWDs “are not obliged to live in a particular living arrangement.”⁹⁸ In the case of *Stanev V Bulgaria*, the ECtHR has recently

⁹³Article 12 of the CRPD.

⁹⁴V Della Fina (n 60 above) 364.

⁹⁵ LS Enonchong ‘Mental disability and the right to personal liberty in Africa’ (2017) Vol 28 *The International Journal of Human Rights* 1355.

⁹⁶European Coalition for Community Living (n26 above) p 10.

⁹⁷OHCHR (n 86 above) para 21.

⁹⁸Article 19 (a) of the CRPD.

found a violation of Article 5 of the ECHR (which provides for the right to liberty) in relation to someone living in a social care institution.⁹⁹

States Parties are thus required to take all possible and measurable steps to achieve the agenda of deinstitutionalisation and adopting adequately funded strategies with clear time frames and benchmarks.¹⁰⁰ The CRPD Committee¹⁰¹ recommended Kenya to adopt a strategy for deinstitutionalisation of PWDs, within a time frame and measurable indicators.

2.5.3. Personalised Support Services

States Parties to the CRPD are further obligated to ensure that ‘persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living inclusion in the community, and to prevent isolation or segregation from the community.’¹⁰²

Firstly, States Parties have an obligation to ensure a wide range of support services do actually exist within their territory and are accessible to all PWDs living under their jurisdiction. These can involve different private and public providers. The CRPD Committee has specifically addressed this aspect of Article 19(b) in the decision of an individual communication against Sweden.¹⁰³ The Committee held that the denial of a building permit for an indoor hydrotherapy pool at home, for the purpose of rehabilitation, deprived the complainant of access to hydrotherapy, which was the only option that could support her living and inclusion in the community. This denial had the effect of forcing complainant to enter a specialised healthcare institution hence violating the complainant’s rights under Article 19 (b) of the CRPD.

⁹⁹*Stanev V Bulgaria*, Application No. 36760/06, judgment 17th January 2012.

¹⁰⁰VD Fina et al (n 60 above) 367.

¹⁰¹Concluding Observations on the initial report of Kenya as approved by the Committee at its fourteenth session (30 September 2015), CRPD/C/KEN/CO/1, 2015 para 38(a).

¹⁰²Article 19(b) of the CRPD.

¹⁰³*H.M. v Sweden* CRPD Committee, Communication No. 3/2011.

In addition, the support services envisaged from Article 19 should be person-centred.¹⁰⁴ They should reflect the preferences of the person with disabilities, with PWDs having control over the support provided. Resources are needed to fund the strengthening, creation, and maintenance of community-based services. This aspect of Article 19 links with Article 26 which requires States Parties to facilitate the provision of services and programs to support participation and inclusion in the community.

2.5.4. Accessibility to Mainstream Community Services

States Parties are also required to ensure accessibility to mainstream community services by PWDs on an equal basis with others so that they are able to enjoy the right to independent living.¹⁰⁵ This covers all services and facilities provided for in society such as education, health, vocational training, social assistance, housing, transportation, information, communication technologies as well as support in finding and maintaining employment.

The link between Article 19 and other provisions of the CRPD is further established under Article 9 on ‘accessibility’ to transportation, information, and communication technologies and to other facilities and services open or provided to the public. There is also Article 20 on personal mobility, Article 21 on the part concerning access to information, Article 24 on education, Article 25 on health and Article 27 on work and employment. The purpose of Article 19 is to ensure PWDs enjoy rights on an equal basis with others and thus linked to the overarching principle of the CRPD, i.e. equality and non-discrimination¹⁰⁶ and in particular provision of reasonable accommodation to PWDs.¹⁰⁷

¹⁰⁴Concluding Observations on the initial report of Latvia as approved by the Committee at its fourteenth session (10 October 2017), CRPD/C/LVA/CO/1, 2017 para 31(c).

¹⁰⁵Article 19(c) of the CRPD.

¹⁰⁶Article 5 of the CRPD.

¹⁰⁷Article 5(3) of the CRPD.

2.6.Sources of the right to Independent living

At the international level, the CRPD is the first binding international treaty to protect the right to live in the community for PWDs. None of the equality clauses of any of the three major instruments¹⁰⁸ mention PWDs as a protected category. Amongst the thematic Conventions, it is only the Convention on the Rights of the Child (CRC)¹⁰⁹ that makes reference to ‘mentally and physically disabled’ children but there is no reference to the right to independent living for PWDs. In an effort to bridge this gap the United Nations system tried to interpret and apply the core human rights instruments to PWDs.¹¹⁰ Secondly, a body of international interpretations and commentary, known as soft laws, began to emerge to protect the rights of PWDs in general including the right to community living¹¹¹

The instruments include the Declaration on the Rights of Mentally Retarded Persons, adopted in 1971 by the United Nations General Assembly¹¹² as well as the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which both urge that a right to community integration is enforced under international human rights standards. Furthermore, in 1975, the UN General Assembly adopted the Declaration on the Rights of Disabled Persons.¹¹³ This Declaration asserts a specific right to live with one’s family.

Following these declarations, the UN adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care known as the ‘MI Principles.’¹¹⁴ Although the MI Principles do not ban institutionalisation outright, they

¹⁰⁸ UDHR, ICCPR and ICESR.

¹⁰⁹ Article 23 of the CRC. See also Article 2 which provides for prohibition on discrimination on the ground of disability.

¹¹⁰ R. Kayess and P. French (22 above) 13.

¹¹¹ AS Kanter (n 71 above) 187.

¹¹² Article 4 of the Declaration on the Rights of Mentally Retarded Persons UN Doc A/RES/2856 (XXXVI), 20 December 1971.

¹¹³ Declaration on the Rights of Disabled Persons, UN Doc A/10034 (1975).

¹¹⁴ Protection of Persons with Mental Illness and for the Improvement of Mental Health Care UN Doc A/RES/46/119, Annex, 17 December 1991 (‘MI Principles’).

provide for the right of persons with mental disabilities to live and work, to the extent possible, in the community¹¹⁵ as well as the right to be treated and cared for, as far as possible in the community the persons with mental disabilities live.¹¹⁶ The UN further adopted a resolution entitled ‘the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities’ (‘Standard Rules ‘).¹¹⁷ These Rules affirm the principle that PWDs should be enabled to live with their families.¹¹⁸

With the adoption of Article 19 of the CRPD, the right of all PWDs to live in the community is now firmly enshrined in international law.¹¹⁹

Under the African disability law regime, the ACHPR affirmed disability as a prohibited ground of discrimination although it is not clearly mentioned under article 2 of the African Charter on Human and Peoples’ Rights (the African Charter).¹²⁰ The other Human Rights treaties such as the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (AWP), the African Charter on the Rights and Welfare of the Child (ACC) and the African Youth Charter also just address the rights of persons with disabilities generally and in the anti-discrimination clauses.¹²¹ There is however no provision for the right to independent living for PWDs in all these human rights instruments. L.O Oyaro opines that these African treaties adopt an elementary medical model approach to disability singularly attributing disability to impairment without considering social and environmental factors.¹²² In addition to these regional instruments, there are also some sub-

¹¹⁵See Principle 3 of the MI Principles.

¹¹⁶Principle 7 of the MI Principles.

¹¹⁷ Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, UN DOC A/RES/48/96, 4th March 1994.

¹¹⁸ AS Kanter (n71 above) 190.

¹¹⁹ AS Kanter (n71 above) 196.

¹²⁰Purohit v the Gambia (n 85 above).

¹²¹ See for example, Article 24(1) of the African Youth Charter, Article 23 of the African Women Protocol and Article 3 of the African Children’s Charter.

¹²² L.O. Oyaro *Africa at Crossroads: the United Nations Convention on the Rights of Persons with Disabilities* (2015) Vol 30 *American University International Law Review* 356.

regional treaties¹²³ that also cater for the rights of PWDs but there has not been a specific provision to expressly provide for the right to independent living for PWDs.

The African Disability Protocol is the first African Human Rights Treaty to expressly provide for the right to independent living¹²⁴ States Parties are obligated to ensure that PWDs have the opportunity to choose their place of residence and where and with whom they live.

Nationally, the Zimbabwean legal framework is silent on the right to independent living. The enabling legislation predates the Constitution and is based on the welfare and medical model of disability.

2.7.Challenges

Whilst the right to independent living is provided as a standalone right in the CRPD and in the context of Africans, in the African Disability Protocol, implementation of this right has faced numerous impediments. Denial of legal capacity, either through formal laws and practices or de facto by substitute decision-making about living arrangements has also derailed progress in realising this right.¹²⁵

The relevant national legal framework does not incorporate independent living as a right in statutes. Tied to this is the inadequacy budget allocations aimed at providing personal assistance and individualised support as well as insufficient mainstreaming of disability in general budget allocations.

In addition, Zimbabwe is yet to domesticate the provisions of the CRPD into its national legal frameworks as it follows a dualist approach in as far as International Conventions are

¹²³See for example the East African Community Treaty and the Treaty of the Southern African Development .

¹²⁴Article 14 of the African Disability Protocol.

¹²⁵General Comment No. 5 (n 36 above) para 15(a).

concerned. Additionally, in Zimbabwe, most disability-related Statutes predate both the Constitution and the CRPD.

Furthermore, stigma, misconceptions, and myths around psycho-social disabilities and independent living persist and the result is often discrimination and exclusion.¹²⁶ Stereotypes of PWPDs make them appear unintelligent, “weird”, unable to work, with no chance of recovery, unpredictable and dangerous.

2.8. Conclusion

Although disability is not easy to conceptualise, it has been indicated that disability results from the intersection between impairments and barriers. It has been found that the conceptualisation of disability is linked to various models of disability which are mainly the Medical, Social and Human Rights Models. Disability studies and scholars have theorised disability and the social oppression of PWDs as outcomes of the way fundamental activities are organised in society. This conceptualisation referred to as the Social Model has provided the knowledge base which has informed the international legal development aimed at full involvement and human rights for PWDs.

In addition, psycho-social disability was also distinguished from related disabilities such as developmental disabilities. It has been shown that the CRPD includes all persons with mental health conditions as persons with psychosocial disabilities. Article 19 reaffirms non-discrimination and recognition of the equal right of PWDs in general and PWPDs, in particular, to live independently, with choices equal to others and be included in the community. It has been highlighted that Article 19 of the CRPD has roots in civil and political as well as economic, social and cultural rights, thus becoming one of the core rights

¹²⁶United Nations, economic and Social Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health*, Hunt, P. (2005) U.N. Doc. E/CU.4/2005/51 para 54.

provided for in the CRPD. These are the right to liberty of movement and freedom to choose one's residence and the right to an adequate standard of living, including adequate clothing, food, and housing.

Various Scholars are in agreement on the elements of independent living and the main identified ones are free choice of residence, the prohibition of forced institutionalisation and deinstitutionalisation, personalized support services as well as accessibility to mainstream community services.

It has also been found that independent living as a right is found under international and regional human rights instruments. The CRPD is the first international treaty to protect the rights of PwPDs to decide where and with whom to live as well as what services to receive and where. With the adoption of Article 19 of the CRPD, the right of PwPDs including PwPDs to live in the community is now firmly enshrined in international law. The right to independent living has also been found to be firmly entrenched in the African Disability Protocol. Prior to that, the disability rights regime in Africa remained fragmented and thus needed to be harmonised.

Furthermore, it has been established that the road to the realisation of the right to independent living for PwPDs is not an easy road. The various challenges negating the realisation of the right to independent living basically include institutional, legislative, policy, myths and stigma/ stereotyped challenges.

The next chapter analyses the extent, if any, to which the right to independent living is being provided for and enforced in Zimbabwe as provided in the Zimbabwean legislative framework. Reference is made to the Constitution of Zimbabwe, the Mental Health Act, the Disabled Persons Act, Persons with Disabilities Bill, 2019 and the Social Welfare Assistance Act.

CHAPTER 3

3.1.Introduction

The previous Chapter conceptualised disability and also discussed the main models of disability. It has been established that the CRPD is premised firstly on the Social Model as well as the Human Rights Model of disability. In addition, the meaning of psycho-social disabilities was also examined. The Chapter went on to discuss the right to independent living, its justification, and the content of the right as well as the legal recognition of the right to independent living. Furthermore, the elements of the right to independent living, its sources and the various challenges existing in the realisation of the right to independent living were also discussed.

The CRPD is the first United Nations human rights treaty to be adopted in the 21st Century and is reputed to be the most rapidly negotiated ever.¹²⁷ The introduction of the CRPD offers new opportunities for various countries that have committed themselves to the Convention to reconsider their domestic legal regimes relating to disability rights.¹²⁸ Zimbabwe ratified the CRPD and its optional protocol on the 23rd September 2013 after it adopted a new Constitution on the 22nd August that same year. This confirms that Zimbabwe has begun to embrace a human rights approach to disability and has assumed an obligation to fulfil the objectives of the CRPD.¹²⁹

The Constitution contains some improvements with regards to the realisation of the rights of Persons with Disabilities (PWDs) in Zimbabwe in general. However, the major challenge is that the enabling legislation is yet to be realigned to the Constitution and the CRPD. The enabling legislation predates the CRPD and embodies the medical model of disability.

¹²⁷ R. Kayess & P. French (n 22 above) 2.

¹²⁸ PT van Reenen and H. Combrinck (n32 above) 133.

¹²⁹ See Article 4(1) (a) of the CRPD.

Furthermore, when it comes to the right to independent living for PWDs in general and PWPDs in particular, the Constitution is silent. By ratifying the CRPD Zimbabwe is bound by the CRPD and is expected to execute its obligations in good faith. Zimbabwe's first report was due on the 23rd of October 2015 but none was filed.

Prior to the adoption of the Constitution in 2013 the primary law dealing with PWDs includes the DPA, the ZMHA, and the SWAA. While all these laws are still operational they nonetheless have gaps and weaknesses with regards to the realisation of the rights of PWDs in general as well as the right to independent living for PWPDs. All of them were enacted before the CRPD was ratified and before the new Constitution came into force.

While the CRPD and the Constitution view disability from a human rights perspective, the DPA does not contain a human rights-based approach in dealing with PWDs. It does not have a provision for the right to independent living for PWPDs. It views PWDs from a medical and social welfare perspective.

The same applies to the ZMHA. The Act governs the care and involuntary detention of PWPDs in Zimbabwe and its reference to 'detention' is actually in clear contrast with the provisions of the CRPD and the right to independent living as provided for in section 19 of the CRPD. The CRPD provides that provisions of health care facilities should not be tied to particular environments. States Parties should always ensure that the will and preferences of PWDs with regards to residence and living arrangements are always considered and respected just like those of the other people.

Furthermore, the SWAA makes provision for the granting of social welfare assistance to 'destitute or indigent persons.' The Act was promulgated with the misconception that disability is always associated with poverty. While it is a requirement in terms of Article 19

of the CRPD for States Parties to provide support services to PWDs, the assistance envisaged by the CRPD does not include treating PWDs as objects of charity.

Thus, apart from the Constitution, other laws addressing disability in Zimbabwe and in particular rights of PWDs predate the CRPD and they subscribe to the Medical Model of disability. They treat PWDs as objects of charity and in need of financial and medical assistance. However, Zimbabwe is in the process of aligning its laws to the Constitution, including its disability laws. The Persons with Disabilities Bill, 2019 if it successfully passes as law, intends to repeal the DPA and to provide for the protection of the rights of PWDs in accordance with the CRPD. Section 34 of the Bill provides for a standalone right for PWDs to independent living and being included in the community.

3.2.The legal framework

3.2.1. The Constitution

As a starting point, the Constitution recognises the inherent dignity and equal worth of each human being in terms of its founding values and principles.¹³⁰ It further provides for the recognition of the equality of all human beings and under the principles clause, there is specific recognition of rights of PWDs.¹³¹ The recognition of the inherent dignity and equal worth of each human being as outlined mirrors Article 17 of the CRPD which provides for the right of PWDs to have their physical or mental integrity to be respected.¹³² This section thus is important especially for PWDs who are usually treated without dignity. This is in accordance with the principles underlying the CRPD in Articles 3(a) and (d).

¹³⁰ Section 3 (e) of the Constitution.

¹³¹ Section 3 (2) (i) (ii) of the Constitution.

¹³² E. Mandipa, (n13 above) 77.

It has been argued that one of the core content of the right to independent living is the inherent dignity and equal worth of each human being.¹³³ There is thus a paradigm shift in Zimbabwe as the previous Constitution had no recognition of disability rights and an appreciation of the equal worth of all human beings.

In addition, the Constitution mandates that there must be use and development of forms of communication suitable for persons with mental and physical disabilities.¹³⁴ Equal access also includes access to communication as well as buildings and other amenities and hence section 22 (4) also obligates the State to put measures in place to ensure that buildings and amenities to which the public has access to are accessible to PWDs.¹³⁵ This is related to the core element of the right to independent living which mandates States Parties to ensure PWDs have access to mainstream community services. Camilla Parker¹³⁶ opines that the right of equal access to mainstream community services derives from the principle of non-discrimination and is also central to the enjoyment of the right of choice of residence. Thus, this provision is crucial for the realisation of the right to community living.

Furthermore, PWDs are part and parcel of the national objectives in terms of section 22 of the Constitution. The section provides for the recognition firstly of the right of persons with physical and mental disabilities to be treated with respect and dignity¹³⁷ in line with Article 3(1) of the CRPD as one of its foundational principles. The State and all Government institutions are mandated to assist PWDs so that they can achieve their full potential.¹³⁸ This is commendable as it recognises disability as a cross-cutting concept that cannot be addressed by a single government department.

¹³³V Della Fina et al (n60 above) 360.

¹³⁴ Section 22(3) (c) of the Constitution.

¹³⁵ See also Article 9 of the CRPD.

¹³⁶C. Parker (n 74 above)7.

¹³⁷ Section 22(1) of the Constitution.

¹³⁸ Section 22 (2) of the Constitution.

The State is further mandated to develop welfare and developmental programmes for PWDs.¹³⁹ This is important as a way to alleviate poverty amongst PWDs as well as a good move to mainstream disability in developmental plans and sectors of society in line with general obligations of States Parties as set out in the CRPD.¹⁴⁰ Choruma¹⁴¹ opines that disability is both a cause and consequence of disability. The only challenge is that the Constitution seems to restrict disability to physical and mental aspects only and leaving other forms of disability outside. Manatsa¹⁴² in his article notes that it is a fundamental weakness of the Zimbabwean Constitution of making reference to persons with physical and mental disabilities without alluding to other forms of disabilities in contrast with Article 2 of the CRPD. Furthermore, it is also possible that intellectual and mental disabilities are being considered as the same when they are not. In addition to this, the reference to welfare programmes whilst they may be good, it has the challenge of viewing disability as a welfare or charity issue.

Section 56 of the Constitution provides for equality and non-discrimination and disability is one of the grounds on which discrimination is proscribed.¹⁴³ Non-discrimination is an overarching principle of the CRPD,¹⁴⁴ non-discrimination is one of the principles of the CRPD,¹⁴⁵ and elimination of discrimination on the basis of disability is one of the measures to be taken by States Parties under the General obligations of the States Parties to the CRPD.¹⁴⁶ Furthermore, Article 5 of the CRPD specifically talks about equality and non-discrimination and it mandates States Parties to prohibit all discrimination on the basis of

¹³⁹ Section 22(3) (a) and (b) of the Constitution.

¹⁴⁰ Article 4(1) of the CRPD as read with paragraph (g) of the preamble to the CRPD.

¹⁴¹ T. Choruma (n 15 above)3.

¹⁴² P. Manatsa 'Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?' (2015) Vol 4 *International Journal of Humanities and Social Science Invention* 31.

¹⁴³ Section 56(3) of the Constitution.

¹⁴⁴ See preamble (h) of the CRPD.

¹⁴⁵ Article 3 (b) of the CRPD.

¹⁴⁶ Article 4 (1) (e) of the CRPD.

disability. Ngwena noted that the CRPD creates a new vision of disability and inclusive equality, which must find its expression not merely in policy and law-making but through effective implementation.¹⁴⁷

The CRPD Committee¹⁴⁸ emphasised that equality and non-discrimination are at the core of all human rights treaties and hence one of the most fundamental principles and rights of international human rights law. Equality and non-discrimination are at the heart of the Convention and evoked consistently throughout its substantive articles with the repeated use of the wording “on an equal basis with others.” This links all the substantive rights of the CRPD and the right to independent living to the non-discrimination principle. By living in the communities, PWDs are able to enjoy other rights on an equal basis with others including the right to education, employment, and political participation. Thus, failure to recognise the right to independent living for PWDs violates the core principles of equality and non-discrimination.¹⁴⁹

Some scholars have argued that the CRPD does not intend to bring in new rights but to articulate how existing human rights obligations apply specifically to persons with disabilities¹⁵⁰ Thus, Section 83 of the Constitution under the elaboration of certain rights section specifically seeks to elaborate rights of PWDs and one may further argue that the rights being elaborated are those rights already found in Part 2 of the Constitution.

Section 83 of the Constitution shows a Constitutional commitment by Zimbabwe to address some of the major barriers of the equality of PWDs such as access to education, health facilities, protection from exploitation and abuse and the right to live with their families.

¹⁴⁷ C. Ngwena ‘Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of Contradictions in inclusive education.’(2013) Vol 1 *African Disability Rights Yearbook* 140.

¹⁴⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 6, 26 April 2018. CRPD/C/GC/6/2018 paragraph 7.

¹⁴⁹ V Della Fina et al (n60 above) 354.

¹⁵⁰ J. Lord and MA Stein (n.33 above) 100.

These provisions show that Zimbabwe has begun to embrace a human rights approach to disability and it mirrors a number of provisions in the CRPD such as the right to education,¹⁵¹ right to health,¹⁵² freedom from exploitation,¹⁵³ violence, and abuse as well as respect for home and family.¹⁵⁴

However, Section 83 has some weaknesses. For starters, it has failed to elaborate and provide for the right of PWDs and in particular PWPDs to independent living and living in the community as a standalone right. This right can only be inferred from various sections of the Constitution.¹⁵⁵ There is no specific provision providing for the right of PWDs to live independently in their communities as provided for in Article 19 of the CRPD.

Another challenge is that section 83 of the Constitution makes the realisation of the economic, social and cultural rights of PWDs dependent upon resources that are available to the State. It does not provide that the State has a duty to ensure the progressive realisation of such rights. This can pose some serious problems as the Government can rely on the provision to plead poverty.¹⁵⁶ This is inconsistent with the provisions of the CRPD which obligates States Parties to take measures to the maximum of their available resources for the progressive realisation of these rights.¹⁵⁷

Furthermore, section 83 does not embrace a holistic concept of disability to differentiate psycho-social (mental) disabilities from developmental disabilities and it does not also include other forms of disability such as sensory disabilities and disfigurements. This is

¹⁵¹ Article 24 of the CRPD.

¹⁵² Article 25 of the CRPD.

¹⁵³ Article 16 of the CRPD.

¹⁵⁴ Article 23(3) of the CRPD.

¹⁵⁵ See for example, sections 66, 78 and 83(b) and section of the Constitution.

¹⁵⁶ P Manatsa (n 142 above) p 31.

¹⁵⁷ Article 4(2) of the CRPD.

contrary to Article 1 of the CRPD. Cowen Dziva et al¹⁵⁸ bemoan this gap in the Zimbabwean Constitution.

The right to independent living also entails the enjoyment of political rights on an equal basis with others. Section 120 of the Constitution provides that two Senators are elected to represent PWDs¹⁵⁹ and these two should be persons with disabilities themselves.¹⁶⁰ Whilst this is a positive move, the challenge is that the provisions discriminate against persons with mental and intellectual disabilities¹⁶¹ from being registered voters contrary to the right to independent living and participation in the community. The ACHPR in the case of *Purohit v The Gambia*¹⁶² reiterated that PWDs should not be denied their right to vote.

Linked to this is a failure by the Constitution to set out in clear terms the right to legal capacity for PWDs in particular with reference to persons with intellectual and psychosocial disabilities in Zimbabwe in line with Article 12 of the CRPD. One cannot enjoy their right to independent living before their right to legal capacity is recognised. It is apparent that the Constitution has equated a lack of mental capacity to lack of legal capacity if one reads section 2 of the Fourth Schedule of the Constitution. The CRPD Committee in its General Comment Number 1 recognised that the right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for PWDs on an equal basis with others.¹⁶³

Furthermore, the Constitution, in general, does not address the plight of women and girls and children with disabilities who suffer double and sometimes triple discrimination, contrary to

¹⁵⁸ C Dziva et al 'Implementation of the 2006 Convention on the Rights of Persons with Disabilities in Zimbabwe: A Review' (2018) Vol 7 *African Journal of Disability* 2.

¹⁵⁹ Section 120 (1) (d) of the Constitution.

¹⁶⁰ Section 121(3) of the Constitution.

¹⁶¹ Section 121(4) (a) as read with section 2 of the Fourth Schedule of the Constitution.

¹⁶² *Purohit and Moore v The Gambia* (n 85 above).

¹⁶³ Committee on the Rights of Persons with Disabilities General Comment No. 1, 19 May 2014 CRPD/C/GC/1/2014.

Article 6 and 7 of the CRPD. The CRPD Committee in its General Comment Number 3 acknowledged that women and girls face barriers in most areas of life and these barriers create situations of multiple and intersecting forms of discrimination against women and girls with disabilities.¹⁶⁴ Women with Psychosocial disabilities suffer the most in institutions as compared to their male counterparts as they are exposed to sexual abuse.¹⁶⁵ The Constitution should have realised this predicament faced by women and girls.

All in all, whilst the CRPD and the African Disability Protocol provides for a standalone and elaborate right to independent living, the Constitution of Zimbabwe is silent on the right of PWPDs to live independently in their communities as provided for under Article 19 of the CRPD. This right can only be inferred from other general provisions in the Constitution. The CRPD Committee in its General Comment No. 5¹⁶⁶ emphasised that Article 19 plays a distinct role as one of the widest-ranging and most intersectional articles of the Convention and has to be considered as integral for the implementation of the Convention across all Articles.

3.2.2. Mental Health Act

The ZMHA is considered as the principal legal framework for PWPDs. This Act was promulgated with the aim of consolidating and amending the law relating to the care, detention and after-care of persons who are ‘mentally disordered or intellectually handicapped.’¹⁶⁷ The detention can be for purposes of treatment as well as non-treatment purposes in some institutions involuntarily. Thus, the ZMHA was actually promulgated to further detention of PWPDs and in some instances the detention is indefinite. This flies in the face of the right to independent living as provided for under Article 19 of the CRPD.

¹⁶⁴ See Committee on the Rights of Persons with Disabilities General Comment No. 3, 25 November 2016 CRPD/C/GC/3/2016 paragraph 2.

¹⁶⁵ CRPD Committee (n70 above) para 10.

¹⁶⁶ General Comment No. 5 (n 36 above) .

¹⁶⁷ Preamble, ZMHA.

Provision of mental health care rehabilitation should not be limited to institutions and thus it is imperative that these services be provided for in communities together with the support services needed by PWPDs. C. Parker and L. Clements¹⁶⁸ noted that a process of deinstitutionalisation is a necessary consequence of compliance with the provisions of Article 19.

Under the Act, PWPDs have been bundled under ‘mentally disordered or intellectually handicapped’ persons.¹⁶⁹ In relation to a person, this means that ‘the person is suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder disability of the mind.’¹⁷⁰ The terminology used in this Act is derogatory and discriminatory. On the other hand, the principles of equality and non-discrimination are integral to the CRPD not just being addressed specifically in Article 5 but running through the CRPD like a “red thread.”¹⁷¹ Terms like ‘mentally disordered,’ or ‘mental patients’ demean, degrade, belittle, stigmatise and devalue PWPDs.¹⁷² Terms like ‘persons with mental disabilities’ or persons with psycho-social disabilities should be used instead.

It is also clear that there is no appreciation herein that mental disability and developmental disabilities are different forms of disability as the two have been bundled together. The Act also follows the medical/welfare model of disability which is problematic as it views PWDs as people in need of clinical intervention.¹⁷³ This violates the right to independent living

¹⁶⁸ C. Parker and L. Clements ‘The European Union Structural Funds and the Right to Community Living’ (2012) Vol 9 *The Equal Rights Review*, 100.

¹⁶⁹ Section 2 of the ZMHA.

¹⁷⁰ Section 2 of the ZMHA.

¹⁷¹ L. Waddington ‘A New Era in Human Rights Protection in the European Community: The Implications of the United Nations’ Convention on the Rights of Persons with Disabilities for the European Community.’ 2007 *Maastricht Faculty of Law*, 4.

¹⁷² E. Mandipa (n13 above) 86.

¹⁷³ BA Areheart (n 24 above) 6.

provided for under Article 19 of the CRPD. According to Quinn and Doyle,¹⁷⁴ Article 19 moves away from treating PWDs as ‘objects’ to be managed or pitied and towards treating them as ‘subjects’ and rights holders capable of directing their own personal destinies.

In addition, detention of PWDs can be made upon an application by a close relative or any other person.¹⁷⁵ In all these instances the person with a disability in question has no role to play. Both examination and detention are done without his /her consent. PWDs are treated as objects and not subject of human rights. This flies in the face of the right to independent living. The Act actually provides that the reason for the detention is to place PWDs “under care, assessment, treatment or control”¹⁷⁶ thus stripping control of their lives completely.

Peter Blanck and Eilionoir Flynn have pointed out that the independence envisaged under Article 19 means having choice and control over services to enable full participation in society.¹⁷⁷ The practice of isolating and segregating PWDs in institutions conflicts with the provisions under Article 19 which emphasise on the full inclusion and participation of PWDs in the community.¹⁷⁸

In addition, section 18 of the Mental Health Act provides for indefinite detention of PWDs.¹⁷⁹ By making provision for the detention of PWDs in special institutions separated from the mainstream healthcare facilities, the Act has a discrimination orientation in which there is a parallel healthcare system that secludes PWDs.¹⁸⁰ This is prohibited under the CRPD.¹⁸¹ The right to independent living means that health care services should be provided

¹⁷⁴G. Quinn and S Doyle ‘Taking the UN Convention on the Rights of Persons with Disabilities Seriously: The Past and Future of the EU Structural Funds as a Tool to Achieve Community Living’ (2012) Vol 9 *The Equal Rights Review*, 72.

¹⁷⁵Section 4(1) of the Mental Health Act.

¹⁷⁶Sections 9 and 11(1), (6) of the Mental Health Act.

¹⁷⁷ P Blanck and E Flynn *Routledge Handbook of Disability Law and Human Rights*. 2017 p158.

¹⁷⁸C. Parker and P. Clements (n 168 above) 100.

¹⁷⁹See also section 30 which provides for detention of PWDs prisoners in special institutions.

¹⁸⁰ E. Mandipa (n 13 above) 85.

¹⁸¹Article 25 of the CRPD.

for under the mainstream health care services in the communities. The need for health care services should not be the reason for institutionalising PWPDS. Section 114 goes on to even provide for seclusion of PWPDS contrary to the right to liberty linked to the right to independent living. In the case of *Stanev v Bulgaria*¹⁸² the ECtHR has recently found a violation of Article 5 of the ECHR (which provides for the right to liberty) in relation to someone living in a social care institution.

What is further worrisome on the ZMHA is that it also provides for sterilisation of female PWPDS and once again there is no provision to seek their consent.¹⁸³ This results in female PWPDS suffering multiple-discrimination in these institutions in contravention of Article 6 and 7 of the CRPD. The CRPD Committee in its Concluding Observations on Spain¹⁸⁴ noted that women with disabilities face multiple forms of discrimination due to their gender and disabilities, and may also be at risk of gender-based violence. The Committee thus recommended Spain to take effective measures to provide protection for women and girls with disabilities, in particular women and girls with psychosocial disabilities.

Section 113 of the Act also states that the Minister can approve some mechanical means of restraint towards PWPDS. The CRPD Committee in the recent Concluding Observations on Spain noted that forced medical treatment and mechanical restraint on PWPDS and on persons with intellectual disabilities violate the right to liberty and security of the person. The Committee recommended the State party to repeal all legal provisions to prohibit forced institutionalisation and treatment on the basis of disability.

¹⁸²*Stanev V Bulgaria* (n 99 above) .

¹⁸³Section 110A of the Mental Health Act.

¹⁸⁴CRPD Committee (n 70 above) .

The ECtHR has heard many cases recently on behalf of individuals in institutions who are seeking to live in the community. In the case of *Malacu and Others, v Romania*¹⁸⁵ filed in the ECtHR four women and one man who had spent many years in a Romanian social care institution brought a case on behalf of nearly 200 patients who had died in these institutions between 2002- 2004. Another important case is the case of *Ca'mpeanu v Romania*¹⁸⁶ as filed in the ECtHR in 2009 against Romania.

Also, in the case of *Prohit and Moore v The Gambia*¹⁸⁷, the ACHPR held that The Gambia was in violation of the rights of PWPDs detained in one of its Psychiatric institution. These rights include the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. It was also held that legal incapacity may not necessarily mean mental incapacity.

In as far as the right to independent living is concerned for PWPDs, the Mental Health Act does very little to promote and protect this right. Whilst the CRPD Committee has been advocating for deinstitutionalisation,¹⁸⁸ the Act was promulgated to actually further the detention of PWPDs.

3.2.3. Disabled Persons Act

The DPA predates both the CRPD and the Constitution. As noted by Mwalimu,¹⁸⁹ the DPA covers two main areas, which are accessibility to public places, premises, services and amenities, and employment. While it is recognised that Zimbabwe is one of the first African countries to have a disability-specific Act,¹⁹⁰ with the passage of time, the Act is now lagging behind international developments and best practices. The title of the statute itself is

¹⁸⁵*Malacu and Others v Romania*, Application No. 55093/09.

¹⁸⁶*Centre for Legal Resources on behalf of Valentin Ca'mpeanu v Romania*, Application No 47848/08.

¹⁸⁷*Prohit and Moore v The Gambia* (n85 above).

¹⁸⁸ General Comment No. 5 (n 36 above).

¹⁸⁹C. Mwalimu 'International Disability Rights Compendium' (2003) 268.

¹⁹⁰P. Manatsa (n 142 above) 27.

unpleasant and encourages the medical and welfare model of disability with regards to the protection of the rights of PWDs. Nyirikindi¹⁹¹ opines that terms and labels are significant in colouring perspectives and determining what rights may be attached to PWDs. This is also apparent from the preamble of the Act which stipulates that the Act was promulgated to ‘make provision for the welfare and rehabilitation of disabled persons...’ There is no reference whatsoever to the rights of PWDs and PWPDs in particular.

The Act’s definition of a ‘disabled person’¹⁹² is now archaic in that it fails to capture that disability is not only limited to impairments but also to barriers caused by both attitudinal and environmental factors.¹⁹³

The DPA is silent on the right to independent living for PWPDs. In fact, there is no express reference to the rights of PWDs in this Act. Unlike the Constitution which has provisions guaranteeing the protection of rights of PWDs, the Disabled Persons Act does not create any rights that can be enforced in terms of the law.

The right to independent living can only be inferred from the functions of the Board where the Act provides that the Board is mandated to formulate and develop measures and policies designed to ensure disabled persons are afforded full access to community and social services.¹⁹⁴

Whereas the right to independent living is provided for as a standalone right both in the CRPD and the African Disability Protocol, the DPA does not cater for the rights of PWPDs generally and their right to independent living in particular. The DPA is incompatible with

¹⁹¹ L. Nyirikindi ‘A critical analysis of paradigms and rights in disability discourses’ (2006) Vol 12 *East African Journal of Peace and Human Rights* 49.

¹⁹² Section 2 of the DPA.

¹⁹³ Unpublished: E. Mandipa ‘A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe’ Unpublished LLM thesis, University of Cape Town, (2011) 42.

¹⁹⁴ Section 5 (1)(b)(i) of the Disabled Persons Act.

the provisions of the CRPD. Zimbabwe has already embarked on the journey to have its main enabling legislation on disability law amended in line with the provisions of CRPD in the form of the Persons with Disabilities Bill, 2019.

3.2.4. Persons with Disabilities Bill, 2019

The Persons with Disabilities Bill, 2019 (the Bill)'s purpose is to 'repeal the Disabled Persons Act [Chapter 17:01] and to provide for the protection of the rights of persons with disabilities in accordance with the United Nations Convention on the Rights of Persons with Disabilities...'¹⁹⁵ Thus, the Bill, unlike the Disabled Persons Act, is human rights-based. It is meant to align Zimbabwe's disability laws in line with the CRPD.

Firstly, the definition of a person with a disability provided in the Bill mirrors that of the CRPD.¹⁹⁶ Also, it has been noted that the principles of equality and non-discrimination are at the heart of the CRPD and hence are crucial for the realisation of the right to independent living for PWDs.¹⁹⁷ Section 22 of the Bill provides for the right to equality and non-discrimination. Tied to the principles of equality and non-discrimination is the principle of reasonable accommodation. The Bill provides for this concept¹⁹⁸ and the definition also mirrors the one provided for in the CRPD.¹⁹⁹

Furthermore, just like in the CRPD, the Bill provides for a standalone provision for the protection of women and girls with disabilities.²⁰⁰ States parties to the CRPD are obligated under Article 19(c) of the CRPD to ensure accessibility to mainstream community services by PWDs on an equal basis with others. Accessibility is both a principle and a standalone

¹⁹⁵Preamble to the Bill.

¹⁹⁶Article 1 of the CRPD.

¹⁹⁷General Comment No. 5 (n 36 above) p 14.

¹⁹⁸ Section 2 of the Bill.

¹⁹⁹Article 2 of the CRPD.

²⁰⁰Article 25 of the Bill.

right in the CRPD²⁰¹ and section 23 of the Bill which mirrors the CRPD seeks to provide for this right if it is successfully enacted into law.

Finally, in line with the provisions in the CRPD, the Bill goes on to provide in unequivocal terms a standalone right to independent living and community living.²⁰²

3.2.5. The Social Welfare Assistance Act

The provision of personalised support services in the community, as well as accessibility to mainstream community services, is some of the key elements of the right to independent living.²⁰³ Linked to this is the provision of personal assistance as well as financial resources to PWDs so that they can live autonomously in the society. Thus it is imperative to analyse the SWAA.

The Act was promulgated to ‘provide for the granting of social welfare assistance to persons in need and their dependents...’²⁰⁴ These people in need of social welfare assistance are referred to as ‘destitute or indigent person.’²⁰⁵ The Act classifies ‘physically and mentally handicapped’ persons as ‘destitute’ or ‘indigent persons’ who are therefore eligible to receive social welfare assistance from the Department of Social Welfare.²⁰⁶

It is thus clear that the Act was drafted with a misconception that disability is always associated with poverty. The statute follows the outdated Medical Model of disability which depicts PWDs as objects of welfare and not subjects with legal rights.²⁰⁷ The principles underlying the right to independent living include respect for the independence of PWDs, individual autonomy, inherent dignity, and full and effective participation and inclusion in

²⁰¹Article 3(f) and Article 9 of the CRPD.

²⁰²Article 34 of the Bill.

²⁰³C. Parker (n 74 above).

²⁰⁴Preamble, SWAA.

²⁰⁵Section 2 of the Act.

²⁰⁶Section 6 of the Act.

²⁰⁷G. Quinn & T. Degener (n 64 above) 1.

society. As long as PWDs are portrayed as incapable of supporting themselves and are always made objects of charity or welfare, it becomes very difficult to talk about their human rights.²⁰⁸

According to Appiagyei- Atua²⁰⁹ the relevance of the duty element in the African Disability element is that it helps to move the African document away from the medical model where PWDs are seen as ‘charity cases’ who cannot take care of themselves. Thus placing duties²¹⁰ on PWDs confirms that they possess capacity and agency which when given the necessary support will enable them to contribute to their own self –development as well as community development.

The CRPD Committee noted that individualised support services envisaged under Article 19 (b) must be considered a right instead of a form of medical, social or charity care.²¹¹ Thus the support needed in terms of the CRPD is different from the one provided under the Social Welfare Assistance Act. For PWDs, access to a range of individualised support is a precondition for independent living within the community. The Act’s provisions run contrary to the right to independent living as provided under the CRPD and the African Disability Protocol.

3.3.Conclusion

Notwithstanding that Zimbabwe ratified the CRPD and adopted a new Constitution in 2013 it has been pointed out that its legislative provisions are still lagging behind in as far as realisation of the right to independent living for PWDs is concerned. While it has been noted that the Constitution of Zimbabwe is an improvement with regards to the realisation of

²⁰⁸E. Mandipa (n 13 above) 87.

²⁰⁹ K. Appiagyei- Atua, ‘A Comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities (2017) Vol 21 *Law, Democracy & Development* 171.

²¹⁰Article 31 of the African Disability Protocol.

²¹¹ General Comment No. 5 (n 36 above), p7.

rights of PWDS, the right to independent living can only be inferred from other general provisions in the Constitution. It has been noted that the Constitution does not provide for a specific standalone right to independent living as envisaged in the CRPD and the African Disability Protocol.

It has also been indicated that all the enabling disability-related legislation predates both the CRPD and the Constitution. The legislation was modelled along with the outdated Medical Model of disability. The Mental Health Act was actually promulgated to further the involuntary detention of PWPDs and sometimes indefinitely. Women with psycho-social disabilities are exposed to sterilisation against their will and are also exposed to sexual and physical abuse. PWPDs are also exposed to mechanical restraints in violation of their human rights.

It has also been noted that the Disabled Persons Act is outdated and Zimbabwe is in the process of aligning this Act with the CRPD. It does not have a provision for the right to independent living for PWPDs and views PWDs from a medical and social welfare perspective as it provides for the provision of the welfare and rehabilitation of PWDs.

In addition, it has been pointed out that while the Social Welfare Assistance Act makes provision for the granting of social welfare assistance to PWDs, the Act was promulgated with the misconception that disability is always associated with poverty. Despite the fact that it is a requirement in terms of Article 19 of the CRPD for States Parties to provide support services to PWDs, it has been indicated that the assistance envisaged by the CRPD does not include treating PWDs as objects of charity.

There is thus a need to amend the Zimbabwean legal framework and align it with the CRPD in order for disability rights and the right to independent living for PWPDs to become a reality.

The subsequent Chapter is a comparative Chapter. It contains a comparative analysis of how other jurisdictions have grappled with the right to independent living. The aim of this chapter is to draw inspiration from international best practices. The jurisprudence developed in the Republic of Tanzania on the right to independent living for PWPDs is employed for this purpose. Tanzanian legislation to be considered includes the Tanzanian Constitution, 1977 as amended, the Persons with Disabilities Act, 2010 as well as the Mental Health Act, 2008.

CHAPTER 4

4.1. Introduction

In the preceding chapter, it was revealed that Zimbabwe's legislative provisions are still lagging behind in as far as realisation of the right to independent living for PWPDS is concerned. The Constitution of Zimbabwe is an improvement with regard to the realisation of the rights of PWPDS in general. However, whilst the right to independent living can only be inferred from other general provisions in the Constitution, the Constitution does not provide for a specific standalone right to independent living as envisaged in the CRPD. Furthermore, all the enabling disability-related legislation predates both the CRPD and the Constitution.

It has been argued that the CRPD bears an 'African' imprint through its emphasis on the links between disability, poverty, and development.²¹² On the 30th March 2007, the date the CRPD opened for signatures, sixteen African countries signed the CRPD and 34 countries had ratified the Convention.²¹³

It has been said that the development of disability rights in the African human rights system was progressing at a slower pace as compared to its European and Inter- American counterparts.²¹⁴ Tanzania was specifically chosen in this study because it has related financial circumstances and economic development with that of Zimbabwe.

Tanzania is a political union of two semi-autonomous entities, the mainland area of Tanzania and the islands of Zanzibar. Tanzania signed and ratified the CRPD on the 30th March 2007 and 10th November 2009 respectively, and the Optional Protocol to the CRPD on the 29th September 2008 and 10th November 2009.²¹⁵ Tanzania is also a State Party to the African

²¹²PT van Reenen and H. Combrinck (32 above) 142.

²¹³UN Enable Convention and Protocol Signatures and Ratifications, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (accessed on the 2nd July 2019).

²¹⁴ PT van Reenen and H. Combrinck (n 32 above) 133.

²¹⁵UN Enable (n 213 above).

Charter, African Disability Protocol as well as several UN Human Rights Conventions and is thus advanced on the protection of human rights. The 2017 Foundation for Civil Society Report for Tanzania²¹⁶ notes that the promptness in ratifying the convention was a good sign of Tanzania's readiness to implement the international obligations on disability rights.

The Tanzanian Constitution was promulgated in 1977 and has gone through several amendments to date. Tanzania went through a constitutional reform process and it was due to have a new Constitution in 2015 but unfortunately, it was rejected due to the procedural irregularities which were inherent in the process. Despite the fact that the Tanzanian Constitution was enacted prior to the CRPD, Tanzania enacted a comprehensive disability law in terms of its Persons with Disabilities Act and the Mental Health Act.

The Tanzanian Persons with Disabilities Act, 2010 (TPDA) has been described by PT van Reenen and H. Combrinck²¹⁷ as an ambitious document. The Act shows that Tanzania is on the right track in as far as realisation of rights for PWDs in general and the right to independent living for PWPDs in particular is concerned. This is the main legislative document providing for rights of PWDs in Tanzania which also provide for the right to live independently for PWPDs in terms of section 15 of the Act.

Furthermore, the Tanzanian Mental Health Act (TMHA) which came into force on the 6th December 2008 is also in line with the CRPD and is a human rights-based document. It provides for the care, protection, and management of PWPDs and provides for their voluntary or involuntary admission in mental health care facilities. There is no room for indefinite admission of PWPDs and it does not also provide for any detention but admission of PWPDs.

²¹⁶ Foundation for Civil Society, *Implementation Status of the UN Convention on Rights of Persons with Disabilities (2006) Report, Tanzania (2017)* 14.

²¹⁷ PT van Reenen and H. Combrinck (n 32 above) 151.

This is quite different from the ZMHA, which was actually promulgated to detain persons with mental health disabilities and the detention can be indefinite.

4.2. Tanzanian Legal Framework

4.2.1. Tanzanian Constitution

The Tanzanian Constitution came into force in 1977 and thus it predates the CRPD. Although the Tanzanian Constitution does not specifically provide disability as a ground for discrimination, it proscribes discrimination in any law, policy or practice.²¹⁸ Furthermore, section 13(2) of the Constitution addresses equality before the law. The Zimbabwe Constitution has a similar provision. Tanzania went through a constitutional reform process and it was due to have a new Constitution in 2015 but unfortunately, it was rejected due to the procedural irregularities which were inherent in the process. Despite the fact that the Tanzanian Constitution was enacted prior to the CRPD, Tanzania enacted a comprehensive disability law in terms of its TPDA and the TMHA. All these Acts have provisions that either expressly provides for the right to independent living for PWPDS or enhance and safeguard elements of independent living such as the prohibition of forced institutionalisation, community-based rehabilitation, and mainstream community services.

Furthermore, The Draft Tanzanian Constitution of 2014 includes the rights of PWDS. Article 44 provides that PWDs have the right to be respected, recognised and treated in a way that does not lower their dignity. Such a provision would be handy for the implementation of the right to independent living of PWPDS. In addition, Article 52(f) of the Draft Constitution accords PWDs' right to rehabilitation and social integration in conformity with Article 19 of the CRPD. Since Tanzania is yet to enact its new Constitution after the CRPD, best

²¹⁸Section 13(2) of the Constitution of Tanzania.

international practices appear in the Tanzanian subsidiary legislation which complements the provisions of the Constitution.

4.2.2. The Persons with Disabilities Act, 2010

Tanzania enacted a comprehensive disability law in 2010 entitled the ‘Persons with Disabilities Act’ (TPDA). This title resonates well with the CRPD in as far as terminology is concerned, unlike Zimbabwe’s DPA which refers to PWDs as ‘disabled.’ The Act was enacted to make provisions for the health care, social support, accessibility, rehabilitation, education, and vocational training, communication, employment or work protection and promotion of basic rights for persons with disabilities and to provide related matters.²¹⁹ The definition of a ‘person with a disability’ is almost similar to that provided in the CRPD.²²⁰ Just like the CRPD, the TPDA recognises the Human Rights Model of disability in the definition. Any reference to PWDs in the TPDA also refers to PWPDs as the definition includes persons with mental disabilities.

According to E. M Chilemba,²²¹ the definition of a ‘person with disability’ in the TPDA follows the social and human rights models and thus the Act complies with the CRPD on the conceptualisation of disability and persons with disabilities. The CRPD Committee in its Concluding observations on Seychelles recommended that there was a need for the State Party to promote and defend a human rights model to disability and eliminate the use of all derogatory language in laws and when referring to PWDs.²²²

²¹⁹See the Preamble to the TPDA.

²²⁰See Article 3 of the TPDA and Article 1 of the CRPD.

²²¹ E. M Chilemba ‘Disability Rights and emerging Disability Legislation in selected African jurisdictions: A diagnostic Commentary’ (2015) Vol 3 *African Disability Rights Yearbook* 301.

²²²CRPD Committee, Concluding Observations on Seychelles CRPD/C/SYC/CO/1.

Furthermore, just like the CRPD, the Act provides for almost all the General Principles provided for in the CRPD. Shughuru²²³ notes that the TPDA in general and the principles set therein reflects in various provisions the CRPD. The objectives of the Act also mirror the CRPD to a greater extent.²²⁴ There are no such provisions in either the Zimbabwean Constitution or the DPA.

Unlike the DPA, the TPDA was described by Pieter Van Reenen and Helen Combrinck as an Act clearly inspired by the CRPD²²⁵ as several positions follow the CRPD verbatim. In as far as the right to independent living is concerned, unlike the Zimbabwean laws, the Act provides for a standalone section providing for independent living. Article 15 (1) of the Act provides for the right of PWDs to live as independently as possible and to be integrated into the community.

In its concluding observations on Haiti, the CRPD Committee²²⁶ urged Haiti to ensure the right to independent living is included as a subjective right including the enforceability of all its elements. Seychelles was also urged to expressly recognise in its legislation the right of PWDs to choose with whom and where they wish to live.²²⁷

The TPDA further provides that PWDs shall not be forced to live in an institution or in a particular living arrangement including settlement for persons in need of special protection.²²⁸

The Act is very clear on the point that living in a settlement can only happen with the consent of the PWD in question. This is in line with the right to independent living as provided for under Article 19 of the CRPD and Article 14 of the African Disability Protocol. On the other hand, in Zimbabwe, detention of PWDs in psychiatric institutions is always involuntary and

²²³ P.J Shughuru 'Tanzania Report' (2013) Vol 1 *African Disability Rights Yearbook* 345.

²²⁴ Article 5(1) of the TPDA as read with Article 4(1) of the CRPD.

²²⁵ PT. van Reenen and H. Combrinck (n 32 above) 133.

²²⁶ CRPD Committee Concluding Observations on Haiti CRPD/C/HTI/CO/1.

²²⁷ CRPD Committee (n 222 above).

²²⁸ Section 15 (2) of the TPDA.

consent of PWDs in question is not sought. In its Concluding Observations on Cyprus, the Committee urged the State party to redirect resources allocated to institutionalisation and redirect them to community-based services.²²⁹

Dissimilar to Zimbabwe, support for PWDs in Tanzania is further provided for in Article 3 of the Act wherein the Minister and the Council is mandated to make regulations and take measures to enable PWDs to live independently and fully integrated into the community. The measures include the provision of equal opportunities for all PWDs to choose their place of residence and living arrangements and availability of community services without discrimination to PWDs.

In addition, the Act also mandates the Minister and Council to ensure accessibility to a wide range of community-based rehabilitation and inclusion services such as in-house, residential and other community support services including personal assistance necessary for living and integration in the community.²³⁰ There is no provision for community-based rehabilitation under Zimbabwean laws in violation of the right to independent living as enshrined under Article 19 of the CRPD.

The provision of mental health care facilities is pivotal for PWDs in their realisation of the right to independent living. Many countries like Zimbabwe make these services available only in hospitals and institutions thus forcing PWDs to live in institutions in order for them to access health care facilities. The TPDA provides that basic facilities essential for health and rehabilitation services needed by PWDs shall be made available in their respective

²²⁹ Concluding Observations on Cyprus CRPD/C/CYP/CO/1.

²³⁰ Section 19(1) of the Act.

locations.²³¹ Accessibility to mainstream community services by PWDs on an equal basis with others is in line with section 19(c) of the CRPD.

Furthermore, the issue of consent is fundamental for PWPDs. Many PWPDs are treated and forced to live in institutions without their consent. Unlike in Zimbabwe, section 26 (4) (b) of TPDA mandates the Minister to ensure that health and rehabilitation services provided to PWDs are only made after the person concerned has been given his free and informed consent. Health professionals are also entitled to inform PWDs of their rights before they get the treatment or rehabilitation concerned.

Additionally, unlike in Zimbabwe, the Act further establishes the National Advisory Council²³² for PWDs in line with Article 33 of the CRPD. This Council as the national disability body responsible for the implementation and coordination of disability rights in Tanzania is in accordance with the standards of the CRPD.²³³ According to the Foundation for Civil Society's 2017 Report on Tanzania²³⁴, the TPDA embodies a lot of CRPD's contents in its local context, apart from specific rights and duties on disability; the Act establishes implementing mechanisms including the advisory council in response to Article 33 of the CRPD.

Thus, all in all, unlike in Zimbabwe, the TPDA takes a rights-based approach in as far as the right of PWPDs to live independently in the community is concerned. Just like the CRPD, the TPDA provides for a standalone right on independent living for PWDs in general and PWPDs in particular as they are the ones mostly affected by institutionalisation. The Act mirrors the CRPD in various ways. Zimbabwe has a lot to learn from Tanzania in this regard.

²³¹Section 26 (3) (b) of the Act.

²³² Section 7 of the TPDA.

²³³ E. M Chilemba (n 221 above) 302.

²³⁴ Foundation for Civil Society (n 216 above) 1.

SM Uromi and MI Mazangwa²³⁵ describe the TPDA as a law of its kind probably in the whole of the East African Region.

4.2.3. The Mental Health Act, 2008

The Tanzanian Mental Health Act (TMHA) came into force on the 6th of December 2008. It came after the CRPD and after Tanzania had signed the CRPD. It is an Act ‘to provide for the care, protection, and management of persons with mental disorders and to provide for their voluntary or involuntary admission in mental health care facility...’²³⁶This is quite different from the ZMHA, which was actually promulgated to detain persons with mental health disabilities and the detention can be for treatment and non-treatment purposes.²³⁷This promotes detention of PWDs in some cases, for life in violation of Article 19 of the CRPD.

Health care is defined in the TMHA under the interpretation section as a ‘diagnostic or therapeutic interventions for the benefit of health and includes institutions- based treatment, community-based treatment and social- rehabilitation.’²³⁸ This introduction in the Act of community- based treatment is pivotal in the realisation of the right to independent living for PWDs as it gives them a choice instead of only confining health care services to hospitals and institutions as with the Zimbabwean position. According to Article 19(a) of the CRPD, to choose and decide upon how and where and with whom to live is the central idea of the right to independent living. The CRPD Committee²³⁹ noted that often PWDs cannot exercise choice because there is a lack of options to choose from. This is the case in Zimbabwe wherein support and healthcare facilities are unavailable outside institutions. Community-based treatment and social rehabilitation are alien in the ZMHA.

²³⁵ SM Uromi & MI Mazangwa (n 15 above) 158.

²³⁶ Preamble to the TMHA.

²³⁷ Preamble to the ZMHA.

²³⁸ Section 3 of the TMHA.

²³⁹ General Comment No. 5 (n 36 above).

The TMHA provides for voluntary admission into mental health institutions for PWPDS²⁴⁰ as well as involuntary admission under limited circumstances.²⁴¹ The ZMHA, on the other hand, has no provision for voluntary admission of PWPDS. The consent of PWPDS is never sought before and during their detention. This is premised on the old welfare or Medical Model of disability which views PWPDS as people who lack legal capacity to make their own decisions. Felicity K. Kalunga and Chipso M. Nkhata²⁴² note that the right to health protected under Article 25 of the CRPD entitles PWPDS to make informed choices about their treatment, including admission to hospitals for such treatment. They further state that this right to health is enhanced by Article 19 of the CRPD, in particular the right to community support services and access to community services (including medical services) on a basis of equality with others.²⁴³

Also, the CRPD Committee²⁴⁴ picked the right to legal capacity, in line with the Committee's General Comment No. 1 on equal recognition before the law as one of the core elements of Article 19 of the CRPD. The Committee earlier had stated that the denial of legal capacity to PWPDS and their detention in health facilities without their informed consent constitute a violation of their rights, including their right to liberty protected under Articles 12 and 14 of the CRPD.²⁴⁵ Thus, unlike Zimbabwe, Tanzania promotes the right to independent living through voluntary admission as opposed to involuntary detention obtaining in Zimbabwe.

Section 11 (3) of the TMHA states that a person shall not be admitted to a mental health care facility in accordance with the involuntary admission provision for a period exceeding ninety

²⁴⁰Part II of the TMHA.

²⁴¹Section 11 of the TMHA.

²⁴²FK Kalunga & CM Nkhata 'Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of Gordon Maddox Mwena & Others v Attorney –General & Another' (2018) Vol 6 *African Disability Rights Yearbook* 73.

²⁴³FK Kalunga & CM Nkhata (n242 above) 73.

²⁴⁴General Comment No. 5 (n 36 above).

²⁴⁵General Comment No. 1 (n164 above) para 1 & 11.

days. On the other hand in terms of the ZMHA detention can be indefinite.²⁴⁶ What is further striking is that unlike under the ZMHA, the TMHA does not provide for detention but rather an admission for purposes of obtaining mental health care services.²⁴⁷ In Zimbabwe the detention can be for both treatment as well as non-treatment purposes and sometimes the detention can be indefinite. This promotes continued institutionalisation of PWPDs in violation of Article 19 of the CRPD.

In addition to this, the TMHA provides for outpatient care facilities.²⁴⁸ There is also a provision for community-based treatment and rehabilitation as well as social support²⁴⁹ in the communities for PWPDs in line with the principle of independent living. In Tanzania, unlike in Zimbabwe, admission into a mental health institution is not the only available option in line with the CRPD. On the other hand, in Zimbabwe, that is the main available option even for after-care purposes especially considering that there is no social support and community-based rehabilitation programmes.

Furthermore, in keeping with the spirit of the CRPD, unlike the ZMHA, the TMHA embraces a human rights approach to the health care services for PWPDs with the view to promote their autonomy and dignity.²⁵⁰ Personnel taking care of PWPDs are mandated to observe the rights of these people.²⁵¹ It is a criminal offence in terms of the Act for one to participate in the wrongful admission of someone in a mental health institution.²⁵² Cruelty, abuse or neglect, as well as violation of rights of PWPDs, also attract criminal law sanctions.²⁵³ On the other hand in Zimbabwe rights for PWPDs and women, in particular, continue to be violated.

²⁴⁶ Section 18 and 30 of the Zimbabwe Mental Health Act.

²⁴⁷ Section 4 (1) of the TMHA.

²⁴⁸ Section 4 (4) of the TMHA.

²⁴⁹ Section 9(2) of the TMHA.

²⁵⁰ Article 3(a) of the CRPD.

²⁵¹ Section 28(1) of the Act.

²⁵² Section 37(a) and 27(3) of the TMHA.

²⁵³ Section 37(c) of the TMHA.

Section 113 of the ZMHA allows the Minister to approve some mechanical means of restraint towards PWPDs as well as sterilisation of female PWPDs and once again there is no provision to seek their consent.²⁵⁴ Additionally in terms of the TMHA, the right to appeal against any order by the Court, unlike in the ZMHA, is unconditionally guaranteed and the procedure is the same as with other appeals in civil suits²⁵⁵

The TMHA²⁵⁶ is also outstanding in its recognition of PWDs, their organisations, nongovernmental organisations and the community at large in as far as rehabilitation of PWPDs is concerned.²⁵⁷ E. Kamundia²⁵⁸ commended the TMHA on this regard and said that the TMHA is consistent with the CRPD by requiring that persons with disabilities participate in planning, delivering, monitoring and evaluation of health and rehabilitation services. There are no such provisions in the ZMHA.

In terms of section 28(3) of the TMHA, every mental health facility is required to put in place measures to ensure family, non-governmental organisations and community involvement in the care of PWPDs.²⁵⁹ Unlike the ZMHA, the TMHA further mandates the Minister to make regulations for the better carrying out of the provisions of the Act prescribing among other things the manner in which the community can be involved in the care of PWPDs.²⁶⁰

Accessibility to community-based rehabilitation and services is a requirement and an element of the right to independent living. The CRPD Committee noted that States Parties have an obligation to develop transitional plans in consultation directly with PWDs, through their

²⁵⁴Section 110A of the Mental Health Act.

²⁵⁵Section 15(1) of the TMHA.

²⁵⁶Section 26(4) (d) of the TMHA.

²⁵⁷Article 4 (3) of the CRPD.

²⁵⁸E. Kamundia 'Regional developments: The right to the highest attainable standard of mental health in selected African countries: A commentary on how selected mental health laws fare against article 25 of the Convention on the Rights of Persons with Disabilities' (2017)Vol 5 *African Disability Rights Yearbook* 200.

²⁵⁹See also section 31(1) (c) of the TMHA.

²⁶⁰Section 38(k) of the TMHA.

representative organisations in order to ensure full inclusion of PWDs in the community.²⁶¹ Dissimilar to the position in Zimbabwe, the TMHA recognises that PWPDs may require support in living in the community in line with the CRPD.²⁶²

All in all, the Tanzanian Mental Health Act takes a rights-based approach in the area of provision of mental health care to PWPDs, thereby protecting their right to independent living. The Act came into force in 2008 and it mirrors the CRPD in various ways. Zimbabwe can learn a lot from Tanzania in this regard.

4.3. Conclusion

It has been indicated that the Tanzanian legal framework has made strides to comply with the CRPD on the realisation of the right to independent living for PWPDs. Despite the fact that the Tanzanian Constitution was enacted prior to the CRPD, Tanzania enacted a comprehensive disability law in terms of its Persons with Disabilities Act and the Mental Health Act. Both these Acts have provisions that either expressly provide for the right to independent living for PWPDs or enhance and safeguard elements of independent living such as the prohibition of forced institutionalisation, community-based rehabilitation, and mainstream community services.

It has been established that unlike Zimbabwe the terminology used in the TPDA and its definition of a ‘person with a disability’ mirrors the CRPD. Also, just like the CRPD and unlike Zimbabwe, the TPDA recognises the human rights model of disability in the definition and its provisions. The TPDA has been described as a progressive document. The Act shows that Tanzania is on the right track in as far as realisation of rights for PWDs in general and the right to independent living for PWPDs is concerned. This is the main legislative

²⁶¹General Comment No. 5 (n 36 above).

²⁶²E. Kamundia (n 258 above) 201.

document providing for rights of PWDs in Tanzania which also provides for a standalone right to live independently for PWPDs.

It has further been noted that the TPDA has provisions for the admission of PWPDs and the admission is mainly voluntary unlike in Zimbabwe where there is detention and the detention is always involuntary and sometimes indefinitely. The Act is very clear on the point that living in a settlement can only happen with the consent of the persons with disability in question. This is in line with the right to independent living as provided for under Article 19 of the CRPD and Article 14 of the African Disability Protocol.

It has been illustrated that the TPDA establishes effective institutional mechanisms for the implementation of the rights of PWDs. Unlike the Zimbabwean Act which creates institutions without any power and authority, the Tanzanian legal framework²⁶³ substantially complies with the expectations of the CRPD.²⁶⁴

It has also been observed that the TMHA is also in line with the CRPD and is a human rights-based document. It provides for the care, protection, and management of persons with mental disorders and mainly provides for their voluntary admission in mental health care facilities. There is no room for indefinite admission of PWPDs and it does also not provide for any detention but admission of PWPDs. This is quite different from the Zimbabwean Mental Health Act, which was actually promulgated to detain persons with mental health disabilities and the detention can be indefinite contrary to the right to independent living.

It has been ascertained that the TMHA provides for the community- based treatment which is pivotal in the realisation of the right to independent living for PWPDs as it gives them a choice instead of only confining health care services to hospitals and institutions as with the

²⁶³ Section 8(1) of the TPDA.

²⁶⁴ Article 33 of the CRPD.

Zimbabwean position. According to Article 19(a) of the CRPD, to choose and decide upon how and where and with whom to live is the central idea of the right to independent living.

The next chapter is the concluding Chapter of the research. Informed by the deliberations in the preceding chapters, the research provides a summary of the research findings. Drawing from international best practices discussed in the current Chapter, specific and general recommendations on how to make the right to independent living a living reality is proffered. Finally, the Chapter concludes the study.

CHAPTER 5

5.1. Introduction

The previous Chapter explored the Tanzanian legal framework regarding the right to independent living for PWPDs. Tanzania has a more advanced legal framework in the protection and promotion of the right to independent living for PWPDs. Tanzania enacted a comprehensive disability law in terms of its Persons with Disabilities Act and the Mental Health Act.

The TPDA resonates well with the CRPD in many respects. In as far as terminology and definition of disability are concerned, unlike the DPA which refers to PWDs as disabled, the TPDA mirrors the CRPD. Terminology is an important factor for the realisation of disability rights including the right to independent living.²⁶⁵

The TPDA²⁶⁶ provides for a standalone right to independent living for PWPDs by saying that PWDs should live as independently as possible and must be integrated into the community. The Act also provides for accessibility to community rehabilitation and inclusion services as opposed to institutionalisation obtaining in the Zimbabwean legal framework.

The TMHA is also human rights-based. Unlike the ZMHA, it does not provide for the detention of PWPDs but rather their admission. The admission is also mainly voluntary as opposed to the Zimbabwean position where the consent of PWPDs is not sought before their detention. The introduction in the Act of community-based treatment and social rehabilitation resonates well with Article 19 of the CRPD. The Tanzanian legal framework is thus advanced in as far as the protection of the right to independent living for PWPDs is concerned.

²⁶⁵ E. Mandipa (n 193 above) 42.

²⁶⁶ Section 15(1) of the TPDA.

On the other hand, the Zimbabwe legal framework is inadequate as far as the realisation of the right to independent living for PWPDs is concerned. The Constitution is silent on this matter. Zimbabwe's enabling and disability related legislation predates both the Constitution and the CRPD and is yet to be aligned to the CRPD. There is thus a need to amend the Constitution of Zimbabwe, repeal the DPA and amend the ZMHA and the SWAA.

For the Constitution, section 22 and section 83 should be amended so that the definition of disability is not restricted to mean physical and mental disabilities only. A holistic concept of disability is needed. Section 83 should also be amended and widened to specifically provide for the right to independent living for PWDs generally and in particular PWPDs. The Zimbabwean Constitution should also follow the Tanzanian position wherein limitation to the enjoyment of disability rights is subjected to the maximum of the available resources in line with the CRPD. Section 121 of the Constitution and the Fourth Schedule should also be amended so that PWPDs are not discriminated against when it comes to voting. Women with psychosocial disabilities and those with disabilities, in general, suffer from multiple and intersecting forms of discrimination²⁶⁷ and there is a need to amend the Constitution so that the rights of women with disabilities are adequately protected.

With regard to the DPA, the statute fails to adequately protect the rights of PWDs and in particular the right to independent living for PWPDs. The Act is outdated as it predates both the Constitution and the CRPD. The title itself is unpleasant and encourages the medical and welfare model of disability. In fact, the Act does not create any rights that can be enforced in terms of the law.

Zimbabwe has begun to correct this through the Persons with Disabilities Bill, 2019. The Bill mirrors the CRPD in many respects and it specifically provides for the right to independent

²⁶⁷Unpublished: A Roomaney, 'Assessing the right to physical access to justice, for persons with disabilities' Unpublished LLM thesis, University of the Western Cape, (2017) 58.

living for PWDs just like the TPDA. There is thus a need to repeal the entire Act and adopt the Persons with Disabilities Bill, 2019 into law.

Furthermore, the ZMHA is considered as the principal legal framework for PWPDs. Unfortunately, the Act, unlike the TMHA, predates the CRPD and is also not a human rights-based document. There is a need to amend the Act to allow for voluntary admission instead of involuntary detention contrary to Article 25 and 19 of the CRPD. The terminology used in the Act which is derogatory should be removed and replaced with more acceptable terms. The Act should also be amended so that the provision of mental health care is not tied to institutions. For those voluntarily admitted to institutions, their rights should be guaranteed. There is thus a need to amend the ZMHA so that it is aligned to the CRPD.

With regards to the Social Welfare Assistance Act, there is need to amend the Act so that the provision of personalised support services in the community, as well as accessibility to mainstream community services for PWPDs, is guaranteed in line with Article 19 of the CRPD. Reference to PWDs as destitute or indigent persons should also be removed from the Act as this depicts PWDs as objects of welfare and not subjects of rights contrary to the human rights model of disability.

There is also a need for awareness and education on the rights of PWDs involving all sectors of society. Furthermore, a Disability Policy and general regulations will further assist in giving political direction to the powers that be and this will also inevitably influence the disability legal framework in the country.

5.2. Summary of Research Findings

It has been indicated that the Constitution of Zimbabwe does not provide for a specific right to independent living. While rights of PWDs are protected under section 83 of the Constitution, this section is too narrow. It has failed to elaborate and provide for the rights of

PWPDs to independent living as a standalone right as provided for in Article 19 of the CRPD. Another challenge is that section 83 makes realisation of economic, social and cultural rights of PWDs dependent upon resources that are available to the state. This is contrary to Article 4 of the CRPD which obligates States Parties to take measures to the maximum of their available resources for the progressive realisation of these rights. Section 83 further does not embrace a holistic concept of disability.

Furthermore, the DPA is inadequate in the sense that it is archaic and predates both the Constitution and the CRPD. The title of the statute itself is unpleasant and encourages the medical and welfare model of disability with regards to the protection of the rights of PWDs. There is no reference whatsoever to the rights of PWDs and thus does very little as the primary enactment which should be dealing with rights of PWDs. Also, the definition of a “disabled person” is now out-of-date in that it fails to capture that disability is not only limited to impairments but also to barriers caused by both attitudinal and environmental factors.²⁶⁸ In addition, the Act creates toothless institutions which are not well resourced and not independent contrary to Article 33 of the CRPD.

In the same vein, the ZMHA is also outdated and follows the medical model of disability. It predates both the Constitution and the CRPD. The Mental Health Act was actually promulgated to further detention of PWPDs and in some instances the detention is indefinite. Detention of PWPDs especially against their will and failure to provide for community-based rehabilitation flies in the face of the right to independent living as provided for under Article 19 of the CRPD. The other weakness is that the terminology used in this Act is derogatory and discriminatory. The Act does not provide for the right of PWPDs to independent living and instead furthers violation of rights of PWPDs through involuntary sterilisation as well as mechanical restraints of PWPDs against their will.

²⁶⁸ E. Mandipa (n 193 above)42

It has been noted that the Social Welfare Assistance Act makes provision for the granting of social welfare assistance to ‘destitute or indigent persons.’ Thus, the Act was promulgated with the misconception that disability is always associated with poverty. While it is a requirement in terms of Article 19 of the CRPD for States parties to provide support services to PWDs, the assistance envisaged by the CRPD does not include treating PWDs as objects of charity.

On a comparative basis, the Zimbabwean legal framework has gaps and the Tanzanian legal framework is more advanced with the TPDA providing expressly for a standalone right to independent living.²⁶⁹ Notwithstanding that Zimbabwe ratified the CRPD and adopted a new Constitution in 2013, its legislative provisions are still lagging behind in as far as realisation of the right to independent living for PWDs is concerned. The enabling disability-related legislation predates both the CRPD and the Constitution. While it is noted that the Constitution of Zimbabwe is an improvement with regards to the realisation of rights of PWDs, the Constitution and its enabling legislation do not provide for a specific standalone right to independent living as envisaged in the CRPD and the African Disability Protocol.

In light of the above findings, the following specific and general recommendations are made.

5.3. Specific Recommendations

5.3.1. Amendment of the Constitution

While section 83 of the Constitution shows a Constitutional commitment by Zimbabwe to address some of the major barriers of the equality of PWDs it failed to elaborate and provide for the right of PWDs and in particular PWDs to independent living and living in the community as a standalone right as provided for under Article 19 of the CRPD and Article 14

²⁶⁹ Section 15 of the TPDA.

of the African Disability Protocol. It should be amended and the right to independent living expressly provided.

The Constitution should also be amended to provide that the State has a duty to ensure the progressive realisation of such rights. It should be consistent with the provisions of the CRPD which obligates States Parties to take measures to the maximum of their available resources for the progressive realisation of these rights.²⁷⁰

Furthermore, section 83 just like section 22 does not embrace a holistic concept of disability to differentiate psycho-social disabilities from intellectual disabilities and it does not also include other forms of disability such as sensory disabilities and disfigurements. These sections should be amended to be consistent with Article 1 of the CRPD.

Also, section 121(4) (a) of the Constitution and section 2 of the Fourth Schedule of the Constitution disallows PWDs detained in institutions to be registered voters in violation of Article 29 of the CRPD. This should be removed and a clear position stated that PWDs should be allowed to exercise their political rights on an equal basis with others. The right to independent living also entails the enjoyment of political rights on an equal basis with others.²⁷¹

Furthermore, the Constitution, in general, does not address the plight of women and girls with disabilities who suffer double and sometimes triple discrimination, contrary to Article 6 and 7 of the CRPD. Women with psychosocial disabilities suffer the most in institutions and outside as compared to their male counterparts as they are exposed to sexual abuse.²⁷² The Constitution should have realised this predicament faced by women and girls and hence section 83 should expressly provide for the protection of women and girls with disabilities.

²⁷⁰ Article 4(2) of the CRPD.

²⁷¹ Article 29 of the CRPD.

²⁷² CRPD Committee (n70 above) para 10.

5.3.2. Repeal and substitution of the Disabled Persons Act

The Disabled Persons Act is archaic and hence should be repealed and be replaced by a fresh statute. The new statute must have a human rights-based approach and its name must not be derogatory in line with the CRPD as was done by Tanzania on its Persons with Disabilities Act. Furthermore, just like the Tanzanian Persons with Disability Act, the Act ought to include the right to independent living and community living as a standalone and enforceable right. The Zimbabwe Persons with Disabilities Bill, 2019 if passed into law will be compliant with the CRPD and hence there is a need to move with speed and have the Bill enacted into law.

Firstly, the definition of a person with a disability provided in the Bill mirrors that of the CRPD. Also, it has been noted that the principles of equality and non-discrimination are at the heart of the CRPD and hence are crucial for the realisation of the right to independent living for PWDs.²⁷³ Section 22 of the Bill provides for the right to equality and non-discrimination. Tied to the principles of equality and non-discrimination is the principle of reasonable accommodation. The Bill provides for this concept²⁷⁴ and the definition also mirrors the one provided for in the CRPD.²⁷⁵ Furthermore, just like in the CRPD, the Bill provides for a standalone provision for the protection of women and girls with disabilities.²⁷⁶ Accessibility forms part of the elements of the right to independent living and is also both a principle and a standalone right in the CRPD.²⁷⁷ Section 23 of the Bill which mirrors the CRPD seeks to provide for this right if successfully enacted into law. In line with the

²⁷³General Comment No. 5 (n36 above) p 14.

²⁷⁴ Section 2 of the Bill.

²⁷⁵ Article 2 of the CRPD.

²⁷⁶ Article 25 of the Bill.

²⁷⁷ Article 3(f) and Article 9 of the CRPD.

provisions in the CRPD, the Bill goes on to provide in unequivocal terms a standalone right to independent living.²⁷⁸

5.3.3. Amendment of the Mental Health Act.

The CRPD Committee recommended that state parties should take the necessary steps to repeal legislation restricting the right of PWDs to free and informed consent²⁷⁹ as well as enact laws which explicitly recognise the right of the individual to free and informed consent and prohibits the substitution of consent by a third party.²⁸⁰ The Mental Health Act should expressly provide for community-based rehabilitation, personalised as well as community support services²⁸¹ and some Regulations in terms of the Act to provide a clear road map on funding as well as deinstitutionalisation strategy. The terminology used should also be aligned with the CRPD.

5.3.4. Amendment of the Social Welfare Assistance Act

The statute follows the outdated medical model of disability which depicts PWDs as objects of welfare and not subjects with legal rights.²⁸² It should be amended to capture principles underlying the CRPD which include respect for independence of PWDs, individual autonomy, inherent dignity, and full and effective participation and inclusion in society. The terminology used must be aligned to the CRPD. The Act should also be amended to include supported housing models in line with Article 19 of the CRPD.

²⁷⁸Article 34 of the Bill.

²⁷⁹CRPD Committee, Concluding Observations on the initial report of Gabon CRPD/C/GAB/CO/1 para 57.

²⁸⁰CRPD Committee (n279 above).

²⁸¹CRPD Committee, Concluding Observations on Argentina, CRPD/C/ARG/CO/1/2012, para. 34.

²⁸²G. Quinn & T. Degener (n 64above) 1.

5.4. General Recommendations

5.4.1. Domestication and Implementation of the CRPD

In terms of the Zimbabwean Constitution, the dual legal system is an impediment as it requires a Convention to be domesticated before binding the state.²⁸³ There is thus a need to have the CRPD domesticated and adopted as part of the Zimbabwean legal framework. Thereafter, there is a need for the full implementation of the legislation. Domestication and implementation of the CRPD would be in line with the expected promotion and protection of fundamental rights. As was opined by Rasmussen and Lewis²⁸⁴ States Parties must take action domestically to implement the Convention and make its rights a reality. After all, human rights don't happen on paper, not even on Braille.²⁸⁵

5.4.2. Awareness-raising

The rights of PWDs constitute fundamental human rights. States Parties and private persons are obliged to promote and protect the same. In terms of Article 8 of the CRPD, there is a need for awareness raising and culture change for full realisation of the rights.

5.4.3. Adoption of a National Disability Policy

In terms of Article 4 of the CRPD adoption of a concrete National Disability Policy provides direction of the implementation of rights and enactment of new statutes. In addition, there is a need for Regulations to be adopted for the direction and implementation of the provisions contained in the broader Statutes. With regard to this issue, there is also a need to involve PWDs, their representatives and their families in their preparation.²⁸⁶

²⁸³ Section 327 of the Constitution of Zimbabwe.

²⁸⁴ M. Rasmussen and O. Lewis 'Introductory note to the United Nations Convention on the Rights of Persons with Disabilities' (2007) Vol 46 *International Legal Matters* 442.

²⁸⁵ M. Rasmussen and O. Lewis (n 284 above) p 442.

²⁸⁶ CRPD Committee , Concluding Observations on Belgium, CRPD/CBEL/CO/1, 2014, para 33.

5.5. Conclusion

The problem identified in this research is that despite the international obligations assumed under the CRPD, Zimbabwe as a state Party to the CRPD has no laws expressly providing for the right to independent living for PWPDs. This is contrary to Article 19 of the CRPD as well as Article 14 of the African Disability Protocol. The Zimbabwean Constitution does not have a standalone right to independent living. Other Acts affecting PWPDs such as the Mental Health Act, the Disabled Persons Act and the Social Welfare Assistance Act predate the CRPD and do not have a human rights approach to disability.

The right to independent living is provided for in terms of Article 19 of the CRPD. It refers to PWPDs being able to live in their local communities as equal citizens, with the support that they need to participate in every –day life.²⁸⁷ Furthermore, this right provides that States Parties should ensure PWPDs have the same choice, control and freedom as any other citizen and thus any assistance given to PWPDs should be based on their own choices and aspirations. Independent living involves a process of deinstitutionalisation and hence the right to independent living is important as it is related to the enjoyment of other rights like employment and political participation. States Parties should provide explicit and formal recognition of the right, principally by including it in their national legislation in a legislative framework which clearly establishes it as a legal right with a remedy in case of violation.²⁸⁸

The major challenge is that whilst the Constitution contains some improvements with regards to the realisation of the rights of PWDs in general when it comes to the right to independent living for PWPDs, it is silent. This right can only be inferred from the other general provisions in the Constitution such as the right to found a family.

²⁸⁷European Coalition for Community Living (n 26 above) 6.

²⁸⁸OHCHR 2009 (n 89 above) para. 51.

While, the CRPD and the Constitution view disability from a human rights perspective, the Disabled Persons Act does not contain a human rights-based approach in dealing with PWDs. It thus does not have a provision for the right to independent living for PWDs. It views PWDs from a medical and social welfare perspective by its reference to the welfare and rehabilitation of PWDs.

The same applies to the ZMHA. The Act governs the care and involuntary detention of PWDs in Zimbabwe and its reference to 'detention' is actually in clear contrast with the provisions of the CRPD and the right to independent living as provided for in section 19 of the CRPD. The CRPD provides that provisions of health care facilities should not be tied to particular environments. States Parties should always ensure that the will and preferences of PWDs with regards to residence and living arrangements are always considered and respected just like those of the other people. The ZMHA was promulgated to further the detention of PWDs in violation of the right to independent living which advocates for deinstitutionalisation and provision of mental health services to PWDs in the community on an equal basis with others.

The problem remains glaring with the Social Welfare Assistance Act which makes provision for the granting of social welfare assistance to 'destitute or indigent persons.' Thus, the Act was promulgated with the misconception that disability is always associated with poverty. While it is a requirement in terms of Article 19 of the CRPD for States parties to provide support services to PWDs, the assistance envisaged by the CRPD does not include treating PWDs as objects of charity.

However, it has been noted that Zimbabwe is in the process of aligning its laws to the Constitution, including its disability laws and thus there is a new Bill called the Persons with Disabilities Bill, 2019. The Bill if successfully passes as law, intends to provide for the

establishment of the National Disability Commission, to repeal the Disabled Persons Act and to provide for the protection of the rights of PWDs in accordance with the CRPD. Section 34 of the Bill provides for a standalone right for PWDs to independent living and being included in the community.

On a comparative basis, Tanzania enacted a comprehensive disability law in terms of its TPDA and the TMHA. The TPDA is the main legislative document providing for rights of PWDs in Tanzania which unlike Zimbabwe, provides for the right to live independently for PWDs in terms of section 15 of the Act.

Furthermore, it has been observed that the TMHA is also in line with the CRPD and is human rights-based modelled. There is no room for indefinite admission of PWDs and it does also not provide for any detention but admission of PWDs. This is quite different from the ZMHA, which was actually promulgated to detain persons with mental health disabilities and the detention can be indefinite.

Consequently, for the full realisation of the right to independent living for PWDs, it is specifically recommended that the Constitution be amended on its scope on disability. It should also provide for the right of PWDs to independent living as a standalone right as provided for in Article 19 of the CRPD.

Furthermore, with regards to the DPA, it is specifically recommended that it be repealed and the Persons with Disabilities Bill, 2019 be adopted into law as it mirrors the CRPD generally and particularly provides for the right to independent living. In the same vein, the SWAA and the ZMHA should be amended to contain issues including but not limited to new acceptable terminology, provide for informed consent before admission and treatment of PWDs as well as community rehabilitation and provision of mental health care.

Generally, it is recommended that there is a need for awareness-raising on the importance and realisation of the right to independent living for PWDs. Also, there is a need to enact a National Policy on Disability and general Regulations which would direct implementation of measures to be taken by the State, Organisations for PWDs and private parties to further rights of PWDs.

If the above specific and general recommendations are implemented, PWDs would enjoy the right to independent living in Zimbabwe on an equal basis with others.

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