

## 8 The Rights of Persons with Disabilities in Zimbabwe

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### 1 Introduction

The *World Report on Disability*<sup>1</sup> estimates a disability prevalence of 15 per cent of the world population or more than one billion people. These figures indicate an upward increase from previous WHO/UN statistics of 10 per cent of the world population or 650 million people which had been submitted since the 1970s. Estimates point to the fact that more than 80 per cent of persons with disabilities (PWDs) live in developing countries and more than half of them are women.<sup>2</sup> Current precise and reliable data on disability in Zimbabwe is not available. Approximate statistics can however be deduced from the WHO, World Bank and UN standards. It can therefore be estimated that approximately 15 per cent of Zimbabwe's population of 13 million people is disabled (about 2,250,000 people) and more than half of that proportion are women.<sup>3</sup> In a study carried out in Zimbabwe by Eide, Nhiwatiwa and Muderedzi,<sup>4</sup> impairments were found to be uniformly spread among all age groups, amid counts of 45 per cent mobility problems, 34 per cent sensory impairments and 11 per cent emotional, intellectual and learning disorders.

The conceptualisation and definition of disability has been a complex, controversial, multidimensional and evolving issue dating back to the 17th century.<sup>5</sup> There is no standard definition of disability that is accepted worldwide. Some Asian countries believe in rebirth and define disability as a temporary phase of the recreation process.<sup>6</sup> In some African countries, the birth of children with disabilities (CWDs) represents mothers who would have had sex with a white man or a ghost. Some communities in Zimbabwe do not regard people with mental impairment as persons with disabilities but as '*vanhu vanorwara nepfungwa*' (people with brain sickness) or '*vanhu vane mamhepo*' (people who are possessed by the spirit of the winds). However, the meaning of disability in this chapter draws upon the United Nations Convention on the Rights of Persons with Disabilities (CRPD).<sup>7</sup> Article 1 thereof

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<sup>1</sup> World Health Organisation, *World Report on Disability*, World Health Organisation, Malta, 2011, available at <[http://www.who.int/disabilities/world\\_report/2011/accessible\\_en.pdf](http://www.who.int/disabilities/world_report/2011/accessible_en.pdf)>.

<sup>2</sup> L. Hershey, 'Women with Disabilities, Health, Reproduction and Sexuality', *International Encyclopaedia of Women: Global Women's Issues and Knowledge* (2000), available <<http://cripcommentary.com/women.html>>.

<sup>3</sup> See World Health Organisation, *supra* note 1.

<sup>4</sup> A. H. Eide et al., *Living Conditions Among People with Activity Limitations in Zimbabwe. A Representative Regional Survey*, Forskningsveien, SintefUnimed Norway, 2003.

<sup>5</sup> G. L. Albrecht, K. D. Seelman and M. Bury, *Handbook of Disability Studies* (Sage Publications Limited, California, 2001).

<sup>6</sup> C. Haihambo and E. Lightfoot, 'Cultural Beliefs Regarding People with Disabilities in Namibia: Implications for the Inclusion of People with Disabilities', 25:3 *International Journal of Special Education* (2010) pp. 76-87.

<sup>7</sup> United Nations, *Convention on the Rights of Persons with Disabilities (CRPD)*, 2008.

states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

To begin with, this chapter in section 2 explores the broad social and historical context within which the disability discourse should take place. This includes an analysis of the historical development of the rights of PWDs both at the international plane and in Zimbabwe. The chapter is located within a conceptual framework of the intersectional model, as well as the key models of disability (charity, medical, social and human rights models). Intersectionality is important because it helps us to understand that disability does not function in isolation but is always intimately interconnected with other identity markers such as culture, age, sexuality and gender to frame the experiences of PWDs. In addition, intersectionality addresses the issue of difference, and argues that the experiences of disability of PWDs in the Global North are different from those of PWDs in the Global South; hence in domesticating international human rights conventions there is need to pay close attention to all relevant facets of the local context. In this discourse, models of disability are important because they represent structures that assist us to explain the ways in which public thinking and responses to disability are framed as well as to assess the pertinence of such responses.

In section 3 we introduce the charity, medical, social and human rights models of disability, and thereafter in section 4 we discuss the subject of intersectionality. In section 5, we discuss measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing the CRPD at a broader level. Section 83 of the Constitution articulates the commitment of the state to addressing some of the major barriers that result in PWDs not being able to be self-reliant, to live with their families, to be protected from exploitation and abuse, to have access to medical treatment and to education. In section 6 the chapter discusses the possible shortcomings relating to the way in which the constitutional text protecting the rights of PWDs is structured. These shortcomings include, among others, the failure by the legislature to craft the applicable provisions in the language of rights and the fact that the measures to be adopted by the state are subject to available resources. Section 7 explores the way in which the COVID-19 pandemic has exacerbated the challenges confronted by PWDs and emphasises the need for the state to adopt affirmative action measures to support their livelihoods and promote their rights.

## **2 Historical Background and Context**

In every region of the world, persons with disabilities often live on the margins of society, deprived of the most basic human rights and fundamental freedoms. Due to increased vulnerability, patriarchy, cultural beliefs, social stereotypes and stigmatisation, women and children with disabilities endure even more gross human

rights violations as they have other vulnerabilities.<sup>8</sup> Women with disabilities suffer double discrimination, firstly as women and secondly as persons with disabilities.<sup>9</sup> Mandipa underlines that “cultural beliefs and practices weigh too heavily against the realisation of the rights of women with disabilities. Poverty, misery, illiteracy, joblessness and social exclusion are some of the common plights that women with disabilities face in Zimbabwe. Similarly, children with disabilities are normally not sent to school, compared to their nondisabled counterparts. Without the requisite knowledge and skills, it is very difficult if not impossible for the children to secure any form of employment when they grow up. In the end, a vicious cycle of poverty and disability is created.”<sup>10</sup> Unfortunately, discrimination against PWDs occurs, among others, even in the context of one of the most important empowerment rights, that is, access to education, and poses a serious threat to generations of people born in disadvantaged families.<sup>11</sup>

To address the plight and protect the rights of PWDs, the international community drafted the Convention on the Rights of Persons with Disabilities. Zimbabwe is a state party to the CRPD, having deposited instruments of ratification thereof in 2013, the same year the country adopted a new Constitution. The CRPD is a contemporary human rights treaty which consists of novel components which have thus far had great impact on both disability law and disability studies.<sup>12</sup> The purpose of the CRPD as articulated in Article 1 “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”. On 23 September 2013, Zimbabwe made great strides towards recognising the rights of PWDs by becoming the 135th state party to duly ratify the CRPD and its Optional Protocol.<sup>13</sup> In addition, the crafting and enacting of the new Constitution, which came into force in various stages in 2013, meant significant advancement towards expanding disability rights in the country, albeit at policy level and not on the ground. Nevertheless, the move brought a

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<sup>8</sup> See generally A. Moyo and G. Manyatera, ‘International and Domestic Perspectives on Disability and Education: Children with Disabilities and the Right to Education in Rural Zimbabwe’, 1 *Midlands State University Law Review* (2014) pp. 103–135

<sup>9</sup> I. Grobbelaar-du Plessis, ‘The African Women with Disabilities: The Victims of Multilayered Discrimination’, 22 *South Africa Public Law* (2007) p. 405.

<sup>10</sup> E. Mandipa, ‘A Critical Analysis of the Legal and Institutional Frameworks for the Realisation of the Rights of Persons with Disabilities in Zimbabwe’, 1 *African Disability Rights Yearbook* (2013) p. 73, at p. 75. See L. Dube, ‘The Plight of Deaf and Dumb Children in Education’, *Manica Post Newspaper*, 20 December 2011, where it is reported that 75 per cent of children with disabilities never complete primary school in Zimbabwe.

<sup>11</sup> According to the United Nations:

Persons with disabilities make up the world’s largest and most disadvantaged minority. The numbers are damning: an estimated 20 per cent of the world’s poorest persons are those with disabilities; 98 per cent of children with disabilities in developing countries do not attend school; an estimated 30 per cent of the world’s street children live with disabilities; and the literacy rate for adults with disabilities is as low as 3 per cent—and, in some countries, down to 1 per cent for women with disabilities. See United Nations, *From Exclusion to Equality: Realising 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) p. 1.

<sup>12</sup> T. Degener, ‘Disability in a Human Rights Context’, 5:35 *Laws* (2016) pp. 1–24.

<sup>13</sup> E. Mandipa and G. Manyatera, ‘Zimbabwe’, *African Disability Rights Yearbook* (Pretoria University Law Press, Pretoria, 2014).

marked improvement considering that contents of the 1979 Constitution,<sup>14</sup> together with all its 19 amendments, scantily mentioned disability under Section 23(2) as follows:

a person shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner, if, as a result of that law or treatment, persons of a particular description by ... physical disability are prejudiced.

From the above clause, it is evident that whilst the 1979 Constitution condemned discrimination against PWDs, it only recognised physical disability to the express exclusion of all other forms of disability. Although the provisions of the new Constitution are an improvement, in part, the new Constitution follows in the footsteps of the old Constitution by deploring the discrimination of persons with physical and mental disability whilst being unmindful of persons with intellectual and sensory disabilities. However, by enacting the new Constitution, the government of Zimbabwe has in part implemented the provisions of the CRPD. That is so because under Article 4(a) the CRPD requires the adoption of appropriate legislative measures for the implementation of the rights recognised in the CRPD, and in Article 4(b) directs state parties to take all appropriate measures to modify or abolish existing laws that perpetuate discrimination against persons with disabilities.

Generally, the rights of PWDs are protected at multiple levels. First, PWDs are entitled to all the rights to which all human beings are entitled. At this level, the protection and empowerment extended to PWDs are similar to those extended to other members of society in line with the equal protection and benefit of the law clause. Second, the rights of PWDs are enunciated as national objectives in section 22 of the Constitution. At this level, these rights are, strictly speaking, not binding on the state but act as guidelines on the implementation of the justiciable rights of PWDs that are stipulated in other constitutional provisions. Third, as a class of persons that belongs to vulnerable groups, PWDs are also entitled to specific guarantees that apply only to PWDs, as stipulated in section 83 of the Constitution. In addition, the Declaration of Rights (DoRs) expounds 'justiciable' rights of PWDs in section 83, thereby giving PWDs the power to seek redress when their rights have been violated as stipulated in section 85 of the Constitution.

Fourth, where they belong to one of the stipulated vulnerable groups such as women and children, PWDs are entitled to further protection and empowerment that should be constitutionally extended to marginalised groups confronted by disadvantage at multiple levels. To this end, section 56(6) of the Constitution provides that "the state must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination". This provision was designed to shield affirmative action programmes that benefit women, children and PWDs against charges of unfair discrimination. Fifth, the rights of PWDs are protected in specific

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<sup>14</sup> Constitution of Zimbabwe (1979) published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom).

contexts relating to inclusion in the politics and governance of the country. Of significance to the disability discourse in Zimbabwe is also the provision for the appointment of two elected senators under section 120(1)(d) of the Constitution nominated by PWDs themselves to champion their cause.

While there is room to ask for more disability friendly legal provisions protecting and empowering PWDs, the constitutional recognition of the rights of PWDs at different levels should be considered as a significant milestone for a country that historically did not formally protect the rights of PWDs. However, before delving into the main discussion of the constitutional commitments of Zimbabwe towards addressing some of the major barriers faced by PWDs, this chapter partly reflects on prevailing international and local disability statistics as a measure of the impact of disability at a population level.

### 3 Models of Disability

By paying attention to some of the models of disability, our aim is to enhance the understanding of disability and to map the social but not the chronological journey taken by the concept over time. Whilst some scholars in disability studies may argue that the contrast between disability models such as the medical and social models is an outdated ideology, the reality is that the dichotomy between such models has garnered fresh attention in the human rights discourse.<sup>15</sup> In any case the medical and social models of disability played a key role during deliberations that led to the promulgation of the CRPD. Below we discuss the various models of disability.

#### 3.1 The Charity Model

The charity model of disability regards PWDs as unfortunate and suffering victims of impairment who require sympathy and donations.<sup>16</sup> Persons with disabilities are considered as people who are unable to take charge of the affairs of their own lives, and hence they need assistance. Such an understanding of disability is commonly perpetuated by religious beliefs of any given society. Post-colonial Zimbabwe has been rated a Christian nation with approximately 85 per cent of the population following the Christian religion and most persons or families holding some form of church membership,<sup>17</sup> albeit believing in ancestors and consulting traditional healers. The Bible as the cornerstone of Christian religion and through scriptures such as *Luke* (14 vs 12-14) directs charity towards PWDs by declaring that “when you give a banquet, invite the poor, the crippled, the lame, the blind, and you will be blessed”.<sup>18</sup> Left unmoderated such scriptures run the risk of encouraging PWDs to passively sit around as they await to be remembered by compassionate persons so as to benefit from charitable deeds.

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<sup>15</sup> Degener, *supra* note 12.

<sup>16</sup> A. Harris and S. Enfield, *Disability, Equality and Human Rights, A Training Manual for Development and Humanitarian Organisations* (Oxfam Publications in association with Action on Disability and Development, London, 2003).

<sup>17</sup> See <<http://relzim.org/major-religions-zimbabwe/>>.

<sup>18</sup> Biblica, Inc., *Holy Bible, New International Version (NIV)* (Inc Zondervan, Michigan, 2011).

The irony of the matter is that when PWDs begin to expect what may be perceived as different or increased levels of benevolence, they run the risk of being judged as ungrateful or too demanding. It is therefore not surprising that support and services are commonly designed and imposed on PWDs, with very little if any consultation with them. Furthermore, the model's focus on charity justifies the establishment of separate facilities for PWDs such as special residential institutions and schools. Such institutions perpetuate the isolation and marginalisation of PWDs in a context where services offered are usually embedded with conditions which in some instances violate the rights of PWDs. For example, without being given a choice, women with disabilities who reside in some rehabilitation institutions in Zimbabwe are required to first of all undergo tubal ligation alongside a belief that they are being protected from the 'burden' of reproduction.<sup>19</sup> Yet, the findings of the same research have indicated that women with various kinds of disabilities desire to have and to raise their own biological children. However, in the 18th century focus began to shift from the charity model to the medical model, albeit the fact that some communities today still perpetuate the charity model of disability.<sup>20</sup>

### 3.2 The Medical Model

The focus of the medical model of disability is on the biological or physical condition of a person with disability. The model therefore regards the impairment of a person as some kind of illness which should be treated in order to bring the person as close as possible to normalcy.<sup>21</sup> As a result, the medical model calls upon PWDs to behave in the same way that sick persons do, thereby assuming a 'sick role' of passivity. Under this model health care providers often make most of the decisions about the lives of PWDs including on issues that may not even be related to impairment such as whether a PWD should engage in an intimate partner relationship or not or whether he or she should marry.<sup>22</sup> The medical model has come under criticism due to its focus on 'fixing' the person, whilst the person puts his or her life on hold as health care professionals make several attempts to ensure that the person becomes 'normal'.<sup>23</sup> Instead of accepting impairment and encouraging people to live their full lives whilst using assistive devices such as hearing aids and wheelchairs, health care staff may in some instances undertake unnecessary corrective surgery so as to, for example, straighten or lengthen people's legs.

In Zimbabwe, it is not uncommon for PWDs and their families to seek a 'cure' for impairment by relentlessly and simultaneously consulting traditional healers,

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<sup>19</sup> C. Peta, 'Disability Is Not Asexuality: The Sexual and Reproductive Health Experiences and Aspirations of Disabled Women in Zimbabwe', 15 *Reproductive Health Matters* (2017) pp. 10–15.

<sup>20</sup> Albrecht, Seelman and Bury, *supra* note 5.

<sup>21</sup> J. A. Winter, 'The Development of the Disability Rights Movement as a Social Problem Solver', 23:1 *Disability Studies Quarterly* (2003) pp. 33–61.

<sup>22</sup> A. Wilkerson, 'Disability, Sex Radicalism and Political Agency', in K. Hall (ed.), *Feminist Disability Studies* (Indiana University Press, Bloomington, 2011) pp. 194–217.

<sup>23</sup> Harris and Enfield, *supra* note 16.

religious prophets and contemporary health care professionals.<sup>24</sup> That is not to say that a person with disability does not require health care, but it is to say that framing the person's entire identity around a 'sickness' which people perpetually make efforts to get rid of may result in the person giving up hope of living a full and satisfying life which consists of a wider range of needs that go beyond health care. Even in instances where health care professionals may be aware that a person cannot be cured of impairment, they may not articulate the real diagnosis, alongside a belief that such truth would shatter the hopes of the person and his or her family members, who are presumably better off believing that one day the person will be 'normal'. In instances where it is openly accepted that the person's impairment cannot be medically corrected, the individual may be regarded by both health care staff and his or her family and community members as a 'useless' person whose life is not worth living. Contrary to such beliefs, an example is given of a woman in Kosovo who acknowledged that after undergoing several surgeries in order to lengthen her leg by three centimetres so that it would attain the same length as the other one, she felt liberated when she gave up on such treatment and accepted her legs as they were. She pursued a career in the hairdressing/beauty industry and became a leading expert in the field, who attracted customers from afar, thereby supporting her family with her own income.

The above example provides evidence of the shortcomings of the medical model of disability, and proves that the 'sick role' can only serve to deprive PWDs of the right and freedom to take charge of the affairs of their own lives. Considering that autonomy (self-governance) is a defining mark of being human, the disability rights movement condemned the medical model for perpetuating injustice against PWDs.<sup>25</sup> Beginning in the 1970s the movement sought to weaken the supremacy of the medical model and to replace it with the social model which the movement considered to be an appropriate model for understanding the concept of disability. The argument was that if blindness, for example, cannot be cured, then a blind person under the medical model would be a lifetime patient who hands over the control of their own life to health care professionals who will perpetually try to cure the impairment. The disability rights movement argued that the social model of disability was more liberating than oppressive and a foundation of inclusion of PWDs and not discrimination as further discussed below.

### **3.3 The Social Model**

The social model has thus far made great impact in the field of disability law and studies, to the extent where it has been described as standard learning in the field.<sup>26</sup> The social model was formulated in the 1970s by a small group of activists from the

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<sup>24</sup> E. Mpofu and D. A. Harley, 'Disability and Rehabilitation in Zimbabwe: Lessons and Implications for Rehabilitation Practice in the US', 68:4 *Journal of Rehabilitation* (2002) pp. 26–33.

<sup>25</sup> Winter, *supra* note 21.

<sup>26</sup> A. M. Samaha, 'What Good Is the Social Model of Disability?', *University of Chicago Law Review* (2007) p. 74.

British Union of the Physically Impaired against Segregation (UPIAS).<sup>27</sup> Disability activists were challenging the dominance of the medical model of disability whose focus was on the biological nature of impairments. The main proclamation of the social model was that the answer to the disability problem did not lie in the narrow medical curing of impairment but from attaining change at family, community and societal levels, given the fact that PWDs live within those social organisations.<sup>28</sup> Activists argued that in organising itself society pays very little attention to the needs of PWDs, thereby marginalising them and excluding them from most facets of life, as well as violating their fundamental human rights. For example if a PWD is unable to go up to the first floor of a building because of a staircase, the medical model blames the impairment and the wheelchair, whereas the social model views society as having disabled and excluded the person by creating such a barrier. Such exclusion was deemed as preventable and not as an unavoidable outcome of impairment as advanced by the medical model. The development of the social model resulted in the moving of disability from the traditional medical landscape to a new socially oriented territory, albeit in a Global Northern context.

There is need to note that the social model is an urban model of disability which was crafted and upheld by disability theorists who lived in urban settings of the Global North.<sup>29</sup> Whilst we embrace the emancipatory and participatory tenets of the model, we question its applicability in the Global South, and particularly in an African rural context including in Zimbabwe. The real experiences of disability in the rural Global South are characterised by among other things unpaved roads, mountains, sand, hills, rough ground and mud. The majority of PWDs live in the Global South, and they belong to an underprivileged status, which results in them having limited choices in relation to where and how they can live.<sup>30</sup> Thomas points at underprivileged PWDs in poor nations and argues that they are contextually disadvantaged at both economic and social levels to the extent that perhaps all they ever know about is material lack.<sup>31</sup> Oblivious of such perspectives, the 1976 UPIAS policy statement cited among other things staircases, outdated disability aids and kits and inflexible factory and office working patterns as some of the key challenges faced by PWDs. The barriers presented by such challenges in the Global North may be different from those that are confronted by PWDs in the Global South, particularly in African contexts; hence a critical application of the model to suit the local context is required.

However, in spite of its flaws, the social model has been progressive in directing attention from the personal to the political, in giving rise to the disability movement, discouraging a negative disability identity as well as in directing civil rights legislation

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<sup>27</sup> K. W. Hammell, *Perspectives on Disability and Rehabilitation: Contesting Assumptions; Challenging Practice* (Elsevier Health Sciences, Edinburgh, 2006).

<sup>28</sup> Harris, and Enfield, *supra* note 16.

<sup>29</sup> Hammell, *supra* note 27.

<sup>30</sup> H. Avery, 'Feminist Issues in Built Environment Education', 13:1 *Journal of Art & Design Education* (1994) pp. 65–71.

<sup>31</sup> C. Thomas, 'Disability and Gender: Reflections on Theory and Research', 8:2–3 *Scandinavian Journal of Disability Research* (2006) pp. 177–185.



and illuminating and promoting the removal of barriers.<sup>32</sup> In particular, the gains of the social model worldwide have been noted in the passing of legislation which prohibits discrimination on the grounds of disability, particularly in the work place and the transport sector and in some instances in housing and education. However, such laws need both appropriate interpretation and enforcement if at all they are to be meaningful. Thomas asserts that the acknowledgement of the worldwide progress that has been made by the social model does not conceal the huge amount of work that still needs to be done if the full equality and inclusion of PWDs is to be achieved, particularly in the Global South. A model which claims to shape the experiences of PWDs and to make them masters of their own destinies should sufficiently attend to the main concerns of all PWDs,<sup>33</sup> including those in the Global South. However, by advocating for and supporting anti-discrimination legislation and civil rights, the social model has served as a fundamental stepping-stone to the human rights model.<sup>34</sup>

### **3.4 The Human Rights Model**

The human rights model is not a complete departure from the social model of disability but it builds on the social model and develops it further. However, whilst the social model explains disability as a social construct along the lines of barriers, marginalisation and discrimination, the human rights model consists of the values of disability policy that acknowledge the human dignity of PWDs. The attention that is paid to rights by the human rights model is meant to ensure that PWDs gain access to the same privileges that they would otherwise have access to had they not been disabled. Some disability rights scholars state that:

Human dignity is the anchor norm of human rights. Each individual is deemed to be of inestimable value and nobody is insignificant ... The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics ...<sup>35</sup>

The human rights model does not disregard the social model's support of anti-discrimination policy and civil rights reforms, but moving beyond the social model, the CRPD which is based on the human rights model calls for a 'paradigm shift in disability policy' which understands PWDs as people who have human rights. The CRPD is the first human rights instrument which realises that impairment should not be used as a tool for restricting or denying people their rights; persons with all kinds of disabilities are human rights holders in equality with every other citizen. However, in Zimbabwe, the fact that an international treaty has been ratified by the country

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<sup>32</sup> M. Oliver, 'Defining Impairment and Disability: Issues at Stake', in C. Barnes and G. Mercer (ed.), *Exploring the Divide: Illness and Disability* (The Disability Press, Leeds, 1996) pp. 29–54.

<sup>33</sup> M. Lloyd, 'The Politics of Disability and Feminism: Discord or Synthesis?', 35:3 *Sociology* (2011) pp. 715–728.

<sup>34</sup> Degener, *supra* note 12.

<sup>35</sup> G. Quinn and T. Degener, *Human Rights and Disability* (United Nations, New York and Geneva, 2002) p. 14.

does not automatically make it operational.<sup>36</sup> Any such treaty has to first of all be domesticated through the approval of Parliament, thereby integrating it into domestic law via a parliamentary act before it becomes obligatory. However, Zimbabwe thus far has not domesticated the CRPD, in spite of the fact that section 34 of the Constitution states that “the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law”. There is therefore an urgent need for policy makers to realign the outdated Disabled Persons Act<sup>37</sup> with the new Constitution, whilst at the same time taking into consideration important aspects such as the multi-dimensional and intersectional nature of the experiences of PWDs, thereby drawing on the model of intersectionality to enhance understanding

#### **4 Intersectionality: The Need for a Multi-Layered Approach to the Rights of PWDs**

The term ‘intersectionality’ was introduced by American law professor Kimberlé Crenshaw<sup>38</sup> in 1989 in an effort to evade the challenges that are embedded in identity politics. Using legal cases such as that of *Degraffenreid v. General Motors*, in which five black women sued General Motors on the grounds of gender and race discrimination, Crenshaw coined the term intersectionality to illuminate and address the problem of discrimination laws which regarded gender and race as separate social life attributes. She argued that when African American women or other women of colour experienced multifaceted or intersecting discrimination, there were no laws that were available to come to their defence. Justifying why she coined the concept of intersectionality, Crenshaw, in a personal interview with Adewunmi said:

The particular challenge in the law was one that was grounded in the fact that anti-discrimination law looks at race and gender separately ... The consequence of that is when African American women or any other women of colour experience either compound or overlapping discrimination, the law initially just was not there to come to their defence.<sup>39</sup>

The thinking of the courts was that it was impossible for black women to prove discrimination on the grounds of gender because not all women were discriminated against, and black women could also not prove racial discrimination because not all black people were discriminated against. A multi-layered discrimination suit would in the eyes of the courts result in preferential treatment for historically marginalised individuals or groups of persons. Crenshaw brought forth the intersectional model as a tool for addressing that which the Courts were not seeing.

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<sup>36</sup> Mandipa and Manyatera, *supra* note 13.

<sup>37</sup> Government of Zimbabwe, Disabled Persons Act, Chapter 17:01 (Government Printers, Harare, 1996).

<sup>38</sup> K. Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, *The University of Chicago Legal Forum* (1989) pp. 138–167.

<sup>39</sup> B. Adewunmi, ‘Kimberlé Crenshaw on intersectionality: “I wanted to come up with an everyday metaphor that anyone could use”’, *NewStatesman*, 2 April 2014, available at: <<https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could>>.

Intersectionality considers the identities and experiences of people without assigning them to permanent categories.<sup>40</sup> Such classifications are metaphorically described by Sims<sup>41</sup> as the placing of people in specific 'boxes', when in fact most people are reluctant to be put in 'boxes' or to check 'boxes' to denote their identity. Before the introduction of the concept of intersectionality, scholars had been trying to ascertain which among the various social attributes such as class, sex or gender was more significant than the other.<sup>42</sup> As a result, it was not uncommon to find that the fight against one manifestation of a social life attribute would worsen the disunions in the others. It therefore means that if we focus our attention on fighting injustices of disability on their own, other problems may be arising in other attributes such as gender among the same PWDs. The idea is to acknowledge the intersectional nature of various identity markers in framing the oppression of PWDs and dealing with them at once. As stated by Kimberley Crenshaw, "if you are standing in the path of multiple forms of exclusion, you are likely to get hit by both".<sup>43</sup>

Section 56(3) of the Constitution stipulates that every person has the right not to be treated in an unfairly discriminatory manner on such grounds as "language, ... sex, gender, marital status, age, pregnancy, disability ...". The clause acknowledges different identity markers, but it does not point or at least give a hint to the intersectional nature of such attributes. In aligning the DPA with the Constitution, different layers of identity should not be treated as stand-alone attributes, but the significance of the intersectional nature of various identity markers in framing the life worlds of PWDs needs to be acknowledged if disability policy is to effectively promote the realisation of their human rights. The reality is that disability does not operate in isolation nor does gender; hence an understanding of the intersectional, multi-layered and multidimensional nature of various identity markers in creating the oppression of PWDs is likely to result in disability policies that contribute to making a meaningful difference in the lives of PWDs. Another example is section 63(i) of the Constitution which states that every person has the right to participate in the cultural life of their choice. Whilst this is a noble right that can be drawn to a disability and human rights context, there is need for policy makers to acknowledge that culture does not function in isolation either, but it intersects with other identity markers such as disability, age, gender and class to frame the life worlds of PWDs.

The CRPD acknowledges different layers of identity such as disabled women (Article 6) and disabled children (Article 7). However, it is striking to note that primary sections that pertain to disability in the Zimbabwean Constitution take a human rights approach which foregrounds disability and treats it as a standalone social life attribute, thereby turning a blind eye to the intersection of disability with other identity

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<sup>40</sup> J. Simpson, *Everyone Belongs: A Toolkit for Applying Intersectionality. Embracing the Complexities of Women's Lives Project*, Canadian Research Institute for the Advancement of Women (CRIAW), Ontario, 2009.

<sup>41</sup> C. L. Sims, *Faceted Identities: Extending Intersectionality*, 2009, available at: <[https://www.academia.edu/195897/Faceted\\_Identities\\_Extending\\_Intersectionality](https://www.academia.edu/195897/Faceted_Identities_Extending_Intersectionality)>.

<sup>42</sup> J. Beard, 'Perspectives on Intersectionality: Race, Gender and Class in Interaction', 3:2 *Southern African Feminist Review* (1999) p. 19.

<sup>43</sup> Adewunmi, *supra* note 39.

markers. For example, section 22 of the Constitution is gender blind, yet men and women do not experience disability in similar ways; such a thrust resonates with the current ineffective DPA which does not pay attention to gender. By eliminating the practice of assigning experiences to exclusively individual identity categories, intersectionality seeks to broaden and enrich social justice policies and interventions.<sup>44</sup> The objective is to promote possible collective action in an effort to bring those who are at the margins to the centre in a scenario where: “When they enter, we all enter ...”.<sup>45</sup>

The other function of intersectionality is that it deals with the notion of difference.<sup>46</sup> Global North writings perceive PWDs in the Global South as a homogenous group and make extensive generalisations about such persons.<sup>47</sup> An inability to examine difference in relation to the complex intersections of various social life attributes in different contexts runs the risk of rendering disability laws and disability studies irrelevant to oppressed and marginalised groups in other contexts. Different social life attributes intersect in diverse ways in divergent contexts to influence the experiences of disability of affected persons and the realisation and non-realisation of their human rights. The reality is that the lives of Global South PWDs, including those in African countries, have been intensely affected by colonisation, and a presence of the colonial legacy in the lives of such persons has continued to prevail.<sup>48</sup> An analysis of the contextual intersection of different social life attributes is therefore necessary because various identity markers do not create similar kinds of marginalisation, discrimination and oppression for all PWDs in all places in the world.

Human rights are framed around Western ideologies of individualism; hence their uncritical application in African contexts runs the risk of presenting an incomplete picture to the world. As such, paying attention to the political, economic and social contexts within which the intersectional experiences of disability take place is beneficial. For example, the colonial processes of powerful nations such as the USA, England, Portugal and Spain left a trail of dependency, poverty and disability in Global South countries. Whilst for example disabling diseases such as polio have been eliminated in nations of the Global North, such diseases have remained prevalent in some Global South countries, where the impairing outcome of sub-standard drugs that are received from powerful nations and distributed among locals have also been reported. Furthermore, the majority of people in colonised African countries and in other developing nations are unable to afford HIV drugs and assistive devices, in spite of the fact that PWDs who live in the Global South are expected to buy services and goods that come from powerful nations of the Global North. Disability is therefore a part of social, economic and historical settings, and in some instances it is acquired under “oppressive conditions of poverty, economic

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<sup>44</sup> K. W. Crenshaw and L. C. Harris, ‘A Primer on Intersectionality Booklet’, in *African American Policy Forum*, Vassar College, Columbia Law School, Poughkeepsie, NY, 2009.

<sup>45</sup> Crenshaw, *supra* note 38.

<sup>46</sup> S. A. Shields, ‘Gender: An intersectionality perspective. 59 *Sex Roles* (2008) pp. 301–311.

<sup>47</sup> H. Meekosha, ‘Decolonising Disability: Thinking and Acting Globally’, 26:6 *Disability and Society* (2011) pp. 667–682.

<sup>48</sup> M. Holmes, *What Is Gender? Sociological Approaches* (Sage Publications Ltd., London, 2007), and M. Walters, *Feminism: A Very Short Introduction* (Oxford University Press, Oxford, 2005)

exploitation, police brutality, neo-colonial violence, and lack of access to adequate health care and education".<sup>49</sup> Ratifying international human rights treaties is important, but paying attention to conditions in the local context is equally significant.

In the context of the Global South, where national economies are characterised with economic poverty, the identity markers of disability and poverty are closely interrelated in framing the experiences of disability of the affected persons. As poverty intersects with other identity markers, it becomes difficult for African citizens to realise their right to basic provisions such as water, foodstuff, health facilities and schooling.<sup>50</sup> There is widespread agreement that one must always take into consideration the multiple dimensions of oppression, least one risks assuming that all disabled persons are white or people of colour are male or that every other person is heterosexual.<sup>51</sup> As such, different settings breed different challenges and responses even within the same broad band of issues.<sup>52</sup> We therefore in this chapter argue that the facilitation of the voice of PWDs in Zimbabwe in research studies which form part of efforts to align the new Constitution with the provisions of the CRPD and the DPA is likely to result in the formulation of realistic policies that facilitate the realisation of the human rights of PWDs based on the contextual findings of such studies.

Just like any other theoretical concept, intersectionality has been criticised for its imprecision and open-endedness, which allows every other identity marker to be included, depending on relevance in each setting.<sup>53</sup> Some scholars have argued that the model ought to have a clear set of defined boundaries in relation to what social life attributes it should encompass and that which it should not to avoid the 'confusion' that it may create. However, we concur with Davis that the ambiguity and integral open-endedness of intersectionality instigates an endless discovery process which yields novel, broader and significant insights. In any case intersectionality does not yield a normative straitjacket for monitoring human rights in search of the 'correct line', but it encourages a discovery process of relevant identity markers in any given framework. The human rights model considers different layers of identity; hence in the context of disability and human rights, there is need to acknowledge that PWDs are not a homogenous group, but they are for example men and women or children and adults.<sup>54</sup> Whilst there are many more identity markers to be considered, the reality is that the issue of intersectionality of discrimination law in international human rights has not yet been fully addressed.<sup>55</sup> Perhaps, the initial

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<sup>49</sup> N. Erevelles, 'The Color of Violence: Reflecting on Gender, Race, and Disability', in Hall, *supra* note 22, pp. 118–135.

<sup>50</sup> H. Jauch, *How the IMF-World Bank and Structural Adjustment Program (SAP) Destroyed Africa*, 2012, available at: <<http://www.proshareng.com/articles/2428>>.

<sup>51</sup> B. J. Risman, 'Gender as a Social Structure: Theory Wrestling with Activism', 18:4 *Gender and Society* (2004) pp. 429–450.

<sup>52</sup> S. V. Gunjate and M. U. Shivaj, *Post-Colonial Feminist Theory*, Proceedings of national seminar on postmodern literary theory and literature, Nanded, 2012.

<sup>53</sup> K. Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful', 9:1 *Feminist Theory* (2008) pp. 67–85.

<sup>54</sup> Degener, *supra* note 12.

<sup>55</sup> *Ibid.*

use of the intersectional model to address racial and gender inequalities in work place environments resulted in its neglect of issues such as disability. However, the notation of intersectionality permits a multifaceted analysis of disabled persons' oppressions and ultimately the promotion of their human rights.

We reiterate the fact that intersectionality is not an additive, one-plus-one approach which adds one social life attribute to the other.<sup>56</sup> In this chapter, we acknowledge the simultaneous interaction of the various social life attributes in shaping the oppression of PWDs. However, the additional but intersecting social life attributes are made possible by what critiques call the ambiguity and open-endedness of intersectionality, and yet it is such vagueness and infiniteness that permits the exploration of an endless collection of intersecting modes of difference. Through a discovery process, intersectionality brings an awareness of the reality that the experiences of PWDs are more complex and contradictory. Defining a person solely on the grounds of disability means that the various social life attributes that intersect to frame the life worlds of PWDs are marginalised, to the detriment of the realisation of their human rights. However, that is not to say that all social attributes can be included in every analysis, but additional social life attributes should continue to be explored as they arise. In this chapter we use the intersectional model to illustrate the need for a multi-layered approach to the rights of PWDs.

## **5 State Measures to Be Taken to Promote the Rights of PWDs**

Synonymous with the CRPD, the principles of equality and respect for human rights for all people forms the foundation of the Constitution of Zimbabwe. Section 83 of the Constitution articulates the commitment of the state to addressing some of the major barriers that result in PWDs not being able to be self-reliant, to live with their families, to be protected from exploitation and abuse, to have access to medical treatment and to education. Such provisions represent the state's commitment to implementing some of the provisions of the CRPD such as: Article 16 on freedom from exploitation, violence and abuse, Article 23 on respect for home and the family, Article 24 on education and Article 25 on health. In this section we discuss measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing the CRPD at a broader level.

### **5.1 Measures to Enable PWDs to Become Self-Reliant**

The term self-reliance was coined by American philosopher Ralph Waldo Emerson in 1841, in one of his essays in which he encouraged people to think for themselves and to be independent, instead of passively accepting the ideas of other people and

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<sup>56</sup> Shields, *supra* note 46.

being dependent.<sup>57</sup> In 2001, the United Nations High Commission for Refugees<sup>58</sup> delineates self-reliance as “the social and economic ability of an individual, a household or a community to meet essential needs in a sustainable manner and with dignity ... developing and strengthening livelihoods of persons of concern, and reducing their vulnerability and long-term reliance on humanitarian/external assistance”. This definition places focus on three important indicators of ‘self-reliance’, namely the individual’s social and economic stability, the sustainability of the activities from which this stability is derived and the need to reduce or even eliminate reliance on external support. Such an understanding of self-reliance discourages dependency on outside help, thereby bringing consciousness to the ideology and practice of drawing local natural resources to advance the cause of self-reliance in both a social and economic sense.

At the regional level, self-reliance for PWDs is referred to in the African Charter on the Rights and Welfare of the Child. Article 13(1) thereof provides for every ‘disabled’ child’s “right to special measures of protection ... under conditions which ensure his dignity, promote his self-reliance and active participation in the community”. The state’s duty to promote the self-reliance of PWDs should be read together with the founding values and principles of the nation state as well as the national objectives protected in Chapter 2 of the Constitution. For instance, self-reliance can be viewed as both a goal and a result of such founding values and principles as the “recognition of the inherent dignity and worth of each human being”, the “recognition of the equality of all human beings” and “good governance”.<sup>59</sup> Governance measures that are designed to promote self-reliance also inherently promote human dignity, equality and freedom – the key values of the new constitutional dispensation. These principles lie at the heart of the new constitutional order and, together with measures that promote self-reliance, create the necessary preconditions for the achievement of the full potential of PWDs. In addition, the principles of good governance include, among other things, “the equitable sharing of natural resources, including land” as well as “due respect for vested rights”.<sup>60</sup> To be ‘equitable’, the (re)distribution of natural resources should address the specific needs and challenges that confront PWDs when it comes to both ownership and use of natural resources. This implies that the state bears the obligation to enhance the capacity of PWDs to ensure that they make optimal use of the resources that are allocated to them.

As can be gleaned from section 22 of the Constitution, the state’s duty to ensure self-reliance is closely related to the national objectives protected in Chapter 2 of the Constitution. For instance, state institutions and agencies of government have the obligation to recognise the rights of PWDs, in particular their right to be treated with

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<sup>57</sup> M. Dora and H. Amzad, *Principles for Self-Reliance and Sustainability: Case Study of Bangladesh*, Proceedings of the Anti-Poverty Academic Conference with International Participation, Institute for Sustainability and Technology Policy, Murdoch University, Perth, 2006.

<sup>65</sup> UNHCR policy document on the community development approach: “Reinforcing a Community Development Approach” was endorsed by the Executive Committee to the High Commissioner’s Programme in February 2001, EC/51/SC/CRP.

<sup>59</sup> See section 3(1)(e), (f) and (g) of the Constitution.

<sup>60</sup> See section 3(2)(j) of the Constitution.

respect and dignity.<sup>61</sup> For PWDs to have a sense of self-esteem and an appreciation of the value that society accords to them, PWDs must be empowered to lead independent and fulfilling lives. This claim is grounded on the constitutional command that the state and all agencies of government are legally required, within the limits of the resources available to them, to ‘assist’ PWDs “to achieve their full potential and to minimise the disadvantages suffered by them”.<sup>62</sup> These provisions speak to the need to develop disability-friendly laws and policies that are designed to offer preferential treatment to PWDs to ensure that they lead healthy, prosperous and fulfilling lives. To this end, the Disabled Persons Act (DPA) stipulates that one of the functions of the National Disability Board is “to formulate and develop measures and policies designed to enable disabled persons, so far as possible, to lead independent lives”.<sup>63</sup> Accordingly, there are synergies and overlaps between the DPA and the Constitution, especially in the context of the need to create legal and policy frameworks that empower PWDs to contribute towards personal, social and economic development.

In terms of the Mental Health Act,<sup>64</sup> there is also slight mention of treatment and training of patients with intellectual disabilities, but the context does not seem to refer to training for purposes of self-reliance. For instance, section 61(1) of the Act permits mental health institutions designated hospitals and nursing-homes to “receive, accommodate and treat or train a person who is intellectually handicapped with behavioural problems and is likely to benefit from such treatment or training but, on account of his intellectual handicap, is unfit to be received and treated as an informal patient”. A further reading of the relevant provisions dispel the idea that the training referred to is meant to enable mental health patients to lead self-reliant lives. It is noteworthy that this is a gap that must be addressed by the adoption of laws and policies that directly speak to the need for PWDs to be rehabilitated in a manner that gives them a fair chance to lead, at the very least, a minimally decent life.

PWDs should be consciously included in self-reliance projects that revolve around natural resources, for example the use of bamboos in the Binga district to weave baskets for both the local and export markets. Some people hold the mythical belief that self-reliance can only be attained by rich people, but the reality is that in spite of limited resources self-reliant individuals and families can use whatever resources they have effectively and efficiently to uplift their own standards of living and those of other human beings. There is no need for the state to be concerned about creating new structures to promote the self-reliance of PWDs; the state should use existing government structures which transcend to district and ward levels to steer a spirit of independence.

The idea behind self-reliance is to encourage citizens to foster the essence of solidarity in which non-disabled people and PWDs work together and learn to use their own initiative and local resources to improve their well-being instead of

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<sup>61</sup> Section 22(1) of the Constitution.

<sup>62</sup> Section 22(2) of the Constitution.

<sup>63</sup> Section 5(1)(b)(ii) of the Disabled Persons Act.

<sup>64</sup> Chapter 15:12 of the Mental Health Act.



passively waiting for the government or donor to deliver the goods. In any case self-help and peer support are acknowledged as primary areas of promoting self-reliance.<sup>65</sup> That is not to say external assistance should be rejected, but it is to say that a collective self-reliance approach, which is embedded in the mainstream community development agenda, encourages PWDs and their families to look inwards, to be creative and to assist donors to view the world through their own indigenous lens. Such a scenario is not possible if PWDs are inactive and voiceless; too much and prolonged charity perpetuates laziness and weakens the ability of PWDs to develop themselves for self-reliance. Yet, apart from cases of severe disability, there is no type of disability which deters a person from being involved in activities that improve their own standard of living.<sup>66</sup> Whilst some people may prefer to continue giving charity so as to further their own pride, the reality is that perpetual charitable deeds serve to tell PWDs that they are not capable beings. Teaching or training PWDs in both urban and rural areas to adopt self-reliance as a new way of life is likely to go a long way in contributing towards the attainment of their right to self-reliance.

Section 83(a) of the Constitution of Zimbabwe directs that PWDs should be empowered so that they become self-reliant; the question then is: What is the starting point? It is prudent for the state to first of all know what it is dealing with. Instead of introducing policy without consulting stakeholders, the first port of call should be the commissioning of a survey which facilitates the voice of PWDs and those they interact with, in both rural and urban areas, so as to determine the existing state of their experiences, concerns and aspirations regarding self-reliance. The practice of facilitating voice empowers people who might otherwise have remained silent to be heard. Voice is the right to have one's experiences and perspectives available to others, to participate in the construction of the self and to decide how to represent that self to others.<sup>67</sup> Such an approach should be incorporated in disability policy so that periodic surveys are conducted (maybe every four years) in order for the state to keep abreast with among other things the self-reliance status of PWDs. Determining what works and what does not work and responding accordingly is essential, if at all Zimbabwe is to get anywhere close to attaining equal rights for all citizens including PWDs.

A study carried out by Stewart and Bhagwanjee<sup>68</sup> to determine the policy requirements for disability in post-apartheid South Africa revealed that a properly designed participatory research approach can unlock the potential of PWDs for self-reliance and offer deep insights into the ways that opportunities for self-reliance and empowerment of PWDs can be created. In any case, Article 21 of the CRPD in part directs freedom of expression and opinion, including the freedom of PWDs to impart

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<sup>65</sup> See *Ibid.*

<sup>66</sup> K. Ghebrehewet, *Self-Motive of the Disabled: Key to Self-Reliance Part I* (2013).

<sup>67</sup> C. E. Ashby, 'Whose "Voice" Is It Anyway?: Giving Voice and Qualitative Research Involving Individuals That Type to Communicate', 31:4 *Disability Studies Quarterly* (2011).

<sup>68</sup> R. Stewart and A. Bhagwanjee, 'Promoting Group Empowerment and Self-Reliance Through Participatory Research: A Case Study of People with Physical Disability', 21:7 *Disability and Rehabilitation* (199) pp. 338–345.

information and ideas on an equal basis with others. However, most interventions that concern PWDs are planned and implemented with little or nil consultation of the relevant persons, alongside varied assumptions which include the belief that PWDs have no voice and they are unable to represent themselves in national dialogue, to assert their rights or to contribute to policy formulation. Such misconceptions are reinforced if the two senators who are elected under section 120(1)(d) of the Constitution and nominated by PWDs themselves are passive, thereby rendering themselves 'window dressers'. Considering that PWDs have historically been marginalised, the state should make efforts to equip such senators with adequate knowledge and skills to enable them to effectively fulfil their mandate.

However, drawing from studies undertaken in other parts of the world,<sup>69</sup> there is evidence that PWDs may gain self-reliance through formal employment; hence the state should consider imposing on employers a legal responsibility to employ PWDs. Such responsibility should not only mean preferential treatment of PWDs, but it should allow employers to terminate the contracts of PWDs who fail to perform tasks as provided in their job descriptions or who violate the code of conduct and for reasons that are not related to disability. Article 27 of the CRPD directs state parties to recognise the right of PWDs to work on an equal basis with others and to create a labour market and work environment which is open, inclusive and accessible to PWDs. Section 22(3)(a) of the Constitution directs the development of programmes for PWDs, especially work programmes consistent with their capabilities and acceptable to them or their legal representatives. However, an alignment of the Constitution and the DPA is urgently required because the DPA prohibits discrimination of PWDs in the workplace, but it does not award PWDs the right to work, perhaps because the Act was promulgated before both the CRPD and the current Constitution. The employment of PWDs in accordance with their capabilities as highlighted in the Constitution needs to be upheld. Failure to do that may result in the situation that has been noted in South Africa,<sup>70</sup> where PWDs reportedly do not get jobs which they are qualified to do but instead are commonly employed as receptionists, etc. by companies that take a cosmetic approach to employing PWDs.

There is need for the state to formulate a disability policy which promotes the education and training of PWDs so as to prepare them to enter the world of work and to take measures to ensure that PWDs have access to job opportunities such as implementing the quota system or levy system. The International Labour Organisation is a significant and strategic resource centre for guidelines.<sup>71</sup> The practice of quota systems which has been prevalent in Global North countries and in South Africa for years directs both the public and private sector to employ a particular minimum number of PWDs, which ranges from between two to six per cent

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<sup>69</sup> P. Thornton, *Employment Quotas, Levies And National Rehabilitation Funds For Persons With Disabilities: Pointers For Policy And Practice Report*, prepared on behalf of the International Labour Office, 1998, and P. K. S. Wong, *Being Different: Understanding People with Disabilities*, Lecture 11 Employment, 2012.

<sup>70</sup> ENCA interview with deputy minister on employment of persons with disabilities in the workplace, Department of Women, Children and People with Disabilities.

<sup>71</sup> Thornton, *supra* note 69.

of the eligible workforce depending on the size of the organisation or industrial sector. Employers who do not abide by the law can be fined for contempt and the introduction of the levy system can also go a long way in promoting the rights of PWDs to employment. Levy systems allow employers to deposit a certain amount of funds to a special fund in lieu of employing the target proportion of PWDs when the possibility of directly employing PWDs has been exhausted or in cases where it is a legitimate choice. Such levies can then be deposited into a special rehabilitation fund which is then used to advance the cause of self-reliance of PWDs which may include state funded education and vocational training programmes.

However, imposing legislation on the quota or levy system without proper consultation of both PWDs and employers is futile. As noted elsewhere, many employers are not willing to recruit PWDs because they lack knowledge about what disability is and how PWDs can be integrated into the mainstream workforce. A study carried out in South Africa in 2011 revealed that only 1.8 per cent of PWDs were formally employed in the public sector, thereby falling short of the two per cent target that is directed by national policy.<sup>72</sup> Employers may worry that something may go wrong with the employ of PWDs, or such employment may negatively affect the performance of their businesses or other employees may not want to work with PWDs. Yet, research has indicated that the employment of PWDs may offer a diversity of skills and increase the morale of the mainstream workforce and also enable PWDs to develop goal-setting and persistence skills.<sup>73</sup> A South African study revealed that PWDs are easy to train because of their positive attitude towards work, and managers of PWDs become more sensitive and perform better as they learn to make adaptations for PWDs.<sup>74</sup> There is therefore need for the state to raise awareness among employers so as to challenge stereotypes about PWDs and influence the development of company policies that favour the inclusion of PWDs.

By removing barriers such as physical infrastructure which is not disability friendly and learning about disability and addressing negative attitudes, stereotypes and non-supportive behaviour towards PWDs, employers will be moving towards the social and human rights models of disability. Stories have been told in South Africa that some employers are so ignorant of disability issues that they phone the Ministry of Labour just to ask what disability is. However, borrowing practice from South Africa, the government of Zimbabwe should develop technical guidelines on employing PWDs which offer practical assistance to both employees and employers as well as trade unions on the implementation of non-discriminatory practices in the workplace. In addition, the state should put in place a professional and experienced support service or reference point in each province or district for both employers and PWDs that can help to solve problems when they arise. However, the reality is that Zimbabwe, at the time of writing, is a low income country which is currently experiencing economic difficulties which include a high unemployment rate. The

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<sup>72</sup> P. A. Maja *et al.*, 'Employing People with Disabilities in South Africa', 14:1 *South African Journal of Occupational Therapy* (2011).

<sup>73</sup> Wong, *supra* note 69.

<sup>74</sup> Brand South Africa, *Employing the Disabled: Guidelines*, 2003, available at:

<[https://www.brandsouthafrica.com/governance/services/rights/disabled-employment\\_041103](https://www.brandsouthafrica.com/governance/services/rights/disabled-employment_041103)>.

policy of promoting self-reliance should therefore not just be centred on formal employment, but it should also include the development of self-help programmes as further discussed below.

At face value, some people may mistrust and dismiss the concept of self-reliance as an unrealistic and naïve development approach which is not worth implementing, particularly in areas where both non-disabled people and PWDs are accustomed to viewing PWDs as incapable persons or objects of charity (charity model) or as sick persons (medical model). It therefore follows that a human rights approach which seeks to promote the rights of PWDs to self-reliance but which does not address such negative attitudes will not yield much. There is need for the state to use existing government structures to develop and implement a disability policy which directs periodic disability awareness raising programmes which transcend to district and ward levels and which include both community leaders and community members in all the ten provinces of Zimbabwe so as to counter such misconceptions. The approach is likely to move disability from the charity and medical models to the social and human rights models. In any case the social model calls for change at family, community and societal levels within which PWDs live. Furthermore, Article 8 of the CRPD in part directs state parties “to promote awareness of the capabilities and contributions of persons with disabilities”. Awareness raising is important because human rights policy may say one thing, but on the ground society may still create barriers for the inclusion of PWDs due to ignorance. For example, stories have been told in Manicaland of healthy and capable deaf persons who are isolated from the food for work programmes at community levels on the grounds that they are disabled.<sup>75</sup>

By raising awareness on disability issues, the state is likely to help both non-disabled and disabled citizens to unlearn the idea that PWDs are sick and helpless recipients of handouts and foster cooperation between non-disabled persons and PWDs who both have equal rights to undo the present structures of injustice. In any case self-reliance is not about economic issues alone but the ability to network and to build alliances, a key primary strategy of sharing ideas and supporting PWDs who have historically been marginalised. PWDs who are self-reliant do not only assist themselves, but they also reduce their expectations and dependency on government support, and as noted in Eritrea they can also make a significant contribution to the mainstream development agenda,<sup>76</sup> not as receivers of charity but as income earners and tax payers. The idea is for the state to make concerted efforts to move the provisions of the Constitution from paper to the real world to empower PWDs to be self-reliant. Nevertheless, in aligning the DPA with the Constitution, there is need to pay attention to the intersection of various identity markers such as disability, culture, poverty and gender in creating the marginalisation of PWDs and in undermining their right to self-reliance so as to develop appropriate intervention strategies.

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<sup>75</sup> C. Peta, *Discrimination and Marginalization of PWDs in Zimbabwe*, ongoing study.

<sup>76</sup> Ghebrehiwet, *supra* note 66.

From a gender point of view, both men and women with disabilities face challenges in the economic arena, but international research has indicated that the situation is worse for women.<sup>77</sup> In Zimbabwe, traditional practices which view men as breadwinners as compared to women perpetuate the discrimination of women with disabilities in accessing education, vocational training, employment and self-help programmes as disability, gender and culture intersect to frame their oppression, thereby setting them up on a highway to poverty. Recent research has indicated that disability adds an additional layer of disadvantage for women with disability and their children as some men are reluctant to provide for children who have disabled mothers.<sup>78</sup> Such a scenario is common among mothers who acquire disability in the course of their marriages, with children also despised and stigmatised for having mothers with disabilities. When things go wrong in relationships, custody of the children often rests with women, including women with disability, resulting in them assuming greater responsibility alongside a lower or zero income.

The phrase ‘feminisation of poverty’ was invented by the United Nations to refer to an apparent trend in which an increasing number of those living in poverty are women.<sup>79</sup> We therefore call upon the state to conduct a gendered analysis of the strategies that women with disability employ in dealing with the diversity of patriarchy in so far as fending for themselves and raising their children is concerned in settings where fathers are absent. Ignoring the intersection of gender, poverty and culture in promoting the rights of women with disabilities to become self-reliant means neglecting the concerns of a large part of the population of PWDs, especially in light of the fact that more than half of PWDs who live in developing countries are women.<sup>80</sup> A gendered approach in the context of disability and human rights is required if the different ways in which men and women with disabilities experience poverty and disability are to be illuminated as well as the ways in which gendered self-reliance can be promoted among PWDs.

## **5.2 Measures to Enable PWDs to Live with Their Families and Participate in Social, Creative or Recreational Activities**

The state also has the constitutional duty to adopt “measures to enable PWDs to live with their families and participate in social, creative or recreational activities”.<sup>81</sup> The above provision is in part aligned to Article 19 of the CRPD, albeit not addressing the contemporary issue of independent living which is discussed later on in this section. Enabling PWDs to live with their families is a noble practice, but a proper definition of family needs to be clearly articulated, perhaps in the process of aligning the DPA with the Constitution. Whilst the concept of family is regarded as universal,

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<sup>77</sup> E. Boylan, *Women and Disability* (Zed Books, London, 1991).

<sup>78</sup> C. Peta, ‘The “Sacred” Institution of Marriage: The Case of Disabled Women in Zimbabwe’, 35:1 *Sexuality and Disability* (2016) pp. 45–58.

<sup>79</sup> Holmes, *supra* note 48.

<sup>80</sup> L. Hershey, ‘Women with Disabilities, Health, Reproduction and Sexuality’, in *International Encyclopaedia of Women: Global Women’s Issues and Knowledge*, four volumes (Routledge Press, 2000), also available at <<http://cripcommentary.com/women.html>>.

<sup>81</sup> Section 83(1)(b) of the Constitution.

given that it is found in all societies of the world, adopting a Global North definition of family and applying it in Zimbabwe may be irrelevant to the promotion of the human rights of PWDs in the local context because such a Global North definition may include same sex parents with adopted children, whereas same sex marriages are prohibited by the Constitution of Zimbabwe. Could living with a family mean PWDs that live perpetually (from birth to old age) with their parents because of severe disability or PWDs who have their own families (they are married and they have children, or they are single parenting or they are cohabiting and they have children)? Could family also refer to child headed and female headed households, kingship relations or the small house concept that has gained prominence in post-colonial Zimbabwe? There are no visible Zimbabwean studies thus far that have drawn conclusions about appropriate living arrangements for PWDs, and studies undertaken in the Global North have also not been conclusive about which type of living is most suitable for PWDs. If Section 83(b) of the Constitution is not backed by findings of contextual research, the Constitution runs the risk of formulating inappropriate disability policy and implementing intervention strategies which PWDs may not find appropriate.

The notion of enabling PWDs to live with their families may be positive in the sense that it seeks to 'move' PWDs from the restrictions of institutional life to family life, but the provision takes a narrow approach, which fails to holistically adopt the contemporary concept of living independently as directed by Article 19 of the CRPD. The CRPD in Article 19(a) directs state parties to ensure that 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". By denying PWDs a choice, the Constitution assumes that PWDs are a homogenous group, and they all desire to live with their families, yet under independent living PWDs should simply have civil rights, options and control over choices in their own lives as do people without disabilities.<sup>82</sup> Research undertaken in the US revealed that some PWDs may actually prefer to live in disability institutions as opposed to living with their families, thereby separating themselves from the eyes of the oppressor, in other words the eyes of non-disabled people who stigmatise them.<sup>83</sup> In addition, the traditional conceptualisation of disability which associates disability with spirits, taboos and witchcraft may result in some husbands abandoning their disabled wives.<sup>84</sup> As culture, gender and disability intersect to frame the oppression of women with disabilities, such women may prefer to live in institutions than to re-join their maiden families. Institutional life may allow them to hold on to some form of independent living as well as avoid the stigma of both disability and divorce, in a Zimbabwean context where marriage is regarded as a highly respectable achievement, particularly among women.

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<sup>82</sup> G. MacDonald and M. Oxford, *Independent Living History A Brief History of the Independent Living Movement*, available at: <<https://www.accessliving.org/Independent-Living-History>>.

<sup>83</sup> R. Garland-Thomson, *Extraordinary Bodies: Figuring Physical disability in American Culture and Literature* (Columbia University Press, New York, 1997).

<sup>84</sup> Mpofu and Harley, *supra* note 24.

The concept of independent living began in the US in the 1970s, and it began to grow as a worldwide movement of PWDs advocating for self-determination, self-respect and equal opportunities and rights to pursue a course of action and having the freedom to fail and to learn from one's own failures in the same way that non-disabled people do.<sup>85</sup> A national survey which facilitates the voice of PWDs who live in both institutions and in homes would therefore go a long way in informing disability policy and practice in Zimbabwe. There is need to hear the voice of parents of children with disabilities, and in cases where such children are able to share their experiences and views regarding living arrangements, their direct voice should also be heard. That is important because decisions "claimed to be made in the interests of children often reflect what parents want of their children and may not necessarily be in the interests of children".<sup>86</sup> In any case Article 7(3) of the CRPD directs state parties to "ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right". However, such an approach is not meant to undermine parental rights to decision making concerning their children, but it is to uphold the right of children to express themselves on issues that affect their lives; the views of both parents and children should therefore be taken into consideration.

A blanket approach which seeks to enable PWDs to live with their families as a universal remedy leaves a lot to be desired; through research the state needs to establish the functionality of family structures and the extent to which such structures address the concerns of PWDs. The reality is that misconceptions about disability result in some families loathing the practice of living with PWDs, particularly those with psychosocial impairments. That is not to say that living with their families is not fulfilling particularly in cases where PWDs live with their spouses and children, but it is to say that one of Zimbabwe's predominant vernaculars, Shona, labels a disabled person as '*chirema*' translated in English to mean a 'heavy object'. Such delineation means that disability is portrayed as a heavy or very difficult condition to carry; hence PWDs may find themselves experiencing persecution, stigma and discrimination within their own families as disability and culture intersect to frame their oppression. To escape agony, some PWDs may retreat to the streets or informal legal settlements and turn to begging as a livelihood source thereby running the risk of being abused. On the other hand, a charity approach to disability may result in some family members opting to live with PWDs alongside a belief that such a practice attracts God's blessings. Disability in Zimbabwe is therefore characterised by what Kisanji<sup>87</sup> calls a "concoction of both persecution and acceptance". In aligning the DPA with the Constitution, the state needs to realistically consider the intersection of culture, gender, age and disability if it is to effectively promote the right of PWDs to

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<sup>85</sup> MacDonald and Oxford, *supra* note 82.

<sup>86</sup> A. Moyo, 'Reconceptualising the "Paramountcy Principle": Beyond the Individualistic Construction of the Best Interests of the Child', 12:1 *African Human Rights Law Journal* (2012) pp. 142–177.

<sup>87</sup> J. Kisanji, 'Attitudes and Beliefs About Disability in Tanzania', in B. O'Toole and R. McConkey (eds.), *Innovations in Developing Countries for People with Disabilities* (1995) pp. 51–70.

make choices about living arrangements, as well as pay particular attention to the needs and concerns of both adults and children with disabilities.

Children with disabilities may live with their families until adulthood, but depending on the nature of their disabilities and just like every other young adult, they may also want to move out of the family home and live on their own. The government of Zimbabwe may want to borrow the concept of assisted living residences from the US, under which homes are established for about seven PWDs within a given residential centre.<sup>88</sup> For a particular fee, the home could provide not only housing but nutritious meals and other activities such as educational, sporting and entertainment activities as well as ensure the provision of transport to health care centres. The state should consider issuing licenses to families who may wish to operate such homes within their communities or business partners that may come together to establish such homes or development agencies who may set up such homes for non-profit. In addition, the possibility of providing state accommodation for groups of PWDs in given communities needs to be explored. Some people may argue that such an arrangement is tantamount to perpetuating the isolation of PWDs by assigning them to special residential homes. But we argue that the residential homes suggested in this chapter are different from the archaic medical homes such as restricted mental institutions, and they should be supported by social services that enable PWDs to live in communities of their choice which allow interaction of non-disabled persons and PWDs and promote social, creative and recreational activities.

State designed disability awareness raising programmes should also be able to point out what PWDs or their families should look out for when they are searching for a disability residence, least they run the risk of being abused by unscrupulous business persons; the full care, security and training offered by the residence to PWDs is important. PWDs ought to articulate their expectations, look out for potential problems of abuse and negligence and check with other residents as well as probe the administrator for information. Once a home has been selected, paying regular visits to the home before making a commitment is important so as to look out for cleanliness and levels of care and attentiveness given to residents. Homes should not just offer leisure and social interaction, but the homes should focus on building communities where PWDs can learn, grow and reach their full potential.<sup>89</sup> Under the supervision of family and staff, residents should be involved in planning their lives, setting goals, therapy, skills training, etc. Daily activities should move PWDs towards attaining their set goals. Skills training is meant to enable PWDs to not be dependent on other people for their daily routines.

To enable social, creative or recreational activities, the state should formulate policies which direct disability residential homes to arrange for PWDs to watch sporting activities such as athletics, attend arts festivals or music concerts, attend local churches and go for sight-seeing; awareness raising in that regard also needs

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<sup>88</sup> C. Marak, *Disabled: How Assisted Living Facilities and Adult Family Homes Serve Disabled Persons*, 2017, available at: <<https://www.assistedlivingfacilities.org/resources/who-lives-in-assisted-living-/disabled/>>.

<sup>89</sup> *Ibid.*



to be promoted among families and communities. The homes should encourage residents to use various activities such as exercises to improve their health and well-being and vitality and to enjoy their lives. Without necessarily fostering a medical model of disability, but bearing in mind that PWDs just like any other persons may get sick, there is need for a nurse to be engaged perhaps on a part-time basis and for transportation to be made available for medical purposes. PWDs who take regular medication should do so under an established system of resident health services and evaluations, which includes medical reminders. Some PWDs may require assistance with laundry, personal hygiene and bathing by care workers; residents who exhibit certain health related or negative behavioural symptoms need to be timeously attended to. Whichever way, adopting the concept of homes albeit adjusting it to suit the local context is of paramount importance. Considering that within an African context an individual's disability even among adults is commonly regarded as a family affair, it is important for such homes to have a policy of interaction between residents and their families so as not to break existing family bonds.

### ***5.3 Measures to Protect PWDs from All Forms of Exploitation and Abuse***

Article 16 of the CRPD directs state parties to “take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects”. By directing the state to protect PWDs from all forms of exploitation and abuse, section 83(c) of the Constitution echoes the provisions of the CRPD, the African Charter and other international or regional human rights instruments. The state's duty to protect PWDs from exploitation and abuse emanates from the founding value of respect for the inherent dignity and equality of the human person.<sup>90</sup> In addition, children with disabilities are constitutionally afforded additional guarantees with respect to protection from exploitation, abuse, maltreatment and neglect. Section 81(1)(e) of the Constitution provides for every child's “right to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse”. The meaning and reach of abuse and exploitation, including sexual exploitation, are fully explored in a chapter on children's rights in this volume.<sup>91</sup> For this reason, it is not necessary to examine, in great detail, what exploitation and abuse mean for PWDs. However, it is necessary to emphasise, particularly in light of gender roles and stereotypes in the African cultural context, that girls and women bear the brunt of sexual exploitation and other forms of abuse that confront PWDs.

One of the shortcomings of the Constitution is that it is silent on the gendered aspects of exploitation and abuse. Gender is important because experiences of exploitation and abuse are primarily shaped by gender roles; girls and women and boys and men

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<sup>90</sup> Section 3(1) of the Constitution.

<sup>91</sup> See A. Moyo, ‘The Legal Status of Children's Rights in Zimbabwe’, in this volume.

do not experience exploitation and abuse in similar ways.<sup>92</sup> For example, research has indicated that perpetrators desire to exert power and control over all their victims; hence women with disabilities suffer increased levels of sexual abuse because they are usually regarded as easy targets upon which both disabled and non-disabled men wield dominance.<sup>93</sup> The current DPA is gender blind, and hence we call for its urgent revision to enable the Act to adopt a gender lens and to articulate what constitutes exploitation and abuse in gendered terms. However, gender does not function on its own; therefore an understanding of the intersectional nature of exploitation and abuse is important if PWDs are to be adequately protected from exploitation and abuse.

The government needs to sanction a national survey which illuminates the predictors, dynamics and outcomes of abuse and violence among men and women with disabilities so as to be able to formulate appropriate disability policy. In aligning the Constitution with the DPA, the first port of call should be to explicitly define what constitutes exploitation and abuse? We argue that such a definition should be accompanied with rigorous training of relevant stakeholders and awareness raising programmes if the provisions of the Constitution are to be moved from paper to the ground to make a positive difference in promoting the rights of PWDs. We acknowledge that the concept of exploitation and abuse is encompassed within a broad spectrum of issues which include sexual, physical, economic and emotional abuse as well as neglect, among others. However, in this section we use the example of sexual abuse to articulate the multidimensional aspects of the exploitation and abuse, which should be understood if PWDs are to be effectively protected. Discussing all the forms of the concept in this chapter would take the chapter beyond its requirements in terms of length, therefore our focus on sexual abuse under the umbrella of sexuality below.

Sexuality forms a core part of being human, and it determines both the physical and mental well-being of all human beings.<sup>94</sup> Acknowledging the reality that no human being is asexual, the US has seen 'assistance with sexuality' being suggested for inclusion on the list of tasks that encompass the job description of personal assistance service (PAS) providers for PWDs and the identification of a personal assistant (PA) who is comfortable with the subject of sexuality. Duties of a PA may, for example, include undressing and positioning the client for masturbation, placing the PA's hands on the client's hands to guide stimulation, helping two disabled clients

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<sup>92</sup> See J. Biegon, 'The Promotion and Protection of Disability Rights in the African Human Rights System', in I. Grobbelaar du Plessis and T. Van Reenen (eds.), *Aspects of Disability Law in Africa* (Pretoria University Law Press, Pretoria, 2012) p. 53, at p. 54, where the author argues as follows: "For women with disabilities, the intersection between their gender and disability constantly expose them to double discrimination. They are always susceptible to physical and sexual abuse, which in turn puts them at risk of contracting HIV and other sexually transmitted diseases. Moreover, women who give birth to children with disabilities are prone to be blamed for such births and consequently abandoned by their spouses. Not surprisingly, many women with disabilities are single parents."

<sup>93</sup> M. A. Nosek *et al.*, 'Vulnerabilities for Abuse among Women with Disabilities', 19:3 *Sexuality and Disability* (2001) pp. 177–189.

<sup>94</sup> T. G. Gomez, 'The S Words: Sexuality, Sensuality, Sexual Expression and People with Intellectual Disability', 30:2 *Sexuality and Disability* (2012) pp. 237–245.

to stimulate each other, guiding penis/vagina or penis/anal intercourse,<sup>95</sup> all in an effort to build the sexual confidence of PWDs and to enable them to realise their right to addressing their sexuality. The argument is that PWDs are usually assisted with various tasks such as bladder/bowel care and eating and menstrual care, and hence sexual activity might simply be one more activity to add to the list. However, challenges may arise in relation to drawing a line between assisting with sexual activity and practically engaging in the sexual activity; intimate work of this nature may have legal ramifications in a context where there are no clear guidelines and policy on assisting with sexual expression.

In Zimbabwe there is a common assumption that PWDs are asexual beings who are innocent of sexual thoughts, feelings and experiences and who are unable to give sexual consent. Most men who have sexual relations with women with disability, particularly women with mental disability, are viewed with suspicion and are likely to be regarded as sexual abusers who should be brought before the courts to stand trial, but the truth is with or without disability no human being is asexual. PWDs have a right to engage in sexual relations with people of their choice, and women who have mental disabilities are not in perpetual mental relapse, and hence they have full decision making capacity during certain periods of their lives. Why then should a non-disabled person who engages in sexual relations with a consenting woman with disability be uncritically regarded as an abuser who should be thrown in prison? In any case, invisible disabilities are usually a challenge as women with disabilities are often faced with an ethical dilemma in deciding how and when to reveal their true condition to a potential lover. Whilst the women are conscious of the moral worthiness of not being deceptive to a loved one, they are also confronted with the fear of rejection if a partner walks away when they have revealed the true nature of their disability;<sup>96</sup> hence they often have to make complex decisions in relation to self-disclosure.

However, when something goes wrong, such as the occurrence of an unwanted pregnancy, should the justice delivery system treat every man who engages in sexual relations with a PWD as a criminal, detach them from their partner (woman with disability) and throw them in prison? Whilst protecting PWDs from exploitation and abuse is a noble cause, are the courts and police in Zimbabwe appropriately equipped with disability knowledge, skills and facilities to ensure fairness for both the 'perpetrator' and the 'victim' of sexual abuse? Does the justice delivery system understand the dynamics of disability and its intersection with other identity markers such as sexuality, class and gender to be able to draw a clear line between adults with disabilities who consent to have sex and those who do not? Do the police and courts have knowledge about visible and invisible disabilities and about self-disclosure in sexual relations? If not, one wonders about the number of men, particularly non-disabled men, who may be languishing in prison for engaging in consensual sexual relations with women with invisible disabilities, who may not have

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<sup>95</sup> L. R. Mona, 'Sexual Options for People with Disabilities: Using Personal Assistance Services for Sexual Expression', 26:3-4 *Women & Therapy* (2003) pp. 211-221.

<sup>96</sup> R. Basson, 'Sexual Health of Women with Disabilities', 15:4 *Canadian Medical Association Journal* (1998) p. 359.

disclosed the nature of their impairments to their partners. In any case is it illegal for non-disabled men to fall in love with women with visible and invisible disabilities? If the justice delivery system has not been trained specifically on disability issues, what then guides the analysis and determination of cases of exploitation and abuse that involve persons with different kinds of disabilities? However, by arguing that PWDs are sexual beings who desire to address their sexuality just like everyone else, we do not mean to say that PWDs are not vulnerable to sexual abuse, but we acknowledge that disability adds another rung of vulnerability to the exploitation and abuse of PWDs as further discussed below.

Based on their US study, Plummer and Findley<sup>97</sup> state that disability does not shield a person from exploitation and abuse, but it may cause a person to be at an increased risk in cases where they depend financially, emotionally or physically on the perpetrator. The nature of impairment makes a difference in relation to experiences of exploitation and abuse, given that circumstances appear to be worse for deaf persons due to communication barriers.<sup>98</sup> In addition, deaf people experience communication problems if they try to report cases of exploitation and abuse to the police because in most cases the police are unable to use sign language.<sup>99</sup> A British study revealed that it is difficult to obtain information on the kind of abuse that could have been experienced by women with intellectual impairment. That is so because victims may not be able to distinctly narrate what transpired, particularly in cases where the incident would have taken place in the distant past compared to recent times. However, McCarthy and Thompson<sup>100</sup> note that in some cases stories of abuse are shared by the victims without them even realising that what they have experienced is abuse. Whichever way, it is critical for researchers to record all forms of abuse as experienced by PWDs with intellectual impairment and to give PWDs the vocabulary to describe the abuse if such persons are ever to receive effective and appropriate support, particularly when they approach the justice delivery system for recourse. The state should keep accurate gender disaggregated data on exploitation and abuse which occurs among PWDs so as to inform policy and practice.

There is need for the state to adequately provide police officers, prosecutors, magistrates and judges in Zimbabwe with appropriate knowledge regarding disability issues. It is wrong to assume that disability erases all the other qualities of a human being, thereby reducing the complex being to a single social life attribute of disability at the express exclusion of an individual's other identity markers, and erroneously concluding that PWDs are 'damaged' goods who do not desire to address their

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<sup>97</sup> S. B. Plummer and P. A. Findley, 'Women with Disabilities' Experience with Physical and Sexual Abuse: Review of the Literature and Implications for the Field', 13:1 *Trauma, Violence, and Abuse* (2012) pp. 15–29.

<sup>98</sup> J. Hanass-Hancock, 'Interweaving Conceptualizations of Gender and Disability in the Context of Vulnerability to HIV/AIDS in Kwazulu-Natal, South Africa', 27 *Sexuality and Disability* (2009) pp. 35–47.

<sup>99</sup> M. McCarthy and D. Thompson, 'A Prevalence Study of Sexual Abuse of Adults with Intellectual Disabilities Referred for Sex Education', 10:2 *Journal of Applied Research in Intellectual Disabilities* (1997) pp. 105–124.

<sup>100</sup> *Ibid.*

sexuality with partners of their choice, fall pregnant or have children of their own. The undertaking of a national survey which involves both perpetrators and victims, family and community members is critical, thereby bringing to the fore a realistic picture of the structural, situational and cultural context within which exploitation and abuse takes place. Whilst most studies have indicated that compared to men women are more vulnerable to abuse and violence, it is essential to obtain a holistic view of the gendered aspects of exploitation and abuse so as to also consider the behaviour of women towards their male partners, including their violent behaviours. The only thing that is clear at the moment is that exploitation and abuse of PWDs is a gendered and multifaceted phenomenon, but the broader question of how so has remained largely unexplored. In the absence of such knowledge the commitment of the Constitution to protecting PWDs against exploitation abuse is threatened.

To mitigate vulnerability, international pronouncements on human rights pertaining to disability as well as the Constitution of Zimbabwe award individuals the mandate to seek redress in the event of exploitation and abuse. However, from an African perspective, whilst existing human rights instruments are crafted along the lines that the body belongs to an individual, such instruments may not be applicable in some African contexts. That is so because within some African settings bodies do not belong to the individual, but they belong to the entire family and community, influenced at most by cultural ideologies.<sup>101</sup> As such, in most African communities a person does not own his or her body; hence people usually seek to claim their rights within a shared space, and decisions about disability or exploitation and abuse are taken at family and community level, even in extreme instances where a PWD is raped. In aligning the DPA and the Constitution, it is critical for the state to take such cultural ideologies into consideration if the government is to formulate effective policy and practice for protecting PWDs against exploitation and abuse. Lastly, a multi-layered and multidimensional approach is required.

#### ***5.4 Measures to Give PWDs Access to Medical, Psychological and Functional Treatment***

In terms of section 83, the Constitution requires the state to adopt measures to give PWDs access to medical, psychological and functional treatment in line with international legal obligations. For instance, Article 25 of the CRPD directs state parties to provide affordable health care including sexual and reproductive health care to PWDs and to bring such health care close to communities including in rural areas. By committing in Section 83(d) to providing PWDs with access to medical, psychological and functional treatment, the Constitution adopts such a provision of the CRPD, albeit being silent on sexual and reproductive health care. The state should conduct participatory research among PWDs, parents of CWDs and health care staff so as to establish the experiences of PWDs in accessing health care and those of practitioners in delivering health care to PWDs. The findings of such a study

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<sup>101</sup> C. Izugbara and C. Undie, 'Who Owns the body? Indigenous African Discourses of the Body and Contemporary Sexual Rights Rhetoric', 16:31 *Reproductive Health Matters* (2008) pp. 159–167.

should inform disability policy and practice thereby enhancing the promotion of the rights of PWDs to medical, psychological and functional treatment.

Constitutional provisions which do not seek to identify and address the injustices that are embedded within the health care structures in which PWDs are meant to enjoy rights are futile. In Zimbabwe, negative attitudes of health care staff towards the sexual and reproductive health of PWDs have been reported.<sup>102</sup> Some health care staffers are of the opinion that PWDs are ill people who should consult health care centres for issues related to their illnesses or disability alone. But PWDs have a right, just like everyone else, to access health care for reasons which go beyond disability such as sexual and reproductive issues.

Sexual and reproductive health information in appropriate formats, such as sign language for the deaf and braille for the blind, is almost non-existent, in a scenario which points at a serious violation of the rights of deaf and blind persons in accessing health care. This is in spite of the fact that Section 8 of the DPA prohibits the denial of any service or amenity to PWDs. Those who enrol in some rehabilitation institutions in Zimbabwe are required to first of all undergo tubal ligation, as a condition of enrolment. Yet, Article 23(c) of the CRPD clearly states that PWDs should be allowed to retain their fertility in the same manner that every other person does. In addition, Article 23(b) of the CRPD states that PWDs have a right to responsibly and freely decide on the number and spacing of their own children. The fact that section 83(d) of the Constitution is silent on the subject of sexual and reproductive health for PWDs may have serious ramifications, considering some of the challenges that are confronted by PWDs, as discussed below.

The work ethic of medical staff is usually that of 'we know best'; hence PWDs are rarely consulted even about their own bodies. Regarded as a solid base of truth and personifying the healing front of technology and science, medicine is believed to be absolutely genuine. The medical discourse is rarely questioned because once a bodily status has been certified by the medical fraternity as being sub-standard, people seldom query such certification. In relation to disability the state should come up with a strategy of moderating excessive emphasis on medical diagnoses because the understanding of disability requires much more than clinical 'facts' about the body, albeit the necessity of such 'facts' in determining medicinal remedies in cases where they are required. The problem arises when the power of medicine goes beyond the prescription of medicine to frame the manner in which people should live their lives. An example is given of a couple that was given permission by medical doctors to marry but was directed not to have sex, in a context where medicine becomes an authorising practice. Instead of embracing disability and assisting people to live with it, medicine regards disability as an undesirable element which should be eradicated.

The conscious inclusion of PWDs in the recruitment processes of health care staff should be considered. Trained PWDs are likely to bring awareness to mainstream health care staff about the health care needs of PWDs which include sexual and

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<sup>102</sup> Peta, *supra* note 19.

reproductive health. In addition, the subject of disability should be included in the training of all health care professionals. Formulating a policy which directs the Ministry of Health and Child Care to ensure that all health care centres provide services and information to PWDs in appropriate formats such as sign language for the deaf and braille for the blind promotes the rights of PWDs to access medical, psychological and functional treatment. To have nil sign language using staff or a mitigating strategy implies that the state is indifferent to the health care needs of deaf persons. To be ignored or to be prevented from accessing health care due to communication barriers is to have one's very legitimacy as a human being assaulted. Whilst generic health care approaches may apply to all people, PWDs may need unique communication and health care attention which is tailor-made to suit specific impairments.

In addition, a proper definition of the national health care delivery system to which PWDs are awarded rights is required. Focusing on the contemporary health care approach only and ignoring traditional and religious health care practices is likely to leave other key health care areas unattended to, thereby perpetuating the injustices that are embedded in such spheres. If the state ignores traditional and religious healing in disability policy formulation, how then for example will it be able to address challenges such as the exploitation and abuse of PWDs by traditional healers and religious prophets? During a personal discussion, a woman with mental disability said:

My parents took me to hospital because I was violent, the hospital stabilised me with injection, and my parents took me to a traditional healer. The healer said I must throw away my mental tablets because if I continue taking them I will die. After one week I went into mental relapse, and my parents took me back to hospital, after that back to the traditional healer, I kept doing that, moving between the hospital and traditional healers, but I am still not healed of mental disability.

The Ministry of Health and Childcare should establish a policy which directs all players in the three mode health care delivery system (traditional, religious, contemporary) in Zimbabwe to collaborate in the provision of health care, particularly in aspects that are related to 'curing' impairment. Such an approach is likely to reduce suspicion and antagonism among religious, traditional and contemporary health care practitioners, which prevails at the detriment of the health and well-being of PWDs who simultaneously consult all the three modes of health care. There is no use adopting an international human rights framework which in its domestication fails to pay attention to the realities of the local three mode health care approach. In any case, section 16 of the Constitution states that "[t]he State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans". Pretending that traditional healing practices do not exist and that PWDs and their families do not consult traditional healers results in the formulation of unrealistic policies and intervention strategies. The Ministry of Health and Child Care needs to seek to collaborate with other players in the health care delivery system, such as the Zimbabwe National Association of Traditional Healers (ZINATHA), so as to be able

to understand the intricacies of the three mode approach and its impact on the health and well-being of PWDs and to ultimately formulate meaningful policy.

### **5.5 Measures to Provide PWDs with State-Funded Education and Training**

The Zimbabwean Constitution contains essential principles relating to the protection and promotion of the rights of PWDs. Section 83 of the Constitution provides that the state must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities are provided with special facilities for their education and are provided with state-funded education and training where they need it.<sup>103</sup> Theoretically, Zimbabwe has begun to embrace a human rights approach to disability as the country has largely conformed to most provisions of the CRPD<sup>104</sup> and other international or regional instruments.<sup>105</sup> With regards to education of CWDs, the Disabled Persons Act mandates the National Disability Board<sup>106</sup> to formulate and develop measures and policies designed to achieve equal opportunities for disabled persons by ensuring that they obtain education and employment, among other functions.<sup>107</sup> The Education Act, as the primary law that addresses education for all learners,<sup>108</sup> codifies the state's obligation to ensure free and compulsory primary education in the following terms:

It is the objective in Zimbabwe that primary education for every child of school-going age shall be compulsory and to this end it shall be the duty of the parents of any such child to ensure that such child attends primary school.<sup>109</sup>

Whilst primary education has been largely labelled as 'free' and therefore 'state-funded', current practices at the majority of schools raise doubts about this claim. The reality of the matter is that there have been increases, not in tuition fees, but in levies and other charges at many schools across the entire country. In many if not all schools, the amounts payable in levies are multiple times higher than the money prescribed for tuition fees. With the government currently reported to face perpetual financial challenges, the state's capacity to provide state-funded education and training to PWDs who need it remains in serious doubt. Nonetheless, it is encouraging to note that the Constitution seeks to impose on the state the duty to provide for the quality education needs of PWDs. Given that the majority of PWDs cannot fend for themselves and their children, it is critical for a national constitution to require the state to fulfil this duty to ensure that PWDs are not left out of many educational and developmental programmes. However, it is not clear whether the

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<sup>103</sup> Section 83(e) and (f) of the Constitution of Zimbabwe Amendment No.20.

<sup>104</sup> P. Manatsa, 'Are Disability Laws in Zimbabwe Compatible with the Provisions of the United Nations Convention on the Rights of Persons with Disability (CRPD)?', 4:4 *International Journal of Humanities and Social Science Invention* (2015) p. 25, at p. 32.

<sup>105</sup> See, for example, Article 13(2) of the African Charter on the Rights and Welfare of the Child.

<sup>106</sup> A Board established in terms of Section 4 of the Disabled Persons Act [Chapter 17:01] Act 5 of 1992.

<sup>107</sup> Section 5(1) of the Disabled Act.

<sup>108</sup> E. Mandipa 'A Critical Appraisal of the Right to Inclusive Education for Children with Disability in Zimbabwe', 3 *African Disability Rights Yearbook* (2015) p. 11.

<sup>109</sup> Section 5 of the Education Act [Chapter 25:04]. See also Article 28 of the CRC. On the meaning of 'compulsory' and 'free' education, see paras. 6 and 7 of General Comment No. 11.



Constitution requires the state to prioritise the education and training needs of PWDs ahead of the needs of other ‘vulnerable’ groups such as women and children. In all fairness, it would appear that the Constitution imposes on the state the duty to take affirmative action measures, in the context of education and training, to ensure that PWDs ultimately realise their full mental and physical potential.

At the international plane, access to education for PWDs is extensively regulated by the CRPD. Article 24(1) thereof explicitly recognises the right of PWDs to education which is to be realised without discrimination and on the basis of equal opportunity for all persons. It seeks to remedy the exclusion and marginalisation that PWDs have faced for centuries. This shows that the international community is aware that the prevailing trend is that PWDs tend to have much less access to education than their non-disabled counterparts.<sup>110</sup> The exclusion of PWDs from education results in life-long barriers to meaningful employment, health and political participation. For this reason, the main focus of Article 24 is on the elimination of disability based discrimination in educational settings, as well as the provision of inclusive education at various levels. Further, the CRPD focuses primarily on access of PWDs to the general education system, rather than separate or segregated educational settings that perpetuate further stigmatisation.<sup>111</sup>

Article 24 envisages the need for increased accessibility of educational settings and the need to train teachers and staff, including teachers with disabilities, as some of the ways by which equal access to education can be enhanced. For countries such as Zimbabwe to meet the obligations created by Article 24, they must increase the accessibility of their educational spaces, develop inclusive curricula and provide adequate learning assistance.<sup>112</sup> This is particularly important in light of the Millennium Development Goal of ‘education for all’, which by definition cannot be attained if an entire segment of any given population is denied equal access to education

In line with international developments, section 83(e) and (f) of the Constitution directs the provision of special educational facilities for PWDs and state-funded education and training where it is required. The DPA provides for non-discrimination of PWDs with regards to “the choice of persons for training, advancement, apprenticeships, transfer” and many other issues. Unfortunately, both the Constitution and the DPA do not place adequate focus on inclusive education as required by international law. For instance, the Constitution provides that the state should take measures, within its available resources, to provide special facilities for their education. If improperly implemented, this provision may justify discriminatory government policies that perpetuate segregation of PWDs from inclusive learning settings.

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<sup>110</sup> K. Guernsey, M. Nicoli and A. Ninio, *Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the Bank*, The World Bank, 2007, p. 13.

<sup>111</sup> See Article 24(1) of the CRPD. However, special schools should continue to exist for those individuals still wishing to opt-out of mainstream settings and those who cannot – because of severe learning disabilities – cope with the expected pace of learning in inclusive settings.

<sup>112</sup> Guernsey, Nicoli and Ninio, *supra* note 110.

In addition, there seems to be inadequate focus on early childhood education in both the Constitution and the DPA. As a result, it remains questionable whether PWDs can reach advanced developmental stages in the absence of a concrete foundation in the form of earlier education. Studies show that students who have access to early childhood learning are more likely to “graduate high school, hold a job, and form more stable families of their own”.<sup>113</sup> Denying CWDs access to appropriate education settings is tantamount to thwarting their potential to attain full growth; a scenario which is in direct contradiction with treaties which seek to secure the rights of CWDs, which include the CRPD, the Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). Nevertheless, in spite of such treaties, the reality is that early childhood years have not received much attention or investment from governments in most nations including in Zimbabwe. This scenario can be attributed to the fact that the promulgation of human rights treaties does not automatically mean the availability of appropriate knowledge regarding disability or adequate capacity and budgets.

There is need to undertake a national survey which begins with early childhood education (ECE) for PWDs right through to tertiary level education so as to establish the status quo and to ultimately inform policy and practice. A holistic approach which pays attention to curricula, staffing, resources, parental involvement and transition into adulthood employment is required. We argue that the voyage should begin with early childhood learning because research has indicated that 80 per cent of the brain’s capacity develops before the age of three; hence the early years of a child’s life plays a significant role in fostering developmental gains.<sup>114</sup> In this chapter, we emphasise early childhood education because it lays a strong foundation upon which later education (primary school, high school and tertiary level) can be constructed, thereby creating an avenue through which PWDs can escape vulnerability to abuse and poverty.

Study after study shows that the sooner a child begins learning, the better he or she does down the road ... And for poor kids who need help the most, this lack of access to preschool education can shadow them for the rest of their lives ... Every dollar we invest in high-quality early education can save more than seven dollars later on.<sup>115</sup>

Children who come from poor families and who live in rural areas usually do not have access to ECE, and they are most likely to drop out of school,<sup>116</sup> thereby perpetuating the cycle of poverty as such persons will ultimately have narrow employment opportunities as disability and poverty intersect to frame their marginalisation. A study carried out in Zimbabwe reveals that some women with disabilities who have not had access to education are left with minimal livelihood choices to the extent that they resort to the sex work industry. That is not to say that such an industry is not

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<sup>113</sup> B. Obama, *Obama’s 2013 State of the Union Speech*, 2013, full text available at: <<https://www.theatlantic.com/politics/archive/2013/02/obamas-2013-state-of-the-union-speech-full-text/273089/>>.

<sup>114</sup> UNESCO, *Strong Foundations: Early Childhood Care and Education*, UNESCO, Paris, 2006.

<sup>115</sup> Obama, *supra* note 113.

<sup>116</sup> UNESCO, *supra* note 114.

profitable or that it does not employ millions of people across the world,<sup>117</sup> but it is to say that the livelihood options of PWDs from poor backgrounds may be limited by their lack of education which usually begins in early childhood.

The state should aim to generate funds through disability levies so as to provide state-funded education and training, particularly for PWDs from poor backgrounds. Nevertheless, the provision of special educational facilities and state funded education for PWDs may not materialise if it is not accompanied by an adequate number of special education teachers who are properly trained. Therefore, it is arguable that the government's introduction in 2005 of early childhood development as a compulsory practice which is embedded in schools is significant. But thus far Zimbabwe does not have an adequate number of professionals who are trained in early childhood development.<sup>118</sup> There is need for the government to train 5,800 more qualified teachers, and at the moment only 21.6 per cent of children aged 36–59 months are attending a mainstream early childhood education programme. Of notable concern is that such statistics are silent on the number of early childhood education teachers who are trained to cater for the special needs of CWDs or the number of such children who are accessing education. Sex disaggregated data about the education of CWDs will play a big role in informing policy and practice,

The provision of appropriate educational facilities and teachers and state funded education on its own may not yield much if the initiative is not accompanied by a rigorous awareness raising programme. Unplanned or *de facto* inclusion ranks among the key types of inclusive education that are prevalent in Zimbabwe.<sup>119</sup> A large number of students with disabilities are therefore enrolled in mainstream schools by parents or guardians without any accompanying documentation of the nature of their disabilities. In some instances, parents just decide to keep their children at home alongside a belief that they are 'sub-standard' beings on the ground of disability and hence their lives will presumably not amount to anything. The Ministry of Primary and Secondary Education, civil society and disabled peoples' organisations need to work together to raise awareness about the need and value of obtaining a formal diagnosis of the disability and thereafter enrolling CWDs for education at an early stage. Such awareness will enable families and communities in both rural and urban areas to realise the need for understanding the nature of a child's disability and the importance of educational programmes from an early age and to demonstrate the negative impact of a lack of such education. Involving teenage or adult persons with disabilities in such awareness raising campaigns may go a long way in demonstrating the advantages of gaining access to education and the disadvantages of a lack thereof.

Whilst it is undisputable that Zimbabwe's attitude towards education is that of valuing high quality standards, a health and nutrition study carried out in Zimbabwe revealed that many early childhood centres in mainstream primary schools do not provide food for children; the children are expected to bring their own food and drink from home.<sup>120</sup>

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<sup>117</sup> See C. Hakim, 'The Male Sex Deficit', 19:4 *International Sociology* (2015) pp. 314–335, and W. Spice, 'Management of Sex Workers and Other High-Risk Groups' *Occupational Medicine* (2007) pp. 322–328.

<sup>118</sup> P. Makokoro, *The Status of Education and Early Childhood Development (ECD) in Zimbabwe*, 2017.

<sup>119</sup> M. I. Mutepfa, E. Mpofu and T. Chataika, 'Inclusive Education in Zimbabwe: Policy, Curriculum, Practice, Family, and Teacher Education Issue', 83:6 *Childhood Education* (2007).

<sup>120</sup> Makokoro, *supra* note 118.

The economic decline in the country has resulted in some children not being able to bring any food from home, and they are forced to watch whilst others eat. The government should consider the establishment of a holistic policy which directs synergy of education, nutrition, health and social welfare so as to provide a wholesome supportive and rich experience for all children including CWDs. Families should be educated on the importance of early education, balanced diets and good health for children through community engagement, lobbying and activism. However, whilst there is growing international interest in the early learning of children, the focus on CWDs is grossly under-researched within the Global South. We therefore call upon interdisciplinary scholars to undertake further research on this valuable topic particularly within African contexts.

The Education Act does not clearly make provision for state-funded education for persons with disabilities where it is required.<sup>121</sup> To this end, the Constitution offers better protection to the rights of PWDs, at least in theory. It has been highlighted that while the BEAM is having a positive impact, children with disabilities are significantly less likely to be beneficiaries of the BEAM programme.<sup>122</sup> According to UNICEF, at least one third of the world's children who are not in school have a disability.<sup>123</sup> It has also been suggested that children with disabilities may be better served by a different funding mechanism, especially if they do not fit the current poverty based criteria.<sup>124</sup> In line with this, it is arguable that more needs to be accomplished to translate positive attitudes into action (even if supported by policy) and that a shift is needed in the entire education system in Zimbabwe to support meaningful inclusion.<sup>125</sup>

## 6 Shortcomings of the Constitutional Provisions

This section briefly discusses some of the shortcomings of the constitutional provisions entrenching the rights of persons with disabilities. These include, among others, the failure by the legislature to craft the applicable provisions in the language of rights and the fact that the measures to be adopted by the state are subject to available resources.

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<sup>121</sup> See, for example, Centre for Applied Legal Research (CALR), *Reviews of Laws Affecting Persons with Disability in Zimbabwe: Alignment of Legislation to the Convention on Rights with Disability (CRPD) and the Constitution of Zimbabwe*, 2016, p. 15, available at: <<http://www.ca-lr.org/wp-content/uploads/2016/12/>>.

<sup>122</sup> H. Smith *et al.*, *Zimbabwe: Evaluation of the Basic Education Assistance Module Programme*, Ministry of Labour and Social Services, Government of Zimbabwe, available at: <[http://www.unicef.org/evaldatabase/index\\_69966.html](http://www.unicef.org/evaldatabase/index_69966.html)>.

<sup>123</sup> United Nations General Assembly, *Report of the Secretary-General on the Status of the Convention on the Rights of the Child*, 3 August 2011, UN Doc A/66/230, at para. 29.

<sup>124</sup> M. Deluca *et al.*, *Including Children with Disability in Primary School: The Case of Mashonaland, Zimbabwe* (2014) p. 14.

<sup>125</sup> R. Chireshe, 'The State of Inclusive Education in Zimbabwe: Bachelor of Education (Special Needs Education) Students Perception', 34:3 *Journal of Social Science* (2013) pp. 223–228.

## 6.1 *The Failure to Draft the Applicable Provisions in the Language of Rights*

Section 83 of the Constitution is mischievously misleading to the extent that its heading purports that the provisions therein are ‘Rights of persons with disabilities’ whereas in actual fact they are merely directives relating to possible action to be taken by the state in its attempt to meet the ‘needs’ of PWDs. The provisions of section 83 of the Constitution are not couched in the appropriate language which depicts actual and concrete entitlements of PWDs.<sup>126</sup> Instead, the entire section enumerates measures which the state should take in order to ensure that PWDs ‘realise their full mental and physical potential’. The entire section totally fails to articulate the rights which PWDs are entitled to under the Constitution, and this inadequacy is made more conspicuous when one juxtaposes section 83 to other sections of the Constitution which immediately precede it. The preceding sections, which enumerate the rights of other disadvantaged groups, clearly mete out concrete rights for certain categories of persons, and this is borne out expressly from the language in which they are couched. For example:

**81 Rights of children**

(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –

**82 Rights of the elderly**

People over the age of seventy years have the right –

The foregoing provisions clearly announce that they extend ‘rights’ to certain individuals, and this is different from the language adopted under section 83 which opens with the phrase “[t]he State must take appropriate measures”. Section 83 presents a curious case of elusiveness in terms of depicting the actual content of the rights which PWDs are afforded under the Constitution. The operational text provides that “[t]he State must ...” which implies a peremptory obligation on the state to take steps to ensure that all the obligations relating to PWDs are fulfilled.<sup>127</sup> However, that very small glimpse of hope is immediately taken away by the infamous phrase “within the limits of the resources available to it”. This creates a double jeopardy situation in that, firstly, the provisions of section 83 do not strictly extend rights to PWDs but are merely ‘directives’ relating to appropriate government actions, and, secondly, the fulfilment of these ‘directives’ is contingent upon the resources available to the state.

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<sup>126</sup> Section 83 of the Constitution reads:

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

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

<sup>127</sup> It can be argued, to a limited extent, that the obligations imposed on the state under section 83 of the Constitution create corresponding rights for PWDs. However, this does not detract from the compelling argument that section 83 is not sufficiently couched in adequate human rights language and that this may ultimately have a bearing on how PWDs approach the courts to seek relief in terms of the Constitution.

This effectively means that the state's reluctance to fulfil its obligations under section 83 can be mischievously justified by reason of lack of adequate resources.<sup>128</sup> The very idea of tying the rights of PWDs to the availability of resources indicates a common yet unfounded assumption that all of the envisaged rights of PWDs invariably have budgetary implications.

Indeed, the key provisions of the Constitution extend many human rights to 'everyone', including PWDs, and the temptation that there is no need for further protection is very high. One of the obvious risks that lies in leaving the rights of PWDs within the same scope of the general provisions of the Constitution is the tendency to overgeneralise, and with that comes the turning of a blind eye to some of the nuances that might arise insofar as PWDs are concerned. Besides, the Constitution also singles out specific categories of persons who have been historically marginalised and unfairly discriminated against in order to reinforce (and in some instances extend) the rights which they are already afforded under the 'general' provisions of the Constitution. This evinces the legislature's appreciation of the dangers which are inherent in approaching human rights issues from a generalised perspective. For example, even though section 51 extends the right to human dignity to 'every person', section 80(1) nonetheless re-packages this right within the context of women's rights. By no means should this be considered unnecessary repetition. Rights applicable to specific groups come as a realisation of the past injustices which these groups have suffered at the hands of society and the state, thus the need to go the extra mile in protecting their rights within the scheme of the Constitution.

Section 83 does not enumerate any rights in the appropriate language which enables PWDs to approach the courts for redress. The fact that the Constitution confers on other historically marginalised groups such as women, children and the elderly additional rights that address their specific circumstances raises the question of why the legislature failed to equally do the same for PWDs. All PWDs are entitled to under the current constitutional framework is the right to request the state to "take appropriate measures, within the limits of the resources available to it, to ensure that [they] realise their full mental and physical potential". The exact meaning of this right is not immediately clear, but the provision subjects the realisation of the rights of PWDs to the caveat to which the realisation of all socio-economic rights is subjected. Besides, the entire provision proceduralises the rights of PWDs in that it does not confer on them concrete entitlements that are enforceable in a court of law but stipulates procedures that ought to be taken to ensure that PWDs realise their full potential.

There is no indication of what happens if the state decides not to take the stipulated measures or procedures in light of the limited resources that might be available. This makes it hard for PWDs to demonstrate that the state's failure to take the stipulated measures is not justified by the resources available to it, especially given that

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<sup>128</sup> For cases to do with obligations which generate budgetary implications for the state, see *Soobramoney v. Minister of Health Kwazulu Natal* 1998 1 SA 765 (CC), *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 1 SA 46 (CC) and *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 5 SA 721 (CC).

information on how much money is available to promote the rights of PWDs may not be in the public domain. If courts were to require the state to take the stipulated measures ahead of other goals considered to be compelling by the state, such a path would constitute priority-setting and is highly likely to offend the separation of powers doctrine. This is because making a command that the state adopt measures that have cost implications without asking the legislative and executive branches of the state whether the resources for such measures are available would be tantamount to usurping the functions of these political branches of the state.

It is self-evident that for a provision which carries the heading “[r]ights of persons with disabilities” section 83 leans heavily on the side of misrepresentation. One hopes that the state of section 83 is a result of an unfortunate drafting error, if not, that failure to clearly spell out the rights to which PWDs are entitled is a serious indictment on the legislature and ultimately the entire Zimbabwean society. Not much faith should be placed in the argument that the rights of PWDs are fully protected under the other general clauses of the Constitution, especially against the backdrop that the very same Constitution singles out other categories of persons in order to reinforce or add other rights for their protection and advancement. To their credit, the drafters of the Constitution do refer to ‘rights’ of PWDs as part of national objectives under Chapter 2 of the Constitution. Even then, however, it should be recalled that national objectives are not fundamental rights that are binding on the state. Whilst they provide interpretive guidance to the courts and other agencies of the government, national objectives are not rights and do not ground concrete legal obligations that are enforceable in the courts of law. There is, therefore, dire need to have specific provisions of the Constitution which deal directly and substantively with the rights of PWDs.<sup>129</sup>

## **6.2 The Measures to Be Taken by the State Are Subject to Available Resources**

In terms of our constitutional framework, the obligations imposed on the state by the rights of PWDs are subject to the availability of resources. For instance, the DoRs, under section 83 of the Constitution, provides that “[t]he State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realise their full mental and physical potential”. Section 22 of the Zimbabwean Constitution provides that the state and all institutions and agencies of government at every level must, within the limits of the resources available to them, assist persons with physical or mental disabilities to achieve their full potential and to minimise the disadvantages suffered by them.

What is apparent from these provisions is that the obligations imposed on the state with regards to rights of PWDs are dependent upon the availability of resources for such purposes. Thus, the corresponding rights themselves are, at the

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<sup>129</sup> For example, the CRPD provides a full range of rights, and even though these rights are normally extended to every individual, the Convention adds elements that are significant in the context of disability. See generally G. Quinn and C. O'Mahony, 'Disability and Human Rights: A New Field in the United Nations', in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook*, 2nd edition (2012).

implementation level, limited by reason of the lack of resources. Whilst the relevant provisions can be commended to a greater extent, it can be argued that the inclusion of a claw back clause in sections 22(2) and 83(1) of the Constitution may water down or dilute the rights of PWDs.<sup>130</sup> Given the lack of resources and the significant demands placed on them, an unqualified obligation to meet these needs would not ordinarily be capable of being fulfilled.<sup>131</sup> The conditionality of resource availability gives the state an excuse in the event of a failure to promote and fulfil the rights of PWDs.<sup>132</sup> Arguably, while section 83(1) of Constitution makes the realisation of the economic, social and cultural rights of PWDs contingent upon resources that are available to the state, it does not necessarily provide that these rights are subject to progressive realisation.<sup>133</sup>

The scope of the state's obligations to protect, promote and fulfil the rights of PWDs under section 83 of the Constitution can be partly determined by making reference to some of the national objectives stated in section 22 of the Constitution. This follows the peremptory obligation imposed on the courts, when interpreting the provisions of the DoRs to "pay due regard to all the provisions of the Constitution, in particular the provisions of Chapter 2". When performing their interpretive functions in terms of section 83 of the Constitution, courts must therefore refer to the provisions relating to the rights of PWDs under section 22 of the Constitution. Section 22 of the Constitution mandates all government institutions and agencies at every level to develop programmes for the welfare of persons with physical or mental disabilities especially work programmes consistent with their capabilities and acceptable to them or their representatives.<sup>134</sup> Government institutions and agencies are also mandated to consider the specific requirements of persons with all forms of disabilities as one of the priorities in their developmental plans.<sup>135</sup> This responds to the demand to have support for disability programmes and organisations in Zimbabwe.<sup>136</sup> The constitutional provision obliging the state to develop welfare programmes for persons with physical or mental disabilities appears to be aligned to an outdated approach which views disability as a welfare rather than a human rights issue.<sup>137</sup> However, the level of support and the type of disability organisations to be supported has not been specified.<sup>138</sup> The new Constitution simply states that governmental institutions and agencies have to render assistance to persons with

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<sup>130</sup> Manatsa, *supra* note 104.

<sup>131</sup> *Soobramoney v. Minister of Health: Province of KwaZulu-Natal D & CLD 5846/97*, 21 August 1997, unreported. See also the Committee's General Comment No. 13, para. 1.

<sup>132</sup> J. Mungumbate and C. Nyoni, 'Disability in Zimbabwe under the New Constitution: Demands and Gains of People with Disabilities', *Southern Peace Review Journal* (2013) p. 10. See also King George VI School and Centre for Children with Physical Disabilities, *Disability in Zimbabwe*, available at: <[http://www.kinggeorge6.org/home/the-centre/disability-in Zimbabwe](http://www.kinggeorge6.org/home/the-centre/disability-in-Zimbabwe)>.

<sup>133</sup> See also L. Nyirinkindi, 'A Critical Analysis of Paradigms and Rights in Disability Discourses', 12 *East African Journal of Peace and Human Rights* (2006) p. 49, at p. 52.

<sup>134</sup> Section 22(3)(a) of the Constitution of Zimbabwe Amendment No. 20. See also the preamble of the Social Welfare Assistance Act 10 of 1988 [Chapter 17: 06].

<sup>135</sup> Section 22(3) (b) of the Constitution of Zimbabwe.

<sup>136</sup> Mungumbate and Nyoni, *supra* note 132, p. 11.

<sup>137</sup> C. Ngwenya, 'Deconstructing the Definition of Disability under the Employment Equity Act: Social Deconstruction', 22 *South African Journal on Human Rights* (2006) p. 620.

<sup>138</sup> Mungumbate Nyoni, *supra* note 132, p. 11.



physical and mental disabilities without indicating the nature of assistance to be provided.<sup>139</sup>

## 7 COVID-19 and the Rights of Persons with Disabilities

Pandemics exacerbate inequalities and further marginalise the poor and other vulnerable groups in society. The COVID-19 pandemic has excessively affected persons with disabilities across the world, including in Zimbabwe. Persons with disabilities are severely exposed and affected because of their specific conditions and needs. During the lockdown, PWDs have limited ability to undertake informal livelihoods activities; access health and education services; food and nutrition; and information on COVID-19. According to the International Disability Alliance (IDA) and WHO, PWDs are more likely to face barriers during a humanitarian crisis, unless some practical solutions are availed to effectively address the range of potential risks.<sup>140</sup> The UN Convention on the Rights of Persons with Disabilities (CRPD) requires countries to ensure equal access to facilities and services. In humanitarian crises, such as pandemics, Article 11 of the CRPD obligates states to protect the safety of PWDs. Section 83 of the Zimbabwean Constitution provides for the rights of PWDs in all contexts (including public health emergencies) and section 56(3) of the Constitution prohibits discrimination on the basis of disability among other grounds.<sup>141</sup> The pandemic has negatively impacted PWDs, especially given the government's failure to take urgent measures to prevent or curb the challenges confronted by all vulnerable groups.

Persons with disabilities have unique medical needs as well as communication and information needs, some of which require specific technologies, formats and language. In times of crises and disasters, a lack of access to communication and information platforms for persons with various types of disabilities makes them more vulnerable and prone to life-threatening situations.<sup>142</sup> Disabled persons' failure to access communication platforms and vital information during global times of crises is traceable to social, technical and affordability (financial) reasons.<sup>143</sup> An ableist culture is often blamed for giving low priority to persons with disabilities and favouring able-bodied persons in providing services in these critical times of crises and disasters; hence, able-bodied people are implicated in making decisions that disproportionately negatively impact persons with disabilities, instead of providing best practice accessibility that benefits everyone.<sup>144</sup> The fact that most decision makers are able-bodied and the lack of awareness of the intricate needs of PWDs

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<sup>139</sup> *Ibid.*

<sup>140</sup> UNESCO, 'Assessing the Impact of COVID-19 on Persons with Disabilities in Zimbabwe', available at <<https://en.unesco.org/news/assessing-impact-covid-19-persons-disabilities-zimbabwe>> (accessed on 18 December 2020).

<sup>141</sup> Constitution of Zimbabwe Amendment (No. 20).

<sup>142</sup> M. Kent and K. Ellis, 'People with Disability and New Disaster Communications: Access and the Social Media Mash Up', *Disability Society* (2015) p. 421.

<sup>143</sup> N. A. Mhiripiri and R. Mudzi, 'Fighting for Survival Persons with Disabilities: Activism for Mediatization of COVID-19 Information', *Media International Australia* (2020) p.1, p. 2.

<sup>144</sup> *Ibid.*

relegates PWDs to the margins of social provisioning programmes because governments rarely take the rights of marginalised groups very seriously.

Lack of access to information for disabled persons, especially the deaf and hard of hearing (DHH) and the virtually impaired, has been a thorny issue in Zimbabwe since the pandemic started. This culminated in an urgent chamber application in *Centre for Disability and Development and Two Ors v. Zimbabwe Broadcasting Holdings (Private) Limited and Three Others*<sup>145</sup> where it was held that the lack of access to information that is accessible to persons with disability places them at high risk as a result of missing out on critical information pertaining to COVID-19 and was a violation of Article 16 of the CRPD which provides for freedom of expression and access to information as read together with section 83 of the Constitution. Without this information, PWDs might unknowingly go about their normal business and thereby endanger themselves and others with the risk of contracting the deadly and incurable coronavirus disease which has wreaked havoc in several parts of the world.<sup>146</sup>

In addition, the failure by government authorities to ensure that written communications are also distributed in formats which are accessible to blind and partially sighted persons is equally a violation of the rights to access to information.<sup>147</sup> This case was a landmark in that it immediately ensured that PWDs have access to sign language materials as a matter of right. It also ensured that that all written information related to COVID-19 and provided by the government is also made available in formats accessible to blind and partially sighted persons, such as audio versions, large text, and or readable digital text and distributed to the intended beneficiaries. It was also ordered that the Ministry of Health and Child Welfare's COVID-19 hotlines and centres be staffed with persons who are equipped to deal with the unique needs of PWDs. The information provided by government institutions both to prevent infection and to know how to act in case of illness must be available in accessible formats, including sign language, video captioning, the use of alternative text in images and graphics displayed digitally, and easy-to-read versions. This has not happened in Zimbabwe and other African countries, leaving the majority of PWDs and those around them largely exposed to the pandemic.

Due to the nature and characteristics of the coronavirus, some PWDs might be at a higher risk of infection or severe illness due to underlying medical conditions. Persons at higher risk of severe illness from COVID-19 include those with serious underlying chronic medical conditions like chronic lung diseases, serious heart conditions, or weakened immune systems. Furthermore, evidence from past epidemics indicates that resources are often diverted from routine health services during pandemics. This further reduces the already limited access of many girls and young women with disabilities to sexual and reproductive health services, as well as maternal, new-born and child health services. Some SRHR services delivery points

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<sup>145</sup> *Centre for Disability and Development (CDD) and Two Ors v. Zimbabwe Broadcasting Holdings (Private) Limited and Minister of Information Publicity and Broadcasting*, <[www.veritaszim.net](http://www.veritaszim.net)> (accessed on 21 December 2020).

<sup>146</sup> See *CDD v. Zimbabwe Broadcasting Holdings*, para. 6.

<sup>147</sup> *Ibid.*, para. 7.

have been forced to close and increased financial pressures have made contraception for sexually transmitted infections and maternity services unaffordable for PWDs.<sup>148</sup> This is in violation of Article 28 of the CRPD which states that state parties should recognise that PWDs have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability and shall take all appropriate measures to ensure access for PWDs to health services that are gender sensitive, including health related rehabilitation.<sup>149</sup>

Article 16 of CRPD provide that states parties should take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities both within and outside the home from all forms of exploitation, violence and abuse, including their gender based aspects.<sup>150</sup> Despite this women and girls with disabilities are experiencing high rates of gender based violence (GBV) and have limited access to legal services. Children with disabilities have also been exposed to abuse as school closures have left them without any reliable protective environment. The increase of violence against women with disabilities has attributed to their increased poverty, vulnerability and dependence on their abusers. Women and girls with disabilities, particularly those in rural areas, face additional barriers in accessing SRHR including GBV services such as the clinical management of rape. Access to GBV services should not be put to hold during the pandemic. UNDP Zimbabwe through the Spotlight Initiative has reprogrammed some of its activities to provide a disability and gender inclusive response to the pandemic.<sup>151</sup> This is being achieved through community engagement and awareness campaigns which are providing information and training on legislative processes and policies, gender responsive institutions, violence prevention programmes and essential services.<sup>152</sup>

More importantly, COVID-19 has undermined the ability of public services, including policing, to respond to women's needs despite the designation of GBV response services as 'essential' by government.<sup>153</sup> Survivors of GBV, including PWDs, describe facing multiple barriers in accessing services such as transportation, being turned away at roadblocks, courts being closed, and police responses being insufficient.<sup>154</sup> This can be largely attributed to the lack of implementation of the decision to declare responses to GBV an essential service, underpinned by a lack of clarity on the types of GBV services designated essential and a lack of clear communication to frontline government officials.

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<sup>148</sup> Social Development Direct, 'COVID-19 and Gender Based Violence in Zimbabwe: How Is the Pandemic Increasing the Risk of Violence Against Women and Girls?', available at <<https://www.sddirect.org.uk/news/2020/12/covid-19-and-gender-based-violence-in-zimbabwe-how-is-the-pandemic-increasing-the-risk-of-violence-against-women-and-girls/>> (accessed on 18 December 2020).

<sup>149</sup> See also section 83(d) of the 2013 Zimbabwean Constitution.

<sup>150</sup> See also section 83(c) of the 2013 Zimbabwean Constitution.

<sup>151</sup> UNDP Zimbabwe, 'COVID-19 and Persons with Disabilities: Leaving No One Behind', available at <<https://www.zw.undp.org/content/zimbabwe/en/home/presscenter/articles/covid19-and-persons-with-disabilities--leaving-no-one-behind-.html>> (accessed 18 December 2020).

<sup>152</sup> *Ibid.*

<sup>153</sup> SAFE Zimbabwe, *Report on Gender Based Violence –Data in Zimbabwe During COVID-19* (2020) p. 2.

<sup>154</sup> *Ibid.*

Movement restrictions imposed by governments to stop the spread of COVID-19 have made it difficult for PWDs who use personal assistants to take part in daily activities. This was due to the requirements of travelling permits by the Zimbabwe Republic of Police. This requirement was later declared unconstitutional but the harm had already been done as the majority of PWDs lost their livelihoods. The restrictions on movement limit the participation of PWDs in political and public life.

In addition, the COVID-19 pandemic has had far-reaching implications for education services for PWDs. Prolonged school closures have exacerbated existing vulnerabilities and inequalities among children, especially girls, children with disabilities, those in rural areas, orphans and vulnerable children, as well as those from poor households and fragile families.<sup>155</sup> Article 24 of the CRPD states that state parties should recognise the right of PWDs to education with a view to realising the right without discrimination on the basis of equal opportunity to ensure an inclusive education system at all levels and lifelong learning.<sup>156</sup> Be that as it may, when the public radio lessons were introduced no measures were taken by the government to cater for the DHH; hence education for persons with disabilities during the lockdown has not been inclusive and equitable as envisaged in the CRPD and the Constitution. Thus parents and guardians who had the knowledge and tools resorted to home schooling for their children with disabilities. This has not yielded results as many parents are not equipped to respond to the learning demands of children with disabilities.

To eliminate the barriers preventing PWDs from enjoying their rights during the pandemic, the state should adopt affirmative action measures to address the multiple and intersecting disadvantages affecting PWDs in the educational, health, social services and other contexts. This is because every right conferred on PWDs has an equality dimension that requires the state to respond to each of the existing barriers (to achieving full potential) to level the playing field for those with multiple impairments. Apart from prohibiting discrimination based on disability, gender and other factors, section 56(6) of the Constitution requires the state to take reasonable legislative and other measures to promote or advance the rights of persons or categories of persons that were historically subjected to unfair discrimination. Persons with disabilities fit into this category and are constitutionally entitled to benefit from remedial measures that seek to push back the challenges confronted by PWDs during public health emergencies such as COVID-19. In fact, their increased vulnerability and their limited capacity to realise personal goals without any assistance from the state, especially during emergencies, creates an immediate obligation to act on the part of the state.

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<sup>155</sup> OCHA Zimbabwe, 'Cluster Status: Education', available at <<https://reports.unocha.org/en/country/zimbabwe /card/4qUWJuEhk6>> (accessed on 18 December 2020).

<sup>156</sup> See also section 83 (e) and (f) of the Zimbabwean Constitution.

## 8 Conclusion

This chapter discussed, at length, the rights of PWDs in Zimbabwe, particularly within the context of the provisions of the Constitution and the CRPD. Given that disadvantage is by nature plural, the chapter revolved around and sought to explain the importance of multi-layered or intersectional responses to the challenges confronted by PWDs. Intersectionality considers the identities and experiences of people without assigning them to permanent categories or placing people in specific boxes that denote their identity. It implies that society and the state should not place their focus on fighting injustices solely on the basis of disability because other problems may be arising in other attributes such as gender, age, ethnic origin, economic status and the like among the same PWDs. The idea is to acknowledge the intersectional nature of various identity markers in framing the oppression of PWDs and dealing with them at once instead of fragmenting policies and approaches that eventually converge on the PWDs. In aligning the DPA with the Constitution, different layers of identity should not be treated as stand-alone attributes, but the significance of the intersectional nature of various identity markers in framing the life worlds of PWDs needs to be acknowledged if disability policy is to effectively promote the realisation of their human rights. The reality is that disability does not operate in isolation nor does gender; hence an understanding of the intersectional, multi-layered and multidimensional nature of various identity markers in creating the oppression of PWDs is likely to result in disability policies that contribute to making a meaningful difference in the lives of PWDs.

This chapter discussed, in detail, the measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing international law at a wider level. In terms of section 83 of the Constitution, the measures to be adopted by the state include those that are designed to enable PWDs to become self-reliant and to participate in social, creative and recreational activities, to protect PWDs from exploitation and abuse, to give PWDs access to medical, psychological and functional treatment, to provide special facilities for the education of PWDs and to provide state funded education and training where it is needed. The importance of these measures for the enjoyment by PWDs of their rights has been discussed in detail in this chapter.

The state's duty to promote the self-reliance of PWDs should be read together with the founding values and principles of the nation state, as well as the national objectives protected in Chapter 2 of the Constitution. These values and principles lie at the heart of the new constitutional order and, together with measures that promote self-reliance, create the necessary preconditions for the achievement of the full potential of PWDs. The idea behind self-reliance is to encourage citizens to foster the essence of solidarity in which non-disabled people and PWDs work together and learn to use their own initiative and local resources to improve their well-being instead of passively waiting for the government or donor to deliver the goods. Self-reliance does not necessarily mean that external assistance should be rejected. A collective self-reliance approach, which is embedded in the mainstream community development agenda, encourages PWDs and their families to look inwards, to be

creative and to assist funding partners to view the world through their own indigenous lens. This scenario is not possible if PWDs are inactive and voiceless; too much and prolonged charity perpetuates dependency syndromes and weakens the ability of PWDs to develop themselves for self-reliance.

With regards to measures that enable PWDs to live with their families and to participate in social, creative or recreational activities, the notion of enabling PWDs to live with their families is a positive development in the sense that it seeks to 'move' PWDs from the restrictions of institutional life to family life, but the provision takes a narrow approach, which fails to holistically adopt the contemporary concept of living independently as required by international law. The equivalent provision of the CRPD, Article 19(a), directs state parties to ensure that 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". Denying PWDs a choice, the Constitution assumes that PWDs are a homogenous group, and they all desire to live with their families, yet under independent living PWDs should simply have civil rights, options and control over choices in their own lives as do people without disabilities.

As for measures to protect PWDs from all forms of exploitation and abuse, it is necessary to emphasise, particularly in light of gender roles and stereotypes in the African cultural context, that girls and women bear the brunt of sexual exploitation and other forms of abuse that confront PWDs. One of the shortcomings of the Constitution is that it is silent on the gendered aspects of exploitation and abuse. Thus, it is imperative to read the prohibition of exploitation and abuse together with the non-discrimination clause in the Constitution. Gender is important because experiences of exploitation and abuse are primarily shaped by gender roles; girls and women and boys and men do not experience exploitation and abuse in similar ways. In many cases, perpetrators of abuse and exploitation desire to exert power and control over all their victims; hence women with disabilities suffer increased levels of sexual abuse because they are usually regarded as easy targets upon which both disabled and non-disabled men wield dominance. The current DPA is also gender blind. We therefore call for its urgent revision to enable the Act to adopt a gender lens and to articulate what constitutes exploitation and abuse in gendered terms. However, gender does not function on its own. Thus, an understanding of the intersectional nature of exploitation and abuse is important if PWDs are to be adequately protected from exploitation and abuse.

In the context of access to medical, psychological and functional treatment, constitutional provisions which do not seek to identify and address the injustices that are embedded within the health care structures in which PWDs are meant to enjoy rights are futile. In Zimbabwe, negative attitudes of health care staff towards the sexual and reproductive health of PWDs have been reported. Some health care practitioners are of the opinion that PWDs are sick people who should consult specialist health care centres for issues related to their illnesses or disability alone. However, PWDs have a right, just like everyone else, to access health care for reasons which go beyond disability such as sexual and reproductive issues. The work ethic of medical staff is usually that of 'we know best', with the result that PWDs

are rarely consulted even about their own bodies. Regarded as a solid base of truth and personifying the healing front of technology and science, medicine is believed to be absolutely genuine. In relation to disability the state should come up with a strategy of moderating excessive emphasis on medical diagnoses because the understanding of disability requires much more than clinical 'facts' about the body, albeit the necessity of such 'facts' in determining medicinal remedies in cases where they are required.

Section 83 of the Constitution also provides that the state must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities are provided with special facilities for their education and are provided with state-funded education and training where they need it. Whilst primary education has been largely labelled as 'free' and therefore 'state-funded', current practices at the majority of schools raise doubts about this claim. The reality of the matter is that there have been increases, not in tuition fees but in levies and other charges at many schools across the entire country. In many if not all schools the amounts payable in levies are multiple times higher than the money prescribed for tuition fees. With the government currently reported to face perpetual financial challenges, the state's capacity to provide state-funded education and training to PWDs who need it remains in serious doubt. Nonetheless, it is encouraging to note that the Constitution seeks to impose on the state the duty to provide for the quality education needs of PWDs. Given that the majority of PWDs cannot fend for themselves and their children, it is critical for a national constitution to require the state to fulfil this duty to ensure that PWDs are not left out of many educational and developmental programmes.

Going forward, there is need for the state to develop a culture of research which informs policy and practice. By taking into account the voice of PWDs, the state is able to gain first-hand knowledge about the status of PWDs, and determine appropriate strategies for intervention in protecting PWDs from exploitation and abuse, promoting their right to live with their families and to gain access to education, health and self-reliance. If the elected disability senators are unable to facilitate the voice of PWDs, and to ensure that such a voice is heard, or if they are unable to facilitate research and identify new laws, such senators may end up being 'window dressers' who fail to meet the expectations of the citizens whom they represent. Furthermore, given the conflict that appears to reign between international human rights treaties and traditional practices, coupled with contextual differences, there is need for policy makers and implementers to make an effort to reconcile the law with cultural practices, if at the end of the day the concerns of PWDs in Zimbabwe are to be effectively addressed and their rights are to be adequately promoted. Finally, the vulnerability of PWDs requires that states be sensitive to the accelerated marginalisation confronted by this category of persons during public health and other emergencies. This chapter has demonstrated that international law and the Constitution have provisions that mandate states to take remedial measures that give PWDs preferential treatment in post disaster recovery efforts and development programming. These measures should not just address disability as a marker of

disadvantage, but also respond to other identity markers such as gender, age, ethnic identity and many others if all PWDs are to benefit meaningfully from them