

## **ZIMBABWE DISABILITY-INCLUSIVE DEVELOPMENT FORUM**

### **DISABILITY AWARENESS AND MAINSTREAMING WORKSHOP**

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**TOPIC:** Disability Rights and the Post-New Constitution Phase in Zimbabwe: Where do we go from now?

A paper presented during the ‘Disability Awareness and Mainstreaming Workshop’ at the Faculty of Education, University of Zimbabwe, 30 & 31 January 2014

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### **INTRODUCTION**

This presentation comes at a time when two major events which changed the colour and taste of disability activism took place in Zimbabwe. The events are the adoption of a new Constitution in 2013 and the ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) by Zimbabwe on 23 September 2013. The new Constitution effectuates a paradigm shift in the context of disability by expressly recognising the rights of persons with disabilities (PWDs) for the first time in the constitutional history of Zimbabwe. Section 83 of the Constitution shows a constitutional commitment to advance the rights of PWDs who have endured severe marginalisation for a long time in Zimbabwe. By becoming a ratifying party to the CRPD, Zimbabwe has assumed an obligation to fulfil the text of the Convention.

This presentation is divided into 4 sections. The first section is an appraisal of the new Constitution and disability rights provision. The second section briefly highlights Zimbabwe’s obligations under the CRPD. The third section illuminates what needs to be done with regards to full and effective realisation of the rights of PWDs in the Post-New Constitution Phase in Zimbabwe. This section proffers general and specific recommendations on how to utilise the

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disability rights provisions in the new Constitution and the CRPD so as to achieve a more effective realisation of the rights of PWDs. The last section is the conclusion.

## **DISABILITY RIGHTS AND THE NEW CONSTITUTION**

A constitution is a fundamental legal pronouncement in any given jurisdiction. A constitution shapes the law and informs the way the legislation is drafted by the legislature and interpreted by the courts. A constitution thus is a foundation upon which a nation is built. Although the new Constitution has been received with mixed feelings by the disability movement, it can still be submitted that the new Constitution of Zimbabwe signifies the dawn of a new era with regards to the protection, promotion and fulfilment of the rights of PWDs in the following manner;

Prior to 2005, the non-discrimination clause in the Constitution of Zimbabwe did not include disability as one of the prohibited grounds. Section 23 of the Constitution was amended in 2005 to include physical disability as a prohibited ground of discrimination. While the amendment was applauded for extending protection to disability, questions were asked about its inclusiveness. Mental, intellectual, sensory and other types of disabilities, which are protected under the CRPD, were implicitly placed outside the scope of constitutional protection.

In April 2013, Zimbabwe adopted a new Constitution through a referendum. The Constitution came into force on 22 August 2013. The Constitution contains some improvements with regards to the realization of the rights of PWDs. It provides a historic bridge between the past of extreme marginalization of PWDs and a future founded on the recognition and realization of the rights of PWDs. The Constitution also represents a confirmation of PWDs as rights holders as opposed to being recipients of charity. It is therefore a transitional constitution and one which establishes a new order in Zimbabwe, an order in which all persons regardless of their abilities or disabilities are equal in all aspects of life.

As a starting point, the Constitution expressly includes disability as a ground of prohibited discrimination under section 56. This represents a milestone in guaranteeing the right to non-discrimination of PWDs.

The provisions on inherent dignity and equal worth of each human being under the provision on founding values and principles are also worth mentioning. The respect for the inherent dignity

and the acceptance of PWDs as part of human diversity and humanity is thus a strong assertion in the confirmation of PWDs as rights-bearers and valued members of society. The recognition of the inherent dignity of all human beings is therefore an important phenomenon especially for persons with sensory (especially those with albinism), mental and intellectual disabilities who are normally treated without dignity.

More importantly, the Constitution also recognizes the rights of PWDs among the founding values and principles. Given the fact the founding values and principles are non-derogable pronouncements which must be applied by courts of law when resolving legal disputes, the Constitution is really commendable. It can be submitted that there is at least recognition of disability rights and an appreciation of the equal worth of all human beings in Zimbabwe as opposed to the previous Constitution which did not expressly provide for the rights of PWDs in any section.

Similarly, Section 22 of the Constitution provides that all institutions and agencies of the government at every level must recognize the rights of persons with physical or mental disabilities, particularly their right to be treated with respect and dignity. The State, its institutions and agencies of government are further mandated to assist persons with physical and mental disabilities to achieve their full potential and to minimize disadvantages suffered by them. The provision is commendable, given the fact that disability is an evolving, at times contentious, cross-cutting concept that cannot be addressed by a single governmental department.

Furthermore, section 22 mandates the State, 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; to consider the specific requirements of persons with all forms of disabilities as one of the priorities in development plans; to encourage the use and development of forms of communication suitable for persons with mental or physical disabilities; to foster social organizations aimed at improving the quality of life of PWDs; and to take measures to ensure accessibility of PWDs to buildings and amenities. This appears to be a step forward in attempting to alleviate poverty among PWDs in Zimbabwe and to ensure inclusion and participation in society by PWDs. In addition, the provision requires mainstreaming of disability rights in

Zimbabwe. It can be submitted that mainstreaming disability issues is a paramount part of the strategies of sustainable development

With regards to official languages, the Constitution advances disability rights by making sign language one of the official languages of Zimbabwe. The right to language cannot be underestimated because it is only through the ability to communicate with others that makes PWDs, especially those with speech functional and hearing disabilities, be fully and effectively included in the society.

For the first time in the constitutional history of Zimbabwe, the Constitution contains a dedicated section on the rights of PWDs. Section 83 of the constitution states that;

The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realize 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.

Section 83 shows a constitutional commitment to address some of the major barriers to the equality of PWDs such as access to education and health facilities, exploitation and abuse, and the right to live with own families. The state has an obligation to ensure that PWDs realize their full mental and physical capabilities. Provisions of section 83 confirm that Zimbabwe has begun to embrace a human rights approach to disability. Furthermore, section 83 of the Constitution indicates that the State has an obligation not to use its power in such a way as to violate any of the fundamental rights of PWDs but has a corresponding duty to use its power to protect and promote the rights. The Constitution is further complemented by the CRPD in the following manner;

## **ZIMBABWE'S OBLIGATIONS UNDER THE CRPD**

The recent ratification of the CRPD indicates that Zimbabwe has assumed all the obligations under the Convention. The Convention embodies the best practices for the realisation of the rights of PWDs. The ratification therefore has far reaching implications for reform in all sectors in Zimbabwe. The CRPD embodies all the generation of human rights and its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all PWDs. Not only is the CRPD a human rights document but it is also a developmental tool to be utilised by governments in favour of PWDs.

## **WHERE DO WE GO FROM NOW?**

This section highlights some of the action that needs to be prioritized if PWDs are to fully and effectively realize their rights in the Post-New Constitution Era in Zimbabwe;

### **i. Alignment of disability laws with the Constitution and the CRPD**

This is an urgent exercise which should be implemented without any hurdles. It is cause of concern that laws which address disability in Zimbabwe, with the exception of the Constitution, predate the CRPD and are framed along the outdated medical model of disability. As an example, the Disabled Persons Act [Chapter 17:01] is not a human rights document in that it does not confer any rights to PWDs or confer any obligations on the state. Other laws that need to be aligned with the Constitution and the CRPD are the Children's Act [Chapter 5:06], the Mental Health Act [Chapter 15:12], the Social Welfare Act [Chapter 17:06], the State Service (Disability Benefits) Act [Chapter 16:05], the War Victims Compensation Act [Chapter 11: 16] and the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The bulk of these laws still use pejorative terms that disempower rather empower PWDs. Terms like 'imbecile,' 'mentally disordered,' 'intellectually handicapped' and 'mental patients' demean, degrade, belittle, stigmatise and devalue PWDs.

### **ii. Adoption of a national disability policy-WWDs and CWDs**

It is high time that Zimbabwe adopts a national policy on disability. A national policy is very important with regards to implementation of disability laws. Such a policy has also to take into consideration groups of PWDs who face double discrimination for example women and children with disabilities;

Women with Disabilities (WWDs) face the same spectrum of human rights abuses that the able-bodied women face. However, their abuses are magnified due to dependence and social isolation. They suffer double discrimination. In Zimbabwe, the situation of women with disabilities is particularly precarious. They are subjected to harassment, sexual abuse and exploitation. In addition, Zimbabwe being a highly patriarchal society, women with disabilities are less likely to benefit from any developmental initiatives that are available as compared to men with disabilities.

On their part, children with disabilities are doubly marginalized firstly as children and secondly as PWDs. There is a big concern for children with disabilities' vulnerability, welfare and the need to ensure that their rights are protected. A common scenario in Zimbabwe is that children with disabilities are less likely to complete primary education as compared to their non-disabled counterparts. This results in spill over effects in that due to lack of education and requisite skills, it is difficult if not impossible for children with disabilities to secure any form of employment. At the end, a vicious cycle of poverty and disability is compounded.

Not only women and children with disabilities are in need of concerted attention but also persons with dual or multiple disabilities. Needs of persons with multiple disabilities may largely differ from those with a single type of disability. This means that the equal treatment of all PWDs without taking into account the specific individual impairments may as well leads to injustice. Closely linked to the need to take targeted measures for the protection of women with disabilities, children with disabilities and PWDs with multiple disabilities is the issue of affirmative action programmes in favour of all PWDs, which subject I now turn to;

### **iii. The Need for affirmative action programmes in favour of PWDs**

Section 56(6) of the Constitution provides for affirmative action (legislative or other measures to protect or advance people or classes of people who have been disadvantaged by unfair discrimination). PWDs are a class of people who have been disadvantaged by unfair discrimination. A genuinely equal society is one that has a positive approach to and positively accommodates human difference. Formal equality entrenches pre-existing patterns of social disadvantage in a number of fundamental ways and fails to 'reasonably accommodate' the

difference of disability. Formal equality therefore creates illusory benefits for PWDs. Thus, there should be a standing policy in Zimbabwe laying a firm foundation for the increased participation of PWDs in critical sectors like education, employment, health and politics. Good practices may be emulated from Uganda's Constitution which explicitly provides that 'The State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.'

iv. **Litigation on disability and the development of domestic jurisprudence on disability**

Courts of law play a very crucial role with regards to the realization of the rights of PWDs. It is regrettable that only one case on disability has been decided by the Constitutional Court of Zimbabwe. This is the case of *Simon Mvindi & 5 Others v The President of the Republic of Zimbabwe and 3 Others* on the right to secret ballot for PWDs. More referrals are therefore needed on disability issues to the courts of law so as to provide impetus for the development of domestic jurisprudence on disability.

v. **Non-litigious efforts to advance disability rights**

The Constitution and other laws are not only enforced through litigation but through a number of other means for example citizens are entitled to lobby and to pressurize the government to give effect to their rights. Also other commissions for example the Zimbabwe Human Rights Commission and the Zimbabwe Gender Commission can be approached on disability issues.

vi. **Disability mainstreaming**

The need to mainstream disability issues cannot be over-emphasised. It is only through disability mainstreaming that PWDs are accorded their full rights and included in the society.

## **CONCLUSION**

Zimbabwe has to be congratulated for adopting a new Constitution which embraces a human rights approach to disability and for assuming obligations under the CRPD by becoming a ratifying party thereto on 23 September 2013. The time is opportune for Zimbabwe to translate the constitutional and CRPD provisions into actual tangible realities for PWDs. The paper has

indicated that this may be done through alignment of the disability laws with the Constitution and the CRPD. Further action to be taken in the Post-New Constitution Phase in Zimbabwe include the adoption of a national policy on disability, the introduction and implementation of affirmative action programmes in favour of PWDs, litigious and non-litigious efforts on disability issues and disability mainstreaming.

*THANK YOU!!!! BRIGADO!!!!*