

UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

OBLIGATORY ESSAY, 2001

**DOES THE PERSONS WITH DISABILITIES ACT NO. 33/1996
PROTECT AND PROMOTE THE HUMAN RIGHTS OF THE
DISABLED IN ZAMBIA**



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SCHOOL OF LAW

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DATE : 3rd August, 2001

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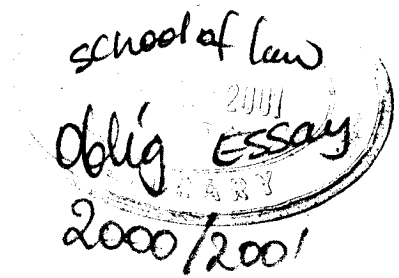
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This essay is dedicated and written in memory of my late father Wilson Mambwe Kafwabulula and my mother Idah Chama Kafwabulula who bore the plight and the challenges of having a disabled child - especially the pressures that they went through to build me up and educate me - I love you both....

"A significant moment becomes possible when there is a revision in the manner in which a substantial group of people, looking at some misfortune, sees it no longer as a misfortune warranting charitable consideration but as an injustice which is intolerable to society.."

Ralph H Turner, Sociologist.

ACKNOWLEDGMENTS

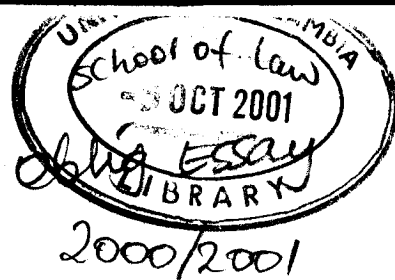


I would like to convey my heartfelt appreciation to all people who have assisted me in anyway. The years of study at UNZA have been tedious crowned with a lot of uncertainties through abrupt closures of an unprecedented nature. I am indebted to my wife for her support. Our daughter, Mumba has proved to be a source of joy and comfort especially during my preparation for exams.

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Further, to all those who in one way or another have rendered me moral support, understanding and assistance in the execution of this research study. I remain solely responsible for any errors in this text.



ABSTRACT

OVERVIEW

The Handicapped Persons Act Cap 551 was repealed in 1996 and replaced by Act No. 33 of 1996 which creates The Zambia Agency for Persons with Disabilities, Management Boards and the National Trust Fund for Persons with Disabilities. This essay tries to access the extent to which the new Act promotes the Human Rights of Persons with Disabilities in Zambia.

Approach and Methodology

Chapter One

- This Chapter gives general picture of disability and how that it is the last Civil Rights Movement
- It briefly touches on Good Governance and the Human Rights of the Disabled
- An overview of the Persons with Disabilities Act in government

Chapter Two

- Gives the advent of the rights of the Disabled
- Talks about early political, and philosophical movements and mentions the magna carta

Chapter Three

- Studies the United Nations Human Rights Division and its impact on persons with Disabilities

Chapter Four

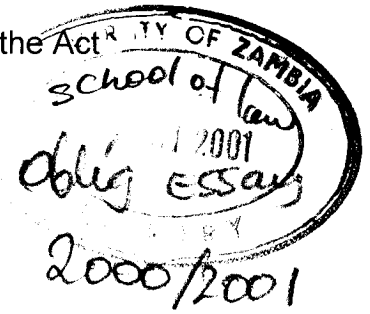
- Looks at Disability in the context of the International Covenant on Economic, Social and Cultural Rights: I C E S C R
- The Historical overview of the rights of Persons with Disabilities
- The International Council on Civil and Political Rights and Disability: C C P R

Chapter Five

-Looks at the Act in line with the Disabled and the pitfalls of the Act

Chapter Six

-Gives the Conclusion and Recommendations



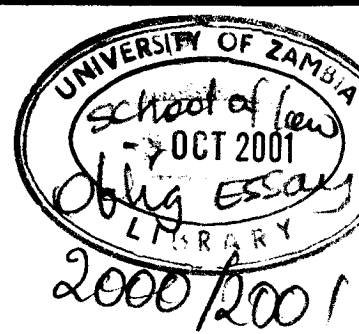


TABLE OF CONTENTS

CHAPTER ONE	PAGE
<u>INTRODUCTION</u>	
Good governance, Human Rights of the disabled	1
The persons with disabilities Act No. 33/1996	4
Definition of disability	4
Zambia Agency for persons with disabilities	5
Management Boards	6
Registration	6
Discrimination on Grounds of disability	7
Adjustment Orders	7
Miscellaneous provision	8
<u>CHAPTER TWO</u>	
Advent of the Human Rights of persons with disabilities (PWD)	10
<u>CHAPTER THREE</u>	
United Nation Human Rights Division	20
World Health Organisation and Disability	35
United Nation, Education, Scientific and Cultural Organizations	42
United Nations High Commission for refugees	45

CHAPTER FOUR

Disability and the International Covenant on economic, Social and cultural rights	47
Brief Historical Overview	51
International Covenant on economic social and Cultural rights in Zambian case	52
United Nations Standard Roles on the Equalization of Opportunities for persons with disabilities (STRE)	53
International covenant on civil and political rights and Disabilities : CCPR	60
Civil Political Rights and disability	61
Civil Rights Continuum	61
Liberty	63

CHAPTER FIVE

The persons with disabilities Act Vis-à-vis Human Rights of the disabled in Zambia. The pitfalls of the Act	63
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CHAPTER SIX

Conclusion	79
Recommendations	82

CHAPTER ONE

INTRODUCTION

Many disabled people view their rights as the last in a long series of movements for Human Rights. Labour movements, black people, colonised people, poor people have all been liberated. It follows therefore that the struggle/fight for the Human Rights of the disabled is the LAST CIVIL RIGHTS MOVEMENTS the world over. And respect for the human rights of the disabled will never come from a document nor from institutions, it will come from the struggle against repression and from freedom.

Disabled people are the largest minority in the World encompassing more than 500 million persons, of which two thirds live in developing countries. For a long time disabled persons have been confronted with different kinds of disregard and mistreatment. Together with women and children, **legal systems** have excluded disabled people (Zambia is no exception as we shall soon see) as non-persons. Eugenic population policies were carried out with the aim to eliminate those deemed disabled through sterilisation and killing programmes. What happened in German National Socialism was the most cruel and far reaching policy of this kind, but its ideology and goal were neither new nor exceptional. Modern disability policies were much more favourable but were also based on the assumption of disabled people not being real citizens. Labelled non-productive members of society, disabled persons were and often still are excluded from main stream society, often locked in large institutions called nursing homes, deprived of all that non-disabled people take for granted: liberty, social and political life, work, education, privacy to name but a few. Disabilities policy has been based on welfare and charity concepts and has not allowed disabled persons to escape the object status and become self-determined subjects.

Bruce Curtis, an American disabled activist who has been involved in the United States in dependent living movements, re-called that through out history people have:-

“been killed at birth, denied education, denied the right to vote, denied the right to employment, denied the right to marry, denied the right to have families, have been sterilised at birth, scientifically experimented upon and imprisoned in institutions under the most inhuman conditions.

We are traditionally the last to receive the benefit or the attention of most societies”.¹

He further stated that disabled persons had been exterminated with Jews, gypsies and intellectuals by the Nazi in the second world war.

GOOD GOVERNANCE, HUMAN RIGHTS AND THE DISABLED

The insistence by donors on good governance and respect for human rights as the precondition for granting aid to Zambia is encouraging. Donors have insisted on the independence of judiciary and its crucial role in ensuring the protection of fundamental rights and freedoms, especially of the minorities. But a question may be raised here – To what extent has Zambian Government under the realm of good governance ensured the promotion and protection of the rights of the disabled? True, one might argue and say, that Government has promoted the rights of the disabled by enacting the persons with disabilities Act No. 33 of 1996. But another question may be raised – To what extent does this Act answer, **protect and promote the human rights of the disabled in Zambia?**

¹ Bruce Curtis ` United Nations Sub-Commission Presentation Aug` 1982 DPI office files Winnipeg.

This whoever, is the purpose for this research i.e. to try and investigate whether this Act will be of any benefit in so far as the promotion of the welfare of the disabled is concerned.

One characteristic of good governance (among others) is the respect of the RULE OF LAW. This concept has three characteristic Viz (a) Law and order better the anarchy.

(b) Equality before the law (c) Government according to law. Under (b) equality before the law, if the law (as it does) stipulates that “every accused person shall be subjected to “fair trial”. The question is, is it a fair trial if a disabled person e.g. (deaf) appears in court and as the proceedings are going on (i.e. the various charges are read to him in a language he can't hear) he has no interpreter for sign language? The right to examine or have witnesses against the accused deaf person must also in logic lead to a right to the aid of interpreters of sign language since otherwise one's due process guarantees could not be provided in full equality. If the deaf do not enjoy the right to a fair trial, due to non use of sign language in court, is this equality before the law as understood under Rule of Law? If not, is there good governance and civil liberties as enshrined in the International Convention on Political and Civil Rights?.

Already one sees that good governance should also promote and protect the rights of the disabled – yes they are a minority but minorities have special rights. Even public commissions of inquiry do not have interpreters of sign language to cater for the deaf so that they too may make submissions.

THE PERSONS WITH DISABILITIES ACT NO. 33/1996

Defining disability is complex and controversial. Though arising from physical or intellectual impairment, disability has social implications as well as health ones. A full understanding dimension and is often associated with social exclusion, and increased exposure and vulnerability to poverty.

Disability is the outcome of complex interactions between intellectual, or mental condition and the social and physical environment. It has multiple dimensions and far more than individual health or medical problem. To a great extent, it has a human rights dimension which shall be discussed at length in latter chapters.

The Persons with Disabilities Act No. 33 of 1996 was enacted on the 12th December, 1996 and it is the Act that that repeals the former Handicapped Persons Act Cap. 551 of the Laws of Zambia.

This Act establishes the Zambia Agency for Persons with Disabilities, defines the functions of the Zambia Agency for Persons with Disabilities, establishes Management Boards and the National Trust Fund.

In order that this essay may be concise, it is imperative that the salient features of the Act are looked into below.

Definition of disability

The Act defines disability as:

“Any restriction resulting from an impairment or inability to perform any activity in the manner or within the range considered normal for a human being and would or would not entail the use of supportive or therapeutic designs and auxiliary aids, interpreters, white cane, reading assistants, hearing aids, guide dogs or any other animal treated for that purpose.

The Zambia Agency for Persons with Disabilities

1.1 The Agency is established as a body corporate with power to do all acts and things that a body corporate may legally do.

The Agency consists of seventeen (17) members.

- a) eight representatives of association of or for persons with disabilities;
- b) representatives, one each from the Ministries of:
 - i) Community Development and Social Welfare;
 - ii) Finance and Economic Development;
 - iii) Education
 - iv) Health
 - v) Science and Technology
- c) a representative of the Attorney-General
- d) a representative of the Zambia Chambers of Commerce and Industry; and
- e) two other members.

All the members are appointed by the Minister and hold offices for a period of three years.

1.2 The functions of the Agency are to:

- a) plan, promote and administer services for persons with disabilities;
- b) keep a register of persons with disabilities;
- c) keep statistical records incidence and causes of disabilities, etc.;
- d) provide rehabilitation, training and welfare services to persons with disabilities;
- e) promote research into rehabilitation programmes;
- f) promote public awareness relating to prevention of disabilities.

Management Boards

- 2.1** In trying to empower people at the grassroots, in the Educational Sector, Government has in this Act established Management Boards in learning institutions in the Country. These Boards have been set up as bodies corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name and with power, subject to the provisions of the Act, to do all such Acts and things as a body Corporate may be law do or perform.
- 2.2** In the Act, the Minister shall establish management boards by Statutory Instrument. It is this instrument which will specify the composition of each board. Further to this, the Minister shall appoint the members of the board. The function of the board shall be to administer the affairs of any institution established under the Act, to persons with disabilities and to do such things as are necessary to promote the well-being of persons with disabilities. Further the Board shall have a Director who shall be the Chief Executive officer of the Board to be appointed by the Minister and shall be responsible for the day to day administration of the Board.

Registration – Part IV

- 3.1** The Agency shall register all persons with disabilities, institutions and Associations for and of persons with disabilities. Registration shall be in the prescribed form and through the Principal of a local authority, Social Welfare officer, Central Statistics officer, School headmaster or an officer in charge of a health center. Associations shall apply in the prescribed form to the Director-General. Institutions shall apply to the Agency for registration in the prescribed form.

Inspection - Part V

- 4.1 Inspectors shall be appointed by the Director-General to inspect institutions. These inspectors shall have powers on production of an identity card to inspect institutions and ensure that the provisions of the Act are being complied with. Obstructing an inspector in the exercise of his/her duty shall be an offence and upon conviction to a fine not exceeding five thousand penalty units or to imprisonment for a term not exceeding three months or both.

Discrimination on Grounds of Disability - Part VI

- 5.1 In this Act Discrimination is defined as:

- a) treating a person with a disability less favourably than a person without a disability.
- b) treating a person with a disability less favourably from another person with a disability.
- c) requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over; or
- d) **not providing different services or conditions required for that disability.**

Under the Act, Discrimination in employment and learning institutions is

Prohibited.

Adjustment Orders - Part VII

- 5.2 Adjustment Orders shall apply to any

- a) Premises constructed before the commencement of the Act to which members of the public are ordinary admitted, whether on payment of a fee or otherwise; and

- b) Services or amenities ordinarily provided to members of the public before the commencement of the Act.

5.3 Under this section, the Agency may issue an adjustment order to any person it may considers that his premises, amenities or services are not accessible to persons with disabilities.

5.4 The Act further states that on the commencement of the Act, any plan for any Premises or amenities approved, after the commencement of the Act, under the Town and Country planning Act, shall provide facilities that are accessible to persons with disabilities.

Miscellaneous - Part VIII

6.1 All property, rights, liabilities and obligations of the former Council for the Handicapped shall vest in the Agency.

General penalty - Part VIII

7.1 Under the Act any person who contravenes any provision of the Act for which no specific offence is provided shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding five thousand penalty units or imprisonment for a term not exceeding three years or to both.

Financial Provision – Part II of Schedule

8.1 The funds of the Agency shall consist of such money as may be appropriated by Parliament, fees, levy, grants and donations. Further to this, the Agency may accept money by way of grant or donations from any

source in Zambia subject to the approval of the Minister, or from any source outside Zambia, raise money by way of loans, salaries, allowances, loans shall be paid from funds of the Agency. Basically the funds of the Agency shall be used for the benefit of disabled persons.

CHAPTER TWO

THE ADVENT OF THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES (PWD)

The concept of human rights has existed under several names in European thought for many centuries, at least since the time of King John of England. After the King violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the **Magna Carta**,⁵ or Great Charter, which enumerates a number of what later came to be thought of as human rights. Among them were the right of the Church to be free from governmental interference, the rights of all free citizens to own and inherit property and to be free from excessive taxes. It established the right of widows who owned property to choose not to remarry, and established principles of due process and equality before the law. It also contained provisions forbidding bribery and official misconduct.

The political and religious traditions in other parts of the world also proclaimed what have come to be called human rights, calling on rulers to rule justly and compassionately, and delineating limits on their power over the lives, property, and activities of their citizens.

In the eighteenth and nineteenth centuries in Europe several philosophers proposed the concept of “natural rights”, rights belonging to a person by nature and because he was a human being, not by virtue of his

⁵ Human Rights Web. www.hrweb.org

citizenship in a particular country or membership in a particular religious or ethnic group. This concept was vigorously debated and rejected by some philosophers as baseless. Others saw it as a formulation of the underlying principle on which all ideas of citizens' rights and political and religious liberty were based.

In the late 1700s two revolutions occurred which drew heavily on this concept. In 1776 most of the British colonies in North America proclaimed their independence from the British Empire in a document which still stirs feelings, and debate, the U.S. Declaration of Independence.

We hold these truths to be self-evident; that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

In 1789 the people of France overthrew their monarchy and established the first French republic. Out of the revolution came the "Declaration of the Rights of Man".

The term natural rights eventually fell into disfavour, but the concept of universal rights took root. Philosophers such as Thomas Paine, John Stuart Mill, and Henry David Thoreau expanded the concept.⁶ Thoreau is the first philosopher perhaps to use the term, "human rights", and does so in his treatise,

⁶ Henry David Thoreau-On civil disobedience

Civil Disobedience. This work has been extremely influential on individuals as different as Leo Tolstoy, Mahatma Gandhi, and Martin Luther King. Gandhi and King, in particular, developed their ideas on non-violent resistance to unethical government actions from his work.

Other early proponents of human rights were English philosopher John Stuart Mill, in his Essay on Liberty, and American political theorist Thomas Paine in his essay, The Rights of Man.

The middle and late 19th century saw a number of issues take center stage, many of them issues we in the late 20th century would consider human rights issues. They included slavery, serfdom, brutal working conditions, starvation wages, child labour, and, in the Americans, the “**Indian Problem**”, as it was known at the time. In the United States, a bloody war over slavery came close to destroying a country founded only eight years earlier on the premises that, “**all men are created equal**”. Russia freed its serfs the year that war began. Neither the emancipated American slaves nor the freed Russian serfs saw any real degree of freedom or basic rights for many more decades, however.

In 1961 a group of lawyers, journalists, writers, and others, offended and frustrated by the sentencing of two Portuguese college students to twenty years in prison for having raised their glasses in a toast to “freedom” in a bar, formed Appeal for Amnesty, 1961. The appeal was announced on May 28 in the London

Observer's Sunday Supplement. The appeal told stories of six "prisoners of conscience" from different countries and of different political and religious backgrounds, all jailed for peacefully expressing their political or religious beliefs, and on governments everywhere to free such prisoners. It set forth a simple plan of action, calling for strictly impartial, non-partisan appeals to be made on behalf of these prisoners and any who has been imprisoned like them, had been imprisoned for peacefully expressed beliefs.

The response to this appeal was larger than anyone had expected. The one-year appeal grew, was extended beyond the year, and Amnesty International and the modern human rights movement were both born.

As indicated above, disabled people view their rights movement as the last in a long series of movements for civil rights. Indeed, it appears that disabled people are some of the last people to be engaged in this historical sweep of the struggle for human rights. Even in places where some groups of disabled people organised relatively early, such as in Sweden in the late nineteenth century, other oppressed groups had organised before them. As of the 1980's, disabled people all over the world have taken up the struggle for equality and participation on an equal footing with other citizens.

Liam Maguire a disabled activist once remarked and observed that:-

"We are mobilising for what, hopefully, will be the last great civil rights struggle, and those who oppose us will be swept from the stage of history and become mere shadows of the past".⁷

Organisations composed entirely of persons with various disabilities - physical, mental and sensory have sprung up in 100 countries since the mid 1970s.⁸

Persons with Disabilities (PWDs) have come to the realisation that their societies were built without their input and participation and hence the physical or construction barriers they encounter in the physical environment around them. One of the results of this recognition was a gathering of disabled people in Singapore in 1981 to form Disabled Peoples' International (DPI). DPI's mandate is to be the voice of disabled people and it believes that disabled people should be integrated as everyone else. With membership in sixty-nine countries, it is activist-oriented, it looks to lobby governments and the United Nations, and it educates the public about the aspirations and abilities of disabled people. Its members hold that by speaking unitedly, they are stronger than when each disability group speaks out on its own concerns. It has been granted consultative status with the United Nations, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the International Labour

⁷ Liam Maguire, address to Mobility International/Canadian Bureau for International Education Conference, Toronto Canada August 7, 1981, 1.

⁸ Dersken Interview June 15, 1986

Organisation. While local, national and regional organisations have existed since 1945, DPI is the first successful effort of people of various disabilities to create a united voice to express the views of the 10 per cent of the world's population who are disabled in one way or another. There were over 500 million disabled people worldwide in 1985.⁹

Disabled people have a physical, mental, or sensory impairment, and their "handicap is the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical or social barriers".¹⁰

In the 1980's the majority of disabled persons, 80 per cent, resided in the developing world-Africa, Asia the Middle East, Latin America and the Caribbean. In some countries the incidence of disability due to malnutrition and communicable diseases was estimated at 20 per cent of the population.¹¹ Disabled people whether in developed or developing countries, are usually poor. This poverty stems from a lack of opportunities to work and participate in the

⁹ WHO "Worldwide Estimates, It's causes and trends.

¹⁰ DPI, 1983 Development Office Files Winnipeg.

¹¹ United Nations, World Programme of Action Concerning Disabled Persons (New York: United Nations, 1983)

main stream of society. DPI Affirms that disabled people want to work and live in the community as do non-disabled people. This view has arisen out of disabled people's experiences since 1945.

By the 1960's and 1970's people with disabilities began to question society's definition of them as odd and abnormal or as so-called cripples. They rejected the tendency of sociologists, social workers and doctors to label them as deviants, clients and patients. They became aware that society's attitude towards them, the idea that disabled people should be shut away from non-disabled society, was a handicap. Disabled people reminded everyone that all people were mortal and vulnerable to physical and mental disabilities. Further more because disabled people have been ware-housed in institutions and shut away in parental homes, they had no input into the design of society's streets, buildings, sidewalks and work places. Many disabled people could not participate fully in society because they could not even enter most buildings. There were stairs or narrow doorways where wheelchair -users could not enter. If mobility impaired people could not enter buildings, they could not attend university, hold down a job, or find a place to live outside an institution, without education and income, disabled people could not become independent and enter the mainstream of society.

Disabled people, realising this, ceased blaming themselves for their limitations. They, had internalised the attitudes of non-disabled society towards them. They began to see themselves as powerful and beautiful people who had something to contribute to society. Literature about disabled people abounds and its many genres reflect attitudes towards disabled persons.¹² Professionals in the areas of psychology, sociology, medicine and social work write about disabled persons as patients and subjects of study. Popular authors tell personal stories about disabled people who overcame their "misfortunes" and triumphed in life. Other literature focuses on the social situation of disabled people and proposes solutions.^{12a} Most of these accounts have been written by non-disabled people.

While a few disabled people have written about themselves,¹³ they are often only writing their own personal stories. They do not recount the story of all of their sisters and brothers. But a new area of literature has opened up in the last ten years.¹⁴ Disabled people are starting to write about themselves as a collective body of people and to propose solutions for the barriers to equality in their lives and it is for this reason that this essay is being written by a disabled person.

¹² Gilford R. – the Disabled and his community London 1990, unpublished.

^{12a} S. Milles. Strengthening disability and development work, discussion paper No. 5 February, 1999

¹³ Konkola (ed) – “Disabled People – Step Forward”

¹⁴ Beverly Ashon, A Rights-based Approach to Disability Sept, 1999

Finkelstein and Enns, both disabled, write about society's attitudes towards disabled people and how these attitudes have interacted with the growing demand for change expressed by disabled persons.¹⁵ They view environment and attitudinal barriers as the reason why disabled individuals are unable to participate, rather than their disabilities. Society, however, still views people with disabilities as sick, helpless patients who need to be cared for. Enns and Finskelstein assert that disabled people's organisations are working to inform society about its attitudes and to help integrate disabled persons into the mainstream of life.

Much of the writing by disabled people is in reaction to professionals, who after the second world war began to study and postulate about disabled persons.

Returning war veterans who became disabled in the war and survivors of the polio epidemics of 1940's and 1950's were rehabilitated with new medical techniques and began to live longer. Everything about their lives became the subject of professional investigation. Professionals as a result, began to view disabled people as individuals with "problems" and accordingly disabled people's lack of participation in society was their personal problem.

¹⁵ Victor Finkelstein, Attitudes and Disabled People: Issues for Discussion No. 5 New York World Rehabilitation Fund 1980.

Three branches of the disabled people's movement have emerged since 1970: the Independent living Movement, Consumer Organisations, and Self-help Groups. Independent Living involves disabled people living and participating in the community like everyone else. Unlike Independent Living Centers, Consumer Organisations of disabled people generally do not provide services. They monitor existing services provided by governments and non-profit rehabilitation organisations.

Consumer organisations are a Western world phenomenon and a reaction to the fact that rehabilitation professionals have made decisions for disabled people in the past. Self-help organisations of disabled people have emerged all over the world since the mid 1970s.

CHAPTER THREE THE UNITED NATIONS HUMAN RIGHTS DIVISION

Despite the fact that disabled persons constitute the largest minority afflicted with serious human rights violations, disabled persons are not covered by the United Nations concept of minority. A recent study of Sub-Commission on prevention of Discrimination and Protection of Minorities states that only ethnic, linguistic or religious groups constitute a minority.¹⁶ Notwithstanding the fact that at least hearing impaired persons who use sign language could qualify as a linguistic minority, disabled persons have always been excluded from the United Nations concept of minorities.¹⁷

Disabled persons also find themselves at a disadvantage with other vulnerable groups in that there is, up to the present, no binding human rights instrument explicitly protecting their human rights. While the proposed adoption of a draft Convention on the Elimination of all forms of Discrimination against disabled persons was rejected by the General Assembly¹⁸, the Decade resulted in a new instrument of a different kind which is supposed to be the basic international legal standard for programmes, laws and policies on disability in future years. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (StRE) were adopted by the General Assembly on December 20, 1993¹⁹ with the purpose of achieving

¹⁶ Eide, A., Protection of Minorities, E/CN.4/Sub.2/1993/34 of 10 August 1993.

¹⁷ Lerner, A., Group rights and discrimination in international law, Kluwer: Dordrecht, 1991, at pp.8-19.

¹⁸ UN Doc. A/C.3./42/SR.13 (1987).

¹⁹ UN Doc. A/48/96 (20 December 1993).

“positive and full inclusion of persons with disabilities in all aspects of society” under the “leadership role of the United Nations therein”²⁰

The StRE are firmly built on the principles and concepts enshrined in the World programme of Action concerning Disabled Persons (WPA) which was the guideline for the UN Decade of Disabled Persons but has been readopted as the guideline for the future.

The difference between the StRE and the proposed convention lies in the legal characters of the instruments. Unlike a Convention the StRE are legally non-binding because they cannot be signed and ratified by Member States. While the weak legal character of the Rules is regrettable, the advantage lies in the fact that they came into force at once with adoption by the General Assembly. Furthermore, as stated in the introduction of the Rules, they can attain binding character as “international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law” Until then they serve as a “strong moral and political commitment on behalf of States to take action for the equalization of opportunities.”

The impact of disability organizations in the drafting process can be detected in the wording as well as in the content and spirit of the instrument. Apart from emphasising the necessity of disabled persons and their

²⁰ UN Doc. A/48/95 (20 December 1993).

organizations being directly involved in all aspects of disability policy and programmes the Standard Rule on Equalization (StRE) contain fundamental principles of the philosophy of the international disability movement.

The adopted concept of disability recognizes disabled people's criticism of the medical and individualistic approach to defining disability taken by rehabilitation experts.²¹ Perceiving disability as a condition similar to illness and exclusively as a functional limitation means that disability is considered as an individual rather than a societal problem, and that solutions are searched in the individual sphere, through therapy and technical or personal support. Thus, neither the society nor the environment have to be changed. The awareness that individual abilities and problems of disabled persons very much depend on attitudinal, architectural and structural barriers of the environment, and on the willingness of society to include the needs of disabled persons in every designing process, was the crucial factor which turned the disability movement into a civil rights movements. The disability movement rejects this medical approach because of the subjectivity of the defining process and the power relations in which it takes place. What is regarded as a disability depends to a great extent on individual, societal, cultural and medical perceptions of what is "normal" and this in turn depends very much on the point of comparison. Also, the person who is considered "normal" has the right to feel superior, while disabled people are frequently described as "different" without having the right to be different.

21 See e.g. Hahn, H., Towards a politics of disability: definitions, disciplines, and policies, *The Social Science Journal*, 1985, 22 (4): pp.87-105; oliver, M., Discrimination, disability and social policy, in: Brenton/Janes (ed.) *Yearbook of Social Policy 1984-1985*, London: Rutledge, 1985, pp. 74-97; Abberly, P. The Concept of oppression and the development of a social theory of disability, *Handicap & Society*, 1987, 2(1): pp. 5-19

The concept of disability adopted in the StRE takes this criticism into account without offering a solution. It is based on the International Classification of Impairments, Disabilities and Handicaps (ICIDH)²² which was published by the World Health Organization in 1980. This definition acknowledges the relationship between disabled persons and their environment but is still very close to the medical notion of disability in that it resembles the WHO's terminology of disease.²³ During the Decade of Disabled Persons this definition – which was adopted in the WPA – gave rise to many discussions and disabled persons expressed concern that the ICIDH has been too narrowly tailored. The StRE contain the promise that these concerns will be addressed in the forthcoming revisions of the ICIDH which for the moment remains the only internationally accepted definition of disability.

The terminology of the international disability movement has also influenced the language of the StRE. The term “independent living” which is used several times can be traced back to the disability movement of the United States where, in the early 1970s the first Centers for Independent Living (CIL) were set up by disabled persons in order to enable themselves and their peers to live in the community and organize to fight against discrimination. The concept of independent living implies the need for disabled persons to have control over the services they need and become

22 WHO, International Classification of Impairments, Disabilities and Handicaps, GENEVA: WHO, 1980

23 WHO, International Classification of Diseases, 1993, 10th rev. GENEVA : WHO

politically involved and empowered in order to achieve equality of opportunity. It strongly opposes the medical rehabilitation paradigm of disability and rejects institutionalization or similar systems promoting dependency of disabled individuals.

The CILS of the United States have inspired disabled persons all over the world to establish similar entities in their countries which often become places for political activities and networking of disabled persons. Particularly in Europe there has been effective networking with respect to independent living organizations. At a first European Conference on Independent Living, in 1989 in Strasbourg, an organization called ENIL, (European Network on Independent Living) was founded. At following conferences, the term "independent living" and intrinsic principles were formulated. The right to independent living as proclaimed by the disability community is not limited to the mode of social services for disabled persons but covers all aspects of life, be it housing, education, work or politics and culture. It is perceived as the fundamental human right of disabled persons and there is a strong commitment that it be internationally recognized as such. It is hoped that the StRE will be of assistance in this process. And it is for this reason that the writer of this essay strongly argues that Disability Issues are in fact Human Rights Issues.

Closely related to the term independent living is the term "personal assistant services" which has been deliberately chosen by the disability

movement to replace the terms “attendant care” or “caring” which were rejected because of their paternalist implications. The word “care” implies that the person receiving this service is a passive object of charity, whereas the paradigm of personal assistant services is closely linked to the philosophy of independent living, in that it stands for all those services which enable independent living for disabled persons, with the implications of empowerment and self direction.²⁴

Perhaps the most important aspect of the philosophy of the international disability movement which has been incorporated by the StRE is the concept of non-discrimination and equality. Inspired by other civil rights movements of the 1960s and 1970s disabled activists began to see their disability in the same political context as black people viewed their race and feminists their gender. In particular segregation and institutionalization, which have determined disability policy for so long were seen in the context of racial segregation and apartheid. Disability was reconceptualized by the activists as a different state of being rather than a tragic deviation from “normality”, and as a social status vulnerable to discrimination by non-disabled persons. When disabled activists consequently demanded equal protection under the law and equal opportunity in society they, however, based their demands on a slightly different equality concept. While black people and feminist activists initially hesitated to demand positive discrimination (affirmative action programmes) as a means of equalizations of opportunity, disabled activists from the start proposed an equality concept that

²⁴ Degener, T. (1992)

demands that society undertake special efforts in order to equalize opportunities for its disabled members. Unlike race, and in most cases gender, disability was immediately perceived as a difference which would not totally become irrelevant once past discrimination and wrongs had been remedied. It was understood that no meaningful equal opportunity for (severely) disabled persons can be achieved without accommodation and / or assistant services. It was clear from the beginning that anti-discrimination policies require cross-disability action, which means that all disabilities of whatever degree were to be taken into account. Thus, disabled activists promoted an equality concept that is based on the needs of all members of society, rather than on those deemed "normal" citizens.

This equality mode implies the notion of the indivisibility, interrelation and interdependence of the two sets of human rights: civil and political rights on the one hand and economic, social and cultural rights on the other hand. This is the human rights concept of the United Nations, as has been quoted so often and emphasized at the 2nd World Conference on Human Rights in Vienna, June 1993.²⁵

The StRE emphasize the goal of equalization of opportunities as a fundamental concept in disability policy: "Equalization of opportunities means a

²⁵ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 preamble, para.5.

process through which the various systems of society and environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.” In addition, disabled persons are described as citizens with equal rights and equal obligations, who should receive assistance in assuming “their full responsibility as members of society”.²⁶

Even though the StRE are designed to substitute for a treaty on the rights of disabled persons and thus to become the major international human rights instrument specifically addressing the situation of disabled persons, they will not be the only legal framework for the human rights of disabled persons. In the preamble of the StRE reference is made to further rights instruments, notably to the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention for the Protection of the Rights of all Migrant Workers and Members of Their Families; the Convention on the Elimination of All Forms of

²⁶ StRE, introduction, para.24-27.

Discrimination Against Women; the Declaration on the Rights of Disabled Persons; the Declaration on the Rights of Mentally Retarded Persons, Declaration on Social Progress and Development, the Principles for the Protection of persons with Mental Illness and for the Improvement of Mental Health Care; relevant ILO conventions and recommendations and relevant work and recommendations of UNESCO, WHO and UNICEF. Thus the StRE have to be read and interpreted with these instruments and recommendations in mind. The comprehensive text of the World Programme of Action might serve as an additional resource, since the StRE acknowledge that the objective of its implementation "is still valid and requires urgent and continued action".²⁷

The reference to these instruments may rectify the fact that the 22 Rules of the StRE have a strong bias towards regulations in the field of economic, social and cultural rights while neglecting political and civil human rights of the disabled persons. Thus, many of the human rights violations concerning disabled persons which have been described by the Special Rapporteur, such as female circumcision, forced sterilization, human rights violations occurring during armed conflicts, or other forms of cruel and degrading treatment in relation to certain forms of punishment or scientific experimentation are not addressed by the StRE. By recognizing violations in both fields of human rights the Special Rapporteur on Human Rights and Disability broke with the traditional legal approach towards disability which commonly is merely associated with economic

²⁷ StRE, preamble.

and social law. The fact, that the StRE reflect this approach may partially be explained by the fact that the StRE were developed by a working group which convened under the auspices of the Commission for Social Development instead of the Commission on Human Rights or its Sub-Commission on Prevention of Discrimination and Protection of Minorities. It remains to be seen whether the Special Rapporteur and the panel of experts, who are supposed to act as the monitoring bodies for the StRE, follow this route or ensure that political and civil human rights of disabled persons are as much acknowledged and implemented as their economic, social and cultural counterparts.

Together with the three other declarations on disabled persons (on mentally retarded persons (1971), on disabled persons (1975) and on mentally ill persons (1991) the StRE mark the end of a preliminary process of standard setting on human rights and disability within the United Nations human rights division. They are neither comprehensive nor the only international specifically designed for disabled persons. Notably the International Labour Organization (ILO) has passed important instruments for the equalization of opportunities in the workforce and in the field of vocational rehabilitation.

A necessary next step might be to elaborate on legal interpretations of these instruments and give comments on how these rules and principles have to be implemented into national policy and legislation. This is also true with respect to those more generally designed human rights instruments which apply to all

human beings and contain few or no provisions on disability. In this respect the Committee on Economic, Social and Cultural Rights – the UN body authorized to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights – is a model for other treaty bodies or monitoring organs in that it has a comprehensive General Comment on persons with disabilities on the agenda.

A similar positive step was taken by the Committee on the Elimination of All forms of Discrimination Against Women (CEDAW). Recognizing that disabled women are not explicitly mentioned in the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW passed a general recommendation on disabled women to ensure that State Parties understand that this instrument also covers the human rights of disabled women. General Recommendation 18 (x) requests State Parties to provide information on disabled women in their periodic reports, and on measures taken to deal with their particular situation, including special measures to ensure that they have equal access to education and employment, health services, and social security, and to ensure that they can participate in all areas of social life and culture.²⁸ The first country to follow this recommendation was Finland in its second periodic report²⁹ in which major human rights issues, such as sexual violence against disabled women, are raised.

²⁸ UN Doc. (CEDAW) C/L.8/Add.18)

²⁹ Ministry of Foreign Affairs, CEDAW Convention. Second periodic report by Finland, Helsinki, 1993

Within the United Nations system, disabled women were not substantially recognized as a vulnerable group with respect to human rights violations until the Nairobi World Conference on Women which took place during the United Nations Decade for Women in 1985. As an “area of special concern” disabled women are mentioned in the “Nairobi Forwarding-Looking Strategies for the advancement of Women”.³⁰ This has paved the way for including disabled women in more recent human rights instruments, such as the Declaration on the Elimination of Violence against Women, (DVAW). It was assumed and hoped that at the fourth World Conference on Women which was held in Beijing in 1995 disabled women would have a major input and would be able to address such serious human rights violations as female genital mutilation³¹ as well as eugenic population policies prohibiting disabled women to procreate or enforcing unvoluntary sterilization on (mentally) disabled women.

THE INTERNATIONAL LABOUR ORGANIZATION AND HUMAN RIGHTS OF THE DISABLED PERSONS

While the term “human rights” as such does not appear in the ILO Constitution of 1919 the ILO is one of the few specialized UN organizations which put the issue on their agendas as soon as the first human rights instruments were adopted. The Discrimination Convention No.111, adopted in 1958, is an example of an early human rights instrument in that it seeks to ensure equality of opportunity and treatment in respect of employment and occupation.

³⁰ Report of the World Conference to Review and Appraise the Achievement of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985, United Nations Publication, Sales No. E.85IV.10 at para.296.

³¹ The WHO estimates that some 90 million females have been subjected to female genital mutilation, usually performed without anesthetics, on small girls and babies aged between seven and 15 years. For further information: Campaign Journal from Amnesty International (British Section) September/October, 1993 No. 63

The corresponding binding human rights instrument prepared by the United Nations' Commission on Human Rights took almost another decade to be adopted. Also, the broad anti-discrimination clause of Article 2 of the Universal Declaration of Human Rights can be found in several ILO instruments, such as ILO Convention No.142 concerning human rights resource and development. As an organization whose mandate originates in the field of work and related individual and collective interests of labour parties, the ILO furthermore was the first to proclaim the indivisible character of human rights encompassing both civil and political rights and economic, social and cultural rights.³²

The first ILO instrument on disabled persons was the non-binding ILO Recommendation No.99, which was adopted as early as 1955, addressing the subject of vocational rehabilitation. While the overall concepts of vocational rehabilitation endorsed in this instrument is still based on the segregational – institutional model of rehabilitation, some important equality concept regarding individual rights of disabled rehabilitation clients were included. Thus, Paragraph 29 calls for equal employment opportunities with non-disabled workers and Paragraph 25 states that disabled persons should not be discriminated against in respect of wages and other employment conditions if their work is equal to that of non-disabled persons.

During the United Nations Decade of Disabled Persons the ILO undertook a number of efforts to overcome the limited functions of specialized – segregated services for disabled people. Community based rehabilitation - a term which

³² ILO, The ILO on human rights. Report of the Director-General (Part 1) to the International Labour Conference, 52nd Session, Geneva, 1968 ILO, Human Rights – A common Responsibility, Report of the Director-General to the International Labour Conference, 75th Session, Geneva, 1988.

received world-wide recognition with the adoption of the World Programme of Action – aims at deinstitutionalization, mainstream and normalization of disabled persons within the labour market. From 1979 onwards, several of these projects were carried out under the auspices of the ILO particularly in rural areas of Indonesia and several African Countries.³³ A few years later projects and research studies on disabled women in vocational rehabilitation and employment were supported by the ILO.³⁴ One of the studies concluded that disabled women in particular tend to be offered fewer opportunities, have lower aspirations and accept a higher degree of dependency than their disability would justify. It also compared the status of disabled women with their non-disabled peers. It found that since they are frequently afraid of losing income opportunities, they are even more vulnerable to exploitation than women in general.

Convention NO. 159 and Recommendation No.168, which were both adopted in 1983, supplemented and updated Recommendation No. 99.³⁵ They emphasized the need to formulate, implement and periodically review a national policy on vocational rehabilitation aimed at appropriate services to all categories of disabled persons and focus on the equalization of opportunities for disabled

³³ Momm, W./Konig, A., Community integration for disabled people – a new approach to their vocational training and employment, in: International Labour Review, Vol. 128, 1989, No. 4: pp.497-509.

³⁴ Stace, Sh., Vocational rehabilitation for women with disabilities, in: African Rehabilitation Institute: Report of the Workshop on the Development of Policies and Programmes for Disabled Women and Female Disabled Children in Southern African Region, Harare, Zimbabwe 16-27 September 1985, Series A: Workshop and seminar reports No. 21 (Harare n.d.).

³⁵ International Labour Conference Geneva, International Labour Standards on vocational rehabilitation, Geneva, 1984 at p.23

persons compared to non-disabled workers. The model of equality adopted by Convention No.159 includes different treatment measures which aim at effective equality between disabled and non-disabled workers. Article 4 clarifies that positive actions undertaken to equalize opportunities for disabled workers cannot be regarded as (wrongful) discrimination against non-disabled workers. Since disabled women are explicitly mentioned in the equality clause of the instrument (Article 4) the Convention also addresses disabled women's experiences of (at least) two-fold discrimination, being disabled as well as women. In this regard, the first binding ILO instrument on disabled persons can be a ground-breaking instrument. Within the general system of the United Nations the situation of disabled women was not substantially addressed before the beginning of the 1990.³⁶ Two other key issues of Convention No.159 and Recommendation No.168 are community participation (Article 5) and vocational rehabilitation in rural areas (Article 8) and they reflect the outcome of former projects of the ILO in this field. Without active involvement of the community vocational rehabilitation efforts will have limited effects, and without outreach to rural areas 80% of disabled persons living in developed countries will be excluded from vocational rehabilitation systems. Finally, it needs to be emphasized that Recommendation No. 168 is one of the few international instruments which openly address the fact that abuse and exploitation of disabled persons takes

³⁶ Seminar on disabled women in Vienna, 1990 UN Doc. Number SDW/1990/WP.1 This seminar was attended by one consultant, 20 participants, and 20 observers from Member States, bodies of the UN system, specialized agencies, and other NGOs. Focus was on issues relating to the double discrimination of disabled women.

place in institutions even though these are sometimes called “sheltered employment” (Paragraph 11 (m)).

THE WORLD HEALTH ORGANIZATION AND DISABILITY

The World Health Organization’s primary concern is the exchange of knowledge within health professions of United Nations Member States. It adopts responsibility for international health matters and public health. Thus, disability and related social problems are approached from the medical model stance which is reflected in the internationally accepted definition of disability prepared by the WHO. The ICIDH has been criticized for underestimating the role of the social and physical environment within the complex phenomenon of disability. In its foreword to the 1993 reprint of the ICIDH the WHO announces a revision of the ICIDH which “will be based upon a review of reports and documents describing its use, and with expert representatives from relevant disciplines” and ensure that the “opinions of international and non-governmental organizations, including organizations of people with disabilities will continue to be sought and considered throughout the process.”

If organizations of disabled persons take this chance of being involved in the revision process it will be their task to ensure that disability is regarded as a human rights issue. The WHO has been criticized elsewhere for showing little interest in human rights, i.e. in defining the content of a right to health as an international human right.³⁷ This certainly can be confirmed with respect to

³⁷ Leary, V., Implications of a right to health, in: Mahoney K.E./Mahoney P. (eds.) Human Rights in the Twenty-first Century, Kluwer: Dordrecht, 1993 pp.431-493 at p.490.

WHO's activities in the field of disability. Resolutions and reports passed during the last few years by the General Assembly or the Executive Board of the WHO show only two solutions for disability: prevention and rehabilitation.³⁸ Disability is seen as a state of being which has to be eliminated by prevention or cure or diminished through rehabilitation. The language of these documents sometimes reveals a military character of this approach when terms such as "eradication policy", and "detection and management of common blinding disorder"³⁹ are used. It seems as if the official WHO policy on disability leaves no room for individual variation and deviation from what is considered normal health status.

The Regional Office of WHO-Europe took a step in another direction with a survey on health and social legislation for disabled persons carried out in 25 European countries.⁴⁰ The title of this report already shows that a change of emphasis was attempted in that disability was seen as a target for anti-discrimination policies. The foreword criticizes past health and social-political action in the field of disability as being too narrow, prejudiced and stigmatizing. The book documents a number of advances in social policies for the disabled, including substantial legislation promoting health and social welfare as well as a growing awareness of the laws. However, the findings also reveal that the prevailing concept of prevention of disability in European countries is based on the assumption that it is better not to live than live as a disabled person. Thus, the national prevention focus is on genetic counselling and/or prenatal diagnosis followed by a selective abortion if deemed necessary. The national policies corresponds to the WHO's conceptual approach towards disability prevention and remain unchallenged in the analysis of the survey.

³⁸ WHO Resolution WHA 42.28 of 19 May 1989; WHO Report EB89/15 of 9 December 1991; WHO Resolution WHA45.10 of 11 May 1992.

³⁹ 47 WHO Doc. EB89/15 at p.7.

⁴⁰ Pinet, G., *Is the law fair to the disabled?* WHO Regional Publications, European Series No. 29, Copenhagen, 1990.

The importance of Declaration of Alma-Ata which calls for equity in primary health care for all members of society should not be underestimated. Disabled persons in all countries are frequently denied access to appropriate health care which often amounts not only to a violation of their right to health but also implies a violation of their right to life. The latter human right has been considered binding on all States by virtue of customary international law. WHO Regional Director for Europe, J.E. Asvall has emphasized the meaning of the Declaration of Alma-Ata for severely disabled persons. **“Health for all must mean that a positive healthy life is within the reach of severely disabled persons in the same sense as is possible for those who are not disabled.”**⁴¹ Even in the developed countries this is not the everyday life experience of severely disabled persons. With increasing economic recession the situation deteriorates, since disabled persons are among the first who are accused of being a burden to society and thus become targets of severe economic cutbacks. It is within this context that the newly emerging debates on “euthanasia” and “selective non-treatment of disabled infants” have to be analyzed. The more intense the discussion becomes in many countries the clearer the social-economic implications of these debates are revealed. For the public health sector of the United States these debates and practices have been analyzed as amounting to genocide of disabled and afflicted persons.⁴²

⁴¹ Pinet (1990)

⁴² Wolfensberger, W., *The new genocide of handicapped and afflicted people*, Syracuse, N.Y., 1987.

Denial of access to appropriate health care is only one field in which human rights violations occur. The other topic is human rights violations that take place within the health sector, the perpetrators being medical personnel. The WHO has been very reluctant to take a stance in this delicate field. Those few human rights instruments that have been adopted until now were prepared by other United Nations bodies, notably the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which is an expert-body subordinate to the Commission on Human Rights and to the Economic and Social Council (ECOSOC). This might explain why the WHO played no significant role in the examination of a case of serious human rights violations perpetrated by Japanese medical health personnel which gained significant international attention during the 1980s. In 1984 two patients of a mental health hospital in Usunomya City were beaten to death by the staff, one for complaining about the food and other for trying to escape from the hospital. Examination of the case revealed that these incidents were only the tip of an iceberg including 222 unexplained deaths that had occurred within three years among some 1000 patients; many patient receiving no treatment at all; 80% of all patients in Japan being hospitalized without personal consent; and 69% of all Japanese mental health patients locked in wards 24 hours a day. The case received international attention when non-governmental organizations, most notably the International Commission of Jurists (ICJ) undertook fact-finding missions to Japan and presented the findings to appropriate UN bodies as well as to the Japanese government and international and national media. Summarizing the findings of

these missions Niall MacDermot, the former Secretary-General of ICJ stated: These Scandals occurred because of the complete lack of any supervisory body to make regular inspections of treatment and conditions in the hospitals. Hospital doctors had discretionary powers to restrict all patient freedoms and were able to exercise any kind of compulsory individual treatment, including psychosurgery."⁴³ The results of these missions and international interventions were enormous, leading to a very fast revision of the Japanese Mental Hygiene Act of 1950 in 1987 and to some promising changes in the treatment system. Furthermore it may be assumed that these international activities also paved the way for some other major changes in Japanese disability policies. On the first international day of disabled persons, 3 December 1993, a new law on Japanese disability policy came into effect which builds on the StRE.

Japan is clearly not the only country in which severe human rights violations are perpetrated by (medical) health personnel. Other countries such as Greece and Romania, gained similar bad reputations during the last two decades. The Special Rapporteur on the human rights situation of persons detained on grounds of mental illness or mental disorder, Erica-Irene Daes, found that patients in mental health facilities are often detained involuntarily without respecting basic due process of law principles, that in many countries psychiatry is used as a means of political oppression and further, that in many

⁴³ MacDermont, N., *The Rights of Mentally Handicapped Persons in Japan*, Mahoney & Mahoney, (1993), *Supra*. Pp.209-217 at p.211; Harding, T.W. et.al. *Human Rights and Mental patients in Japan*, International Commission of Jurists, Geneva.

states psychiatry patients are abused as guinea pigs for scientific experimentation.⁴⁴

The Principles for the Protection of Persons with Mental Illness (PMI) which were adopted by the United Nations General Assembly in 1991 are the first international human rights instrument which addresses this field of human rights violations. Despite their non-binding character they may become a useful tool for international and national human rights advocacy with respect to disabled persons. They reflect major human rights values, such as the principle of dignity and autonomy of all human beings; the right to freedom; and the right to be different; the right to due process of law; and the right to be protected against discrimination and harm. Few national laws contain similar clear prohibitions on sterilization as a means of treatment (Principle 11 (12)) or on the patient's right to reject treatment (Principle 11 (4)).

The PMI offer comprehensive procedural safeguards against abuse of professional power in mental health institutions, whereas they are weaker on substantive limitations for coercion in deciding what is the best interests of the patient. In this field vast discretion is left to the health professionals. Another shortcoming might be seen in fact that the review body does not necessarily

⁴⁴ Principles, Guidelines and Guarantees for the Prevention of Persons Detained on Grounds of Mental Ill Health or Suffering from Mental Disorder, Final Report by Erica-Irene Daes E/CN.4/Sub.2/1983/17 at paragraph 225 (henceforth: Daes-report).

have to be a judicial body (Principle 17 (1)). It has become a custom to introduce medical review bodies or tribunals for the implementation of procedural safeguards in the mental health field. Usually these medical review bodies prove to be less independent when it comes to taking action against members of their own professional societies. Since disabled persons are more vulnerable to medical abuse than other citizens, the separation of powers between medical and judicial bodies in the mental health field should be considered an essential element of due process and implemented accordingly. Medical review bodies are no substitute for the right to legal redress as enshrined in Article 6 and Article 8 of the Universal Declaration on Human Rights. The WHO's perspective on the implementation of international human rights standards was illustrated in a contribution paper of the WHO for the Preparatory committee of the World Conference on Human Rights. Unfortunately, the WHO does not consider the monitoring of the implementation of the PMI to be its task. "This should quite appropriately, be left to non-governmental groups and other independent bodies. WHO's responsibility will be to provide technical advice to the health professionals of the Member States, at their request, so as to enable them to adjust their services to function in ways that are consonant with the Principles.

The Declaration on the Promotion of Patients' Rights in Europe (DPP) can be seen as a promising step undertaken by the WHO Regional Office of Europe to adopt a human rights approach in the field of health care. The principles laid down in the DDP do not reach the same human right standards as the PMI in

that they allow for observational research experiments on incapacitated persons without approval of a competent independent review body (Principle 3(10)). With the dangerous implications of the “euthanasia” debate in mind it might also be questioned whether it was wise to include a right to “terminal care and to die in dignity” (Principle 5 (11) without a corresponding principle on the right to life for disabled and chronically ill patients.

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

In 1986 and 1987 UNESCO undertook a major review of the situation of disabled children in various education systems. Data from 58 Member States were collected and analyzed. The study, which was published in 1988⁴⁵, reveals that in many countries the right to education as enshrined in several human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (Article 13) or the Convention on the Rights of the Child (Article 23 (3)), is not realized at a primary level for all disabled children. In about one third of the countries certain groups of disabled children were explicitly excluded from compulsory education. Disabled children with severe or multiple disabilities were most often excluded by law. In other countries disabled children are de facto excluded from primary compulsory education because the law enforcement is weak and/or educational provisions are limited. Taking these findings into

⁴⁵ UNESCO, Review of the present situation of special education, 1988, ED-88WS/38.

account it is not surprising that the rights to integrated education was only acknowledged and realized by a minority of the responding Member States.

The 1988 review was only one among many surveys and projects undertaken by UNESCO during the International Year of Disabled Persons (IYDP), the United Nations Decade of Disabled Persons and beyond. It can fairly be said that UNESCO is one of the most active United Nations organization with respect to the subject of disability. Among the numerous projects undertaken during the IYDP were publications in Braille, cultural events with disabled artists, and many projects on integrated education in developing countries. At the end of the IYDP the Sundberg-Declaration (SD) was adopted at the World Conference on Action and Strategies for Education in Torremolinos, Malaga, Spain. The SD defines the crucial components of a right to education for disabled persons to include access to education, training, culture and information (Article 1) and integration (Article 6).

During the Decade UNESCO undertook several studies on human rights and Disability, the most interesting being an international human rights study⁴⁶ based on legal research carried out by Professor Maurice Torelli at the University of Nice in 1980. The latter is exceptional in that it points out that the main international human rights standards – notably the international bill on human Rights⁴⁷ – contain rather diffuse rights of variable scope for disabled persons.

⁴⁶ UNESCO, The Protection of the rights of disabled persons afforded under various international instruments. UNESCO Doc.SS-81/WS/43.

⁴⁷ UDHR, CCPR and CESCRC together are called the International Bill of Human Rights.

That the vague formula in these instruments was not the result of ignorance is revealed by the fact that during the drafting process of the universal Declaration on Human Rights the Inter-American Juridical Committee had proposed to the Commission of Human Rights that a specific provision guaranteeing the right to life for disabled children be included. Unfortunately the proposed amendment was connected with a proclamation of the right to life from the moment of conception. With this in mind, the Commission's rejection was wise, since such a proclamation would have implied a severe limitation of women's right to self-determination. The study also discusses major human rights issues of today, such as the threat of eugenic population policies through prenatal diagnostic methods, scientific medical experimentations on mentally disabled persons, conditions of confinement, and exclusion through segregated services. Emphasizing the meaning of a right to be different the study concluded: "Society's duty to accept the disabled person's right to be different so that he can try to achieve the equality to which he is entitled amounts in reality to a duty devolving on the state, which alone has the power to enforce these rights and to impose observance of them."⁴⁸

At the end of the Decade of Disabled persons another major declaration in the education field was adopted at the World Conference on Education for All which took place in Jometien, Thailand 5-9 March 1990. The Conference derives its importance from the fact that it was a ground-breaking event involving UNESCO, UNDP, UNICEF and the World Bank allowing financial organizations to be involve in human rights issues. The World Declaration on education for All (WDEA) reaffirms the right of disabled children to equal access to education and the principle of integrated education (Article 3(5)). The WDEA is not an instrument exclusively for disabled children but tries to encompass all human beings with educational needs. Its impact for disabled children was examined at the World Conference on Special Needs – Education, Access and Equality, which took place in Salamanca, Spain 7-10 June 1994.⁴⁹ The only binding

⁴⁸ UNESCO. DOC55-81/WS/43.P.W.

⁴⁹ Special needs outreach. UNESCO. Special Education Newsletter No. 3 April, 1994 P.1

instrument on education, the Convention against Discrimination in Education of 1960, is a general instrument as well and disabled students are not mentioned explicitly. However, some of its provisions provide strong arguments against segregated education of disabled children and students. Thus, Article 2 of the treaty enumerates legitimate grounds for segregated education systems. Since disability is not mentioned it could be argued that segregated education for disabled persons violates Article 2 of the Convention unless, in case of private schools, the object of the institutions is not to secure the exclusion of any group (Art. 2(c)). According to Article 3(b) State Parties even have the duty “to ensure, by legislation where necessary, that there is no discrimination in the admission of pupils of educational institutions”, which could be a legal mandate for the adoption of anti-discrimination legislation in this area.

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

The basic structure and legal instrument to ensure international protection of refugees were established more than 40 years ago. The UN convention relating to the Status of Refugees was adopted in July 1951⁵⁰ and the Office of the High Commissioner for Refugees was established in January the same year. While the Convention in Article 24 calls on the State Parties “to accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of(...) (b) Social security (legal provisions in respect of (..) disability (..)) most disabled refugees don't even get a chance to enter the country of refuge because their disability status is customarily taken as grounds for being rejected. Many immigration laws do not allow disabled foreigners to enter the territory of the country.

⁵⁰ And entered into force on 22 April 1954. The “Protocol relating of the Status of Refugees” which extends the international protection of the UN Convention to those persons who have become refugees after 1 January 1951, has been adopted on 16 December 1966 and entered into force on 4 October 1967.

Disabled refugees are called a particularly vulnerable group of disabled persons in the most literature as well as in the StRE. Rule 21 of the StRE requires that measures to achieve the equalization of opportunities of disabled refugees should be integrated into general development programmes. This is the goal of the Trust Fund for Handicapped Refugees, which was set up with funds originating from the Noble Peace Prize granted to the UNHCR in 1981. Before, little was known of disabled refugees, who have often become disabled through experience of violence or distress connected with the cause of their seeking refuge. Since then the UNHCR has helped many disabled refugees by covering the costs of social, medical and rehabilitative assistance when these were not provided by the country of refuge or access and facilities were denied to disabled refugees. The "UNHCR guidelines on Assistance to Disabled Refugees"⁵¹ emphasize that all "measures for disabled refugees are based on the concept of community –level care and are incorporated into the overall care and Maintenance Programme." The general policy expected from all UNHCR field offices is based on the philosophy and concepts of the WPA and StRE, i.e. the aim is to achieve equal access of disabled refugees to all societal sectors, to ensure that disabled refugees have access to the same rehabilitation services as nationals and where individuals suffer disabilities related to their situation as refugees (war, persecution, torture,) appropriate rehabilitation services are to be provided as basic components of UNHCR'S assistance programmes. The principle of disabled persons being the best experts in their own concerns as well as the recognition of disabled refugee women being subject to at least double discrimination are taken into account within these outstanding guidelines. Furthermore, the UNHCR has helped to throw some light on the situation of disabled refugees in various countries of African and Asian Regions by organizing workshops on assistance to disabled refugees.⁵²

⁵¹ Prepared by Social Services /PTSS (1992).

⁵² Workshop on Assistance to Disabled Refugees, Peshawar, Pakistan, 04-09 October 1992, Summary of proceedings; Workshop on Assistance to Disabled Refugees, Addis Ababa, Ethiopia, 15-19 February, Country Situation Reports and Case Studies; Atelier sur l'assistance aux Refugies, Dakar, Senegal, 05-09 Julliet 1993, Resume du.

CHAPTER FOUR

DISABILITY AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

International human rights forums have been generally unresponsive to the situation and specific needs of persons with disabilities. While many of the human rights denials that such individuals suffer are concerned with civil and political rights, many others relate to economic, social and cultural rights. The International Covenant dealing with those rights thus offers an important basis upon which to focus greatly increased attention upon the situation of this very large group of persons.

The human rights dimension of disability can only be fully understood against the background of the relationship between the various categories of human rights. It is sufficient to emphasize that the unsatisfactory current standing of economic and social rights is a key element in explaining part of the neglect which disability issues have suffered within the international human rights regime and Zambia in particular.

One of the fundamental principles upon which the international human rights regime rests is the interdependence and indivisibility of various human rights. According to this principle the 'tradition' civil and political rights are neither more nor less important than economic, social and cultural rights.

While this is a principle which is not reflected in most pre-twentieth century philosophical or legal traditions, from which the modern concept of human rights is generally assumed to be derived, its acceptance today is a clear consequence of the continuing development or evolution of the concept of human rights, particularly in the Post-War II era. Despite the fact that this principle is now enshrined in all of the key international human rights standards from the

Universal Declaration of 1948 onwards, it is clear that economic, social and cultural rights continue to be treated as second-class rights in many contexts.

There are various reasons – philosophical, ideological, political and financial – which help to explain the downgrading of economic, social and cultural rights, not only by the vast majority of governments⁵³ but also by a significant proportion of the major non-governmental organizations working to promote respect for internationally recognized human rights. The particular challenges faced by persons with disabilities provide a valuable lens through which to consider the validity, or otherwise, of some of those reasons.

One argument that is sometimes made explicit, but is more often endorsed implicitly, is that civil and political rights deserve priority over economic and social rights because their realization will inevitably lead to the satisfaction of the other human rights. Thus many Western governments and NGOs remain convinced that their near-exclusive focus on civil and political rights should not be taken to represent a downgrading of economic and social rights because people who are able to participate in free elections within a more or less democratic polity will (eventually) be able to ensure that the system treats them equitably in relation to access to the basic material needs of life. But the case of disability reveals, as clearly as any other the fallacious nature of this reasoning. It is quite possible to accord full civil and political rights to persons with disabilities, while effectively disenfranchising and silencing them through the maintenance of policies relating to the workplace, access to employment, access to public facilities and the media, transport and communications and so on which ignore the particular situations and needs of persons with disabilities. Unless the economic and social rights dimension is also addressed the enjoyment of civil and political rights can easily become largely illusory and Zambia answers to this position in as far as Persons with Disabilities are concerned.

⁵³ Boswell D.M. *The Disabled Person in the Country*

A second argument, often based on classical natural law reasoning, is that human rights are solely designed to protect the individual from the State. The ideal human rights framework is thus one which reflects the smallest possible public sector, one whose only rationale is the protection of individual liberty. This vision, popularized in philosophical terms by Friedrich Hayek, Robert Nozick and Milton Friedman, among others, provided strong support to the pressures that arose during the late 1970s and early 1980 to downsize government, to promote privatization, to deregulate the labour market and generally to ensure that governments played a minimal interventionist role not only in relation to the economy but to society at large. This trend greatly assisted the revival of a libertarian approach to human rights at the international level and helped to provide a setting in which, for example former Communist or socialist governments could pursue free market of *laissez-faire* policies which were not underpinned by any form of functioning social safety nets or other forms of protection for the vulnerable and disadvantaged sectors of society.

While it would be unwarranted to suggest that all of the policy developments or recent years that have flowed from these pressures are negative from the point of view of persons with disabilities it can nevertheless be stated with confidence that the private sector can not be expected of its own accord, to adopt policies and practices which will fill the vacuum left by the reduced role of government in relation to those persons. It is thus essential for a comprehensive human rights policy framework to be able to continue to rely upon a degree of government involvement which will operate to mitigate, modify or compensate for the unsatisfactory consequences of the unfettered operation of the free market.

As stated in the World Programme of Action concerning Disabled Persons, "The ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of disability rests with Governments". There will always be instances in which the operation of the free

market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent upon Government to step in and take appropriate measures to temper, complement, compensate for, or override, the results produced by market forces. Similarly, while it is appropriate for Governments to rely upon private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments of their duty to ensure full respect for the full range of human rights.

The next problematic argument, which has been supported by philosophers such as Maurice Cranston,⁵⁴ is that only the true human rights are those which are equally applicable to all human beings. They would therefore argue that rights are specific to, for example, pregnant women, children, or persons with disabilities are not really human rights in any universal sense but are special claims made by particular groups. The significance of the distinction is very considerable because it means that the latter type of claims are no longer privileged by being treated as rights but are simply claims in relation to which a *separate and compelling case must be made in each instance*. Again the case of persons with disabilities clearly demonstrates the unsustainability of an analysis of this type. What is at issue is in fact a range of human rights which are indeed universal and which are shared with all human beings but which, for their realization in the particular situations of disabled persons, requires the adoption of quite specific and targeted measures.

The final argument relevant in this context is the suggestion that the most fundamental components of economic and social rights can be adequately implemented through insistence upon the non-discrimination norm. The assumption is that if governments and perhaps also private actors can be compelled not to discriminate, then the enjoyment of economic and social rights

⁵⁴ European Social Policy on Disability. (94) 33

will largely follow as a result. Yet it is clear that while non-discrimination is a norm of very basic importance in this area, it can also be interpreted in a relatively narrow manner which, while providing a nominal equality between persons with disabilities and those without, in fact severely prejudices the situation of the former.

Arguments such as these must be addressed if the human rights of persons with disabilities are to be promoted effectively in the future. It is for that reason, among others, that the work of the United Nations Committee on Economic, Social and Cultural Rights is potentially very important in this overall context.

BRIEF HISTORICAL OVERVIEW

It was always clear in relation to the norms contained in the two international covenants on human rights that disabled persons were fully covered, simply by virtue of their humanity. The same applies to children but in both cases the relevant norms were in fact interpreted and applied for many years in a way which tended to overlook or even entirely ignore the rights of these groups. Indeed, there was often an unstated assumption that in the case of persons with disabilities a significant range of otherwise applicable human rights was for some reason mysteriously suspended or rendered inapplicable. During the 1960s and 1970s the battle for respect of the rights of persons with disabilities was waged primarily at the national level and relatively little was done within international human rights forums. It was not until the international norms and the institutions promoting them began to demonstrate a degree of effectiveness in relation to other issues that groups of persons with disabilities began to turn their attention to developing a stronger awareness within the United Nations and other related context of the specific problems they confronted in their efforts to exercise their human rights. Up until this time, neither the Commission on Human Rights nor its Sub-Commission on Prevention of

Discrimination and Protection of Minorities had paid any particular attention to these concerns.

The turning point came as a result of intensive lobbying by various individuals and groups to obtain the appointment of Special Rapporteur of the Sub-Commission (Leandro Despouy of Argentina) to report on the relationship between disability and human rights. That development led in time to the emergence of a much greater awareness on the part of various international bodies of their own previous neglect of this issue and of the need to remedy that neglect.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS - ZAMBIAN CASE

This Covenant refers to the need to create conditions 'whereby everyone may enjoy the full range of human rights'. In Zambia this is still far from being realized in so far as persons with disabilities are concerned.⁵⁵ The Covenant establishes the right to self-determination and guarantees that the rights enunciated in the Covenant will be exercised by all without discrimination of any kind. It further recognizes the right to work which includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts. Thus, since persons with disabilities are able to earn a living by working are unable to find employment or engage in income-earning activities due to negative social attitudes and physical environmental barriers, and therefore in a position of inequality in relation to others, this represents a violation of that right.

The Covenant recognizes that everyone has the right to an adequate standard of living for himself and his family, and the right of everyone to education. These rights are far from being realized and respected where

⁵⁵ Ratified in April, 1982. See Essays on the Human Rights of the Disabled by Martimus Nuhoff (1995)

persons with disabilities are concerned. Persons with disabilities still do not have effective access to education in mainstream learning institutions.

The Covenant recognizes the right of every person to take part in cultural life. This right is being violated because access is not possible to facilities such as cinemas, theatres, libraries, and staid in which cultural activities take place. It is violated because no alternatives are provided to enable persons with disabilities to participate and when they are excluded on account of prejudices in respect of their ability to participate or that they should not be seen around in social activities, but should be confined to their homes, due to their disabilities.

THE UNITED NATIONS STANDARD RULES ON THE EQUALIZATION OF OPPORTUNITIES FOR PERSONS WITH DISABILITIES (StRE)

Zambia is a state party to this new and very important United Nations instrument in the disability field, the "Standard Rules on the Equalization Of Opportunities For Persons With Disabilities" (StRE). These standard rules summarizes the present thinking and aspirations in the disability field. They are to a large extent based on the philosophy developed by disabled persons themselves and their organizations. Before I introduce the contents and messages of this new instrument, I should like to comment on the ideological development which has taken place during the three or four last decades.

The more political development in the disability field is of recent date. For a long time the main objective within disability policy was to care for and to help the disabled individual to cope with his or her situation. The disabled individual was the object, not the subject, of action. Disability policy also included a substantial element of protection. In accordance with this philosophy it was natural to build special institutions, where disabled persons lived their whole life, where they went to school or worked.

During the 1940s and 1950s this prevailing thinking was criticized for preventing sound social and economic development and for isolating and segregating large groups of disabled persons. The concepts of normalization and integration were born. It is fair to say that this thinking mainly came from non-disabled people. The basic idea of normalization was, of course, that disabled persons have a right to their family and to their natural social environment. At the same time it was obvious that disabled persons would need training and preparation to be able to cope with the difficulties that they were bound to encounter in the open society.

The ideas of normalization and integration released a lot of positive and constrictive thinking, which strongly influenced rehabilitation programmes and the organization and content of special education. Also the delivery of services to disabled persons had to be restructured. For quite some time, however, the emphasis of disability policy remained on the individual approach. The disabled person should receive training, technical aids and different support services to increase his or her capacity to deal with various tasks and challenges in life. This development of rehabilitation and different types of services was very important and necessary and led to increased independence, but during the 1960s the awareness grew among disabled persons themselves that this disability policy was not sufficient. Despite all the training and services disabled persons met with thousand of obstacles preventing them from participating in everyday life activities. What is the use of being able to maneuver a wheel chair perfectly, if the physical environment does not allow you to go to the places you want to go? What is the use of leaning to read Braille, if nothing or very little of what you want to read is available in Braille?

These and many other similar experiences among disabled persons during the 1970s led to a new conceptualization of disability and handicap. The obvious need to bring the shortcomings of the surrounding society into focus gave birth to the new and environment-related concept of disability. Again this

new thinking released energy and creativity, especially among disabled persons themselves. This new, dual concept of disability recognizes both the need for support of the individual, and the need for change and adaptation of the surrounding environment and the structures and activities of the general society. As a consequence of this, the disability issue grew much more political.

A first attempt to structure this new and more complex disability concept was made during the 1970s by the World Health Organization in its classification of impairment, disability and handicap. The WHO definitions, however, are by many considered to be too individual-oriented and medical in nature. The great breakthrough for these new ideas was the International Year of Disabled Persons (IYDP) in 1981 and its theme - "full participation and equality". A World Programme of Action (WPA) was adopted by the United Nations General Assembly in 1982, which outlined and summarized a modern disability policy. The WPA included many important contributions. Disability policy was for the first time structured in three main areas – prevention, rehabilitation, and equalization of opportunities. The first two areas, prevention and rehabilitation which are well known and established in the disability field, were summarized in a rather traditional manner. The third area, equalization of opportunities, offers a very important contribution to disability policy, dealing with the task of making surrounding society accessible and usable.

The concept of "equalization of opportunities" is defined in the following way in WPA:

"Equalization of opportunities means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all".

The right to integration is described in the following rather simple way:

“Persons with disabilities are members of society and have the same right to remain within their local communities and they should receive the support they need within the ordinary structures of education, health, employment and social services”.

The words in this context are important in themselves, but the most important thing is, of course, that this text has been adopted by the United Nations as a universal policy.

Another important contribution in the WPA is the section on human rights and disability, which for the first time in such an international context asks for an analysis of the situation of disabled persons based on a human rights perspective.

The period 1983-1992 was proclaimed the International Decade of Disabled Persons. This was meant to be a time when the WPA should be implemented. Already by the middle of the 1980s, however, it was obvious that the high level of activity of the IYDP was dramatically decreased. During the midterm evaluation of the decade, which was made by an expert conference in 1987, it was confirmed that the results so far had been very limited. The experts wanted a stronger leadership from the World Organization and therefore proposed that a convention on the rights of disabled persons should be elaborated. This proposal was rejected by the General Assembly of the United Nations, but instead a new kind of instrument – Standard Rules (StRE)– has been elaborated and adopted.

The StRE summarize the message of the WPA and adds the ideological development during the decade. Above all, the stronger emphasis on the human rights perspective, which developed during the decade, has been incorporated. In comparison with the WPA there are three main features which distinguish the StRE. The language of the rules is far more concentrated and shorter in form.

The message of the rules is directly addressed to member states, i.e. the governments of countries. The third characteristic is that the StRE will be monitored through a special monitoring system.

The StRE include an introduction, a preamble, 22 different rules and a description of the monitoring system. The actual rules are divided into three sections: preconditions for participation, target areas for equal participation and implementation measures. The first section, dealing with the preconditions for participation, mainly presents rules on different forms of support to the individual, medical care, rehabilitation and various forms of support services; the purpose of which, of course, is reduced to the functional limitations and increase the independence of the individual. The section on target areas deals with sectors and aspects of society which are of general and fundamental importance for the quality of life. There is an initial rule on accessibility, which deals with all the various aspects of access to the physical environment and activities and services generally available to non-disabled persons. The rules on education, employment and income maintenance and social security are, of course of great importance and have been elaborated in consultation with the specialist agencies in the respective areas. The rule on family life and personal integrity is new and has no corresponding chapter in the World Programme. It reflects an area which has attracted considerable attention during the decade.

The third section of the rules, the implementation measures, presents a number of rather well-known measures. They are, however, all of importance to achieve results and development in the disability field. The writer of this essay would like to draw attention to three of these measures. In the rule on legislation, the message is that States should create a legal basis for measures to achieve full participation and equality for persons with disabilities. Legislative action may also be needed to remove conditions which may adversely affect the lives of persons with disabilities.

In another rule it is stated that States should recognize the right of the organizations of persons with disabilities to represent their groups at all levels. States should encourage and support the formation and strengthening of such organizations. The third measure I would like to draw to your attention concerns coordination. Disability involves all spheres of society and therefore it is necessary to use a comprehensive approach. This also means that there is a need for coordination. In one of the rules it is therefore stated that States are responsible for the establishment and strengthening of national coordinating committees or similar bodies.

The chapter on monitoring states among other things the following:

“The purpose of monitoring mechanism is to further the effective implementation of the Rules. It will assist each State to assess its level of implementation of the Rules and in measuring its progress. This monitoring should identify obstacles and suggest suitable measures that would contribute to the successful implementation of the Rules..... The Rules shall be monitored within the framework of the sessions of the Commission for Social Development. A Special Rapporteur ... shall be appointed .. for three years to monitor the implementation of the Rules. International organizations of persons with disabilities having consultative status with Economic and Social Council should be invited to create among themselves a panel of experts, on which organizations of persons with disabilities shall have a majority ... to be consulted by the Special Rapporteur and, when appropriate, by the Secretariat.”

The StRE, as can be noted, reaffirm the concepts and philosophy of the WPA.

To give an example of the rather straight forward message of the StRE one would like to quote the following from the introduction:

“In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of the States to take appropriate action to remove such obstacles”.

These sentences are of fundamental importance for the whole philosophy of the StRE. When equalizing opportunities for people with disabilities the main objective is to “remove obstacles”. It is the responsibility of States, i.e. governments, to ensure that this is done. The actual obstacle may be present anywhere in society, in the private or the public sector, and therefore the methods chosen by the government must vary from situation to situation. The government, however, still has the final responsibility to make sure that something happens.

The WPA contained a powerful message to the world. Still too little happened. The disappointment among persons with disabilities and their families was great and their disappointment was justified. The StRE have been constructed with this experience in mind. More than seventy member states have actively participated in the elaboration of the Rules. The United Nations is at present building up a monitoring system to encourage and assist member states in their efforts to implement the recommended measures. Let us now use this opportunity to make real progress. We know that we have to do it to avoid discrimination against persons who happen to be disabled.

Although the Rules are not compulsory, they imply a strong moral and political commitment by States on equalization of opportunities for persons with disabilities. They can attain binding character as “International customary rules when they are applied by States with the intention of respecting a rule in international law. They indicate important principles for responsibility, action and cooperation. They also stipulate the trade areas for equal participation of persons with disabilities as accessibility of the environment, education,

employment, family life, sports and recreation, social security and income maintenance.

As a party to these instruments, it is the Zambian Government's responsibility to take appropriate action to remove obstacles preventing persons with disabilities from enjoying their rights and freedoms, and which make it difficult for them to participate fully in the activities of their societies.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND DISABILITY: CCPR

INTRODUCTION

People with disabilities have been effectively excluded from the economic, social and public spheres of life throughout history and in most cultures. By and large such exclusion has no rational grounding whatsoever and rests on either naked prejudice or, perhaps worse, popular and official indifference. Much of the thrust of contemporary efforts in this field has been directed at facilitating the inclusion of such persons into all dimensions of human existence. It is natural therefore that quite a lot of these efforts would be translated into concrete socio-economic supports and programmes to endure effective "mainstreaming" into civil society and public life.

Such action at the united nations (UN) level as the adoption of the World programme of Action Concerning Disabled Persons⁵⁶ (WPA) in 1982 and the more recent adoption of the Standard Rules on the Equalization of Opportunities for Disabled Persons⁵⁷ (henceforth: StRE) provide powerful inspiration and stimulus towards such ends.

⁵⁶ General Assembly of the U.N, Resolution 37/52 (3 December, 1982)

⁵⁷ General Assembly of the U.N, Resolution 48/96 (20 December, 1983)

CIVIL & POLITICAL RIGHTS AND DISABILITY

The various civil & Political rights recognized and protected by the International Covenant on Civil and Political Rights (CCPR) are indeed as much in issue in the context of disability as are their more “substantive” socio-economic “cousins”.

It will prove useful to unfold the civil & political rights continuum thematically while also analyzing the pertinent issues that may arise under the CCPR.

The Civil rights Continuum

The deep structure of the civil & political rights traditions can be rendered, *inter alia*, by reference to the animating ethics of autonomy and inherent human equality which are chiefly (though not exclusively) associated with liberal political and legal theory.

The first preliminary point concerns the very relevance of the CCPR. Since most of the general human rights instruments (including the CCPR) were not adopted with the disabled in mind there naturally arises the argument in some quarters that they do not now have relevance in this field and can not do so unless formally amended. Against this view it must be noted that such instruments were adopted in order to have general applicability to all people throughout society. If certain groups were singled out it was not (and could not have been) without prejudice to the general applicability of the norms to other groups and individuals not so specifically mentioned. Thus, the absence of explicit mention of the situation of persons with disabilities in these instruments can not operate to preclude their application (and necessary tailoring) to the situation of the disabled. To hold otherwise would sap the relevant norms of their

very generality not to mention their majesty and thus enervate the whole human rights mission.

It is at least worthy of note in this respect that most official UN documentation in the field of disability assumes the applicability of general civil & political rights norms. As far back as 1975 the UN General Assembly emphasized in the Declaration on the rights of Disabled Persons⁵⁸ that disabled persons have the same civil & political rights as other human beings. The WPA itself assumed the general relevance of civil & political rights. It invoked the Universal Declaration in support of the concepts of “equality and full participation” and specifically assumed the relevance of the CCPR. The StRE themselves note that all human rights including civil rights apply specifically recalls the relevance of the CCPR in its preamble.

The second preliminary point concerns the character of civil & political rights. Though most civil & political rights are cast in negative terms, they can not but have at least some implications for affirmative state obligations. This is so partly because it proves difficult if not impossible to simply “respect” certain negative rights without implying affirmative state obligations. This point can be nicely made by referring to the famous words of the European Court of Human Rights in *Airey v. Ireland*⁵⁹. There (in the context of a right of access to court as per Article 6 of the European Convention on Human Rights) the Court stated:

“Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. The Court therefore considers ... that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division

⁵⁸ Declaration on the Humans Rights of Disabled Persons, United Nations, GA Resolution 3447

⁵⁹ European Cr. HR. Ser... A. 1979

separating that sphere from the field covered by the Convention”.

LIBERTY

The requirement of making space for the “self” to manifest itself in the world leads logically to a concept of human liberty. Hence the profound functional importance of liberty in fending off hostile state regulation and in opening up civil society for the flourishing of the person. It is therefore both protective and facilitative. It links the souls and the mind with the world.

The right to liberty is protected/advanced by Article 9 CCPR. Interestingly, the right is stated as a right to liberty “and security of person” which might easily be translated into an implicit recognition of the right to bodily and psychic integrity as well as a right to be protected against potential threats to such integrity. In the context of disability, this might well mean an enhanced claim against the state for added protection against wanton violence by private groups.

Two specific applications of the general concept of “liberty” are singled out for separate protection under the CCPR. Article 12, for example, protects “liberty” of movement within a State and freedom to choose one’s residence. It doesn’t take much legal ingenuity to frame the pertinent issues of disability transport policy under this head.

Article 8 protects the individual’s liberty against slavery or servitude. Liberty is therefore not a commodity whereby one person’s life and liberty is owned or controlled by another. Again, although the relevant thresholds of proof are set rather high, it is not beyond the bounds of possibility that at least some extreme and coercive workshop regimes might trigger Article 8 concerns. That this is not likely does not take away from its possibility.

The concept of “due process” really refers to the way in which all rights (but especially liberty because of its functional importance) are policed and clawed back by the State. In essence, it requires due, clear and prior notification of the standards against which behaviour is to be adjudged (the so-called principle of legality).⁶⁰ It presumes that the privation will take place because of some overt act of illegal behaviour that has taken place at some specific time in the past and that such behaviour was illegal at the time of the commissioning of the offence (Art. 15(1) CCPR). It furthermore presumes that the loss of liberty, if sanctioned, will be determined and that the manner of treatment whilst in incarceration will be humane (Art. 10(1) CCPR).

Due process also requires the existence of an independent entity (usually courts) to evaluate the evidence dispassionately and to decide issues of guilt and innocence as well as sentence. Most of the formal protections of “due process” are linked to a certain ideal image of how such trial Courts ought to function. The individual is theoretically “centered” in the proceedings and is thus:

- guaranteed a right to be presumed innocent of all charges levied until found guilty
(Art. 14(2) CCPR);
- has the benefit of a rule against jeopardy (Art. 14(7) CCPR);
- has a right to be promptly informed of the reason for arrest (Art. 9(2) CCPR);
- has a right to be brought promptly before a Court and thus out of the hands of the executive (Art. 9(3) CCPR);
- has a right question the lawfulness of detention at any point (Art. 9(4) CCPR);
- and also has a right to compensation for wrongful arrest or detention (Art. 9(5) CCPR).

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See generally Oscar Garibalidi, General Limitations on Human Rights: The Principle of Legality, 17 Harv.Int.L. J, 1975, PP.503

All such persons are furthermore entitled to a fair and public hearing (Art. 14(1) CCPR). At the trial stage they are entitled, *inter alia*, in “full equality” (Art. 14(3) CCPR):

- to be informed promptly and “in a language which he understands” the nature of the charge (Art. 14(3)(a) CCPR),
- to be tried in his presence with legal assistance if necessary etc., (Art. 14 (3)(d) CCPR),
- to “examine or have examined the witness against him” (Art. 14(3)(e),
- to have “the free assistance of an interpreter if he can not understand or speak the language used in Court” (Art. 14(3)(f) CCPR).

There is additionally a right to appeal of a conviction and / or sentence (Art. 14(5) CCPR).

These norms are relevant in the context of disability in three respects. Firstly, they are (or are increasingly assuming) critical relevant in the civil commitment context. Secondly, they are obviously relevant in the context of ordinary criminal proceedings against individuals who happen to have disabilities. Thirdly, they are relevant in the sense of affording a right to a Court to vindicate other rights.

One may well lose one’s liberty through this route specifically for a condition (“unsoundness of mind”) which may or not be evidenced by overt behaviour. In point of fact, it is usually the condition which is dispositive but the additional question whether due to the condition the individual poses, for example, a threat to the safety of others, the safety of himself or whether he requires institutionalization for treatment (the so-called legislative indicators). But the main point remains which is that, unlike the situation under the “due process” model, it is theoretically possible to commit a person of “unsound mind” on foot of a condition simplicitor, without the benefit of a reflective “due process” trial and

for an indeterminate period with severe knock-on effects for one's remaining rights.

Interestingly, what has been happening over the past three decades or so has been the gradual engrafting of norms more at home in the criminal "due process" model onto the civil commitment process. This phenomenon is referred to as the "*creeping criminalisation of the civil commitment process*"⁶¹. The main motivation was the realization that too many people were being wrongly *incarcerated under the reflexive civil commitment process and that the engrafting of some "due process" norms would make it more reflective and therefore less likely to incarcerate the wrong people.* Thus, although framed in the context of the criminal process, many of the "due process" norms identified above are now assuming increasing relevance in the context of civil commitment. The UN Principles for the Protection of Persons with Mental Illness represent, in a sense, the internationalization of that trend with the important qualification that they move beyond the formal "due process" model to directly address more substantive questions such as a right to treatment.

The "due process" norms are also, of course, relevant in the context of levying ordinary criminal charges against persons who also happen to have disabilities⁶². Affording such individuals effective standing before the Courts must translate into some affirmative action on their behalf. For example, the obligations to promptly inform an arrestee of the reason for arrest "in a language which he understands" and to provide interpreters in cases where the person concerned does "not speak the language of the Court" (Art. 14(3)(f) CCPR) have obvious repercussions for the death. The right to "examine or have examined

61 The Term is Alan Stone. see Alan A. Stone, "The Social and Medical consequences of recent legal reforms of mental health law in the U.S.A: The criminalisation of mental disorder," in : Roth & Blugrass (eds) psychiatry. Human Rights and the Law, 1985, at P. 15

62 U.N. Doc. Discussion paper No. 2, 1995

witnesses against him” must also in logic lead to a right to the aid of interpreters since otherwise one’s “due process” guarantees could not be provided “*in full equality*” as required by Art. (4)(3) CCPR.

There is also a sense in which the right to fair trial affords one a “right to a Court” to resolve one’s civil rights disputes whether against the State or third parties. Thus the right to a Court might be used offensively to establish and vindicate rights. This is, of course, important in the ordinary course of events but doubly so for individuals who are institutionalized. Thus, a right to a Court would afford them a vital window onto the outside world with which to question their continued incarceration as well as the manner of their treatment. Civil commitment ought not to make a difference to this right although it will affect its modalities. Such a right might be inferred from Articles 2(3)(a) and 14 CPPR whose “due process” norms apply, *inter alia*, “in the determination...of [one’s] rights and obligations in a suit at law”.

CHAPTER FIVE

THE PERSONS WITH DISABILITIES ACT VIZ- A-VIZ THE HUMAN RIGHTS OF THE DISABLED IN ZAMBIA – THE PITFALLS OF THE ACT

The Persons with Disabilities Act No. 33 of 1996 was Government's response to the increasing effective campaign for a comprehensive and enforceable anti-discrimination legislation for persons with disabilities. The previous chapters have highlighted in great detail the various international instruments pertaining to the disabled, to which Zambia is a state party and whether Zambia has fulfilled her obligations under these instruments. This chapter specifically examines the human rights of the disabled in Zambia and whether the Act does in fact promote the rights of Persons with Disabilities. As one walks the streets and shop corridors of Town center especially Kamwala second class shopping area, it is common site to see many disabled people especially the blind stretching their hands asking for alms. So many people with disabilities have resorted to street begging as they live in abject poverty. The question then is, since we have legislation in place, catering for the needs and aspirations of the disabled, does it imply that this legislation is not adequate enough to take into account the needs of Persons with Disabilities? This chapter endeavours to study the Act in great detail.

1) COMPOSITION OF THE AGENCY (SECTION 5)

Section 5 of the Act gives the composition of the Agency except for the eight representatives and associations of persons with disabilities, in section 5 (i) (a) the rest of the representatives shall be appointed from Government Ministries. This position raises questions as to whether such officers appointed by the Minister shall be impartial in the execution of their duties. Clearly they will seek to promote the desires of the appointing authority viz the Minister instead of promoting the needs of persons with

disabilities. In this regard, the interests of the disabled will be made subservient to those of Government and yet Government too has been a culprit in marginalizing the rights of persons with disabilities. There is a great likelihood of Government and Political interference in the running of the Agency. The end result is that the needs of persons with disabilities will not be promoted nor upheld.

Section 7 (2) gives the Minister power to appoint the Director-General of the Agency who shall be the chief executive officer of the Agency. It further states that the Director-General shall be eligible for re-appointment and that his tenure of office shall be three years. Already, this makes the Director-General become a "puppet" of the appointing authority and as such can not be expected to adequately serve persons with disabilities nor the Agency. Effectively the Director-General will seek to serve the interests of the Politicians who happen to be the appointing authority.

II) **REGISTRATION OF ASSOCIATIONS (SECTION 14)**

Section 14 (2) gives authority to the Zambia Federation for the Disabled (ZAFOD) to approve to the Agency, associations that can be registered by the Agency. This is a serious irregularity within the ACT. The reason is that ZAFOD is simply a Non-Governmental Organization of the disabled registered under the Societies ACT and as such it is a creature of the Societies ACT, how then is it possible for ZAFOD to "approve" similar Associations registered under the Societies ACT? ZAFOD can not be made to have authority over other Associations which in law are at par as ZAFOD itself.

III) **DISCRIMINATION IN LEARNING INSTITUTIONS (SECTION 21)**

Under Section 21, discrimination in learning Institutions is prohibited. The exact words of the ACT are:-

“A learning Institution shall be guilty of discriminating against a person with disability if that institution –

a) refuses or fails to accept, admit such person on the grounds of his disability.”

From the words of the statute, we note that the legislature takes it for granted that a learning Institution can EXPRESSLY or fail to accept to admit a person with a disability. But what in fact is likely to happen is that a learning Institution will CONSTRUCTIVELY refuse to accept a person with disability to the institution by having non-user friendly buildings or in short inaccessible buildings. In other words, the discrimination is subtle but it can still be detected by a care full observer. So the clause on discrimination in learning Institutions is not all encompassing.

IV) SPECIAL FUND FOR REPAIR OF SCHOOLS (SECTION 23)

With reference to Section 23 (1) (2) concerning special funds for repair, servicing and purchasing of technical aids and appliances for persons with disabilities, the researcher visited such institutions (Munali Secondary School, Cheshire Homes, Bauleni School) and established that Government has never at any one time released such funds. This can only be attributed to Government’s lack of political will to ensure that the ACT succeeds. In other words the ACT was simply put in place for the purpose of window-dressing and in order to show the International Community that the Human Rights of the minorities are being respected.

V) TAX REBATE (SECTION 24)

Under this Section, a person who employs at least three (3) persons with disabilities shall be entitled to a tax rebate at a rate to be

determined by statutory instrument by the Minister responsible for finance. Here the purpose of this provision is to give an incentive to an employer to employ more disabled persons at the same time to reduce unemployment amongst persons with disabilities.

This is a good move by Government, but in practice the likely outcome is that employers will only employ those disabled persons with less severe disabilities leaving out those with serious disabilities. The best that could have been done under the Tax Rebate was to make the rate of the rebate be commensurate with the severity of the disability i.e. the more serious the disability, the higher the tax rate. This way a lot of disabled persons would be employed regardless of their disability levels.

Furthermore, Government could have lifted tax on all appliances and equipment and aids that are used by persons with disabilities e.g. wheelchairs, crutches e.t.c. In fact the ACT could have been more radical by lifting customs duty on all motor vehicles imported by persons with disabilities. For a person with disability, a motor vehicle is a mobility aid. But then to curb abuse of this facility, Government could introduce “red books” instead of white books for such motor vehicles so that with a “red book” reselling of such vehicles became impossible until after a certain number of years have elapsed. This has been successfully archived in other jurisdiction such as Zimbabwe.⁶⁴

VI) **ADJUSTMENT ORDERS (SECTION 25)**

Section 25 stipulates that the Agency may issue an adjustment order to any person it considers that his premises, amenities or services are not accessible to persons with a disability. Section 26 also states that all plans for any amenities or premises approved under the Town and

⁶⁴ Disability frontline No. 24 December, 1999

Country Planning ACT must provide facilities that are accessible to persons with disabilities. Section 25 applies to buildings built before the commencement of the ACT while Section 26 applies to new buildings. In practice this is not very easy to achieve because most of the old structures or buildings are difficult to alter in any case this would be expensive especially granted that Government is the major culprit in this area, and Government itself is financially not sound. Experience shows that it is largely the environment which determines the effect of a disability on a person's daily life. There are mobility and architectural barriers which disabled persons come across as they commute from place to place so as to take part in various activities such as education, work, the latter refers to obstacles presented by physical structures like multi-storey buildings e.g. University of Zambia, foot-bridges, pavements and others.

In effect the restricted movement of the disabled and Government's failure to implement legislation which provides for a barrier-free environment is a direct violation of the freedom of movement of the disabled as enshrined under the Zambian Constitution Article 22 (1) (a). It is a violation of a constitutional right. It is also a violation of rule 5 of the United Nations Standard rules on the equalization of opportunities for persons with disabilities. The rule reads in part:-

“Accessibility requirements should be included in the design and construction of physical environment from beginning of the designing process”.

Under Section 26 of the ACT, all buildings that are approved by the Town and Country Planning should have facilities that are accessible to persons with disabilities. But in practice, we see so many buildings that are approved by the Town and Country Planning which do not in any way conform to the ACT. The ACT should further have been more forceful by

making provision for the disabled individuals or groups of the disabled to report about any premises that are inaccessible to persons with disabilities for the purposes of monitoring and compliance with the ACT. As far as accessibility to public premises is concerned, one would have expected the ACT to be all encompassing i.e. it should extend to public transport services and other means of transportation, street and other outdoor environment. It has been observed by this researcher that many persons with disabilities are excluded from active participation in the community because of doorways that are too narrow for wheelchairs, steps that can not be mounted to leading buildings, buses, trains and aircrafts; telephone booths and switches that can not be reached; and sanitary facilities that can not be used. Similarly, they can be excluded by other types of barriers such as oral communication which ignores the needs of the hearing impaired, and written information that ignores the needs of the visually impaired. Such barriers are the result of ignorance and lack of concern; they exist despite the fact that most of them could be avoided at no great loss by careful planning. Below are some of the public places in the city of Lusaka which are inaccessible to persons with disabilities:-

a) **Shoprite Manda Hill**

The entrance to Shoprite Manda Hill has some silver metallic gates which rotate and these make the entrance quite inaccessible for a person either on crutches or in a wheelchair. The corridors too are just too slippery for a person on crutches or with poor mobility balance. However, the Center Manager a Mr. Mukuka Kangwa promised to do something about this. Management of Manda Hill was also commended for introducing special car parks for disabled drivers which car parks are located very close to the shop entrances. A special toilet is also in place for persons with disabilities at Manda Hill Shopping Complex. These developments are

encouraging and are a step forward in the recognition of the rights and needs of persons with disabilities.

b) **University of Zambia (UNZA)**

The designers of the institution did not ever contemplate that persons with disabilities could ever be admitted to UNZA from the way the institution is built. The Halls of residence are full of barriers. In the old residence, even rooms on the ground floor have a stair case and this is a mobility barrier especially for a person on a wheelchair. The library is inaccessible too. The ramp is only inside the library but the entrance has no ramps.

The Schools of Law, Education, Natural Sciences, Humanities are all located upstairs and these are such a hustle for a student with a physical disability. Currently the School of Law classrooms have just undergone some renovations (July 2001) to turn them into lecture theaters. But the design is again not friendly to a person with a physical disability especially one in a wheelchair. The entrance to these lecture theaters have been made to have a lot of steps making the lecture theater quite difficult to access for a person with a physical disability.

c) **The High Court Of Zambia**

Although this is supposed to be the fountain of justice, the High Court is inaccessible to persons with disabilities. The entire building is littered with stairs. The eastern entrance of the High Court has a small ramp. But upon further inquiry by the researcher as to why the ramp was too narrow, the researcher was informed that in fact the ramp was meant for transporting stationery from the ground into the building using a trolley and not designed as a mobility aid for disabled persons.

d) **The Main Post Office (Cairo Road)**

Although this a public place, it is also inaccessible to persons with disabilities. The first floor has no ramps and no elevators. One wonders really what the efficiency of the Persons with Disabilities ACT is, if in spite of legislation in place the needs of persons with disabilities are still not being met.

e) **Polling Stations**

The researcher has had personal experience that in most cases even Polling stations have been inaccessible to persons with disabilities. This automatically disqualifies or disenfranchises persons with disabilities and as such elections can not be said to be free and fair if a certain community of eligible voters are technically disqualified from voting on account of the inaccessible polling stations due to their structural designs. Government is therefore in violation of Article 21 (4) of the Universal Declaration of Human Rights:-

“Everyone has the right to take part in the Government of his Country, directly or through freely chosen representatives.”

THE ACT VIS-AVIZ GOOD GOVERNANCE

In as far the fundamental Human Rights of the disabled are concerned, the adopted Government document on Good Governance and National Capacity Building does not in any way give an answer to the rights of the disabled and does not constitute Good Governance. The above document on page 1 states that Government is about:-

- a) a culture of constitutional democracy;

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- b) upholding of the rule of law;
 - c) separation of Human Rights and Fundamental freedoms;
 - d) respect of Human Rights and responsible press;
 - e) a free, independent and responsible press;
 - f) accountability and transparency;
 - g) free and fair elections at Central and local government levels;
 - h) political stability and tolerance of opposing of minority views;
 - i) gender equality etc, etc.

Under (b) i.e. Rule of law, the fundamental Rights of the disabled continue to be violated. The concept of Rule of Law has three essential tenets viz (i) Equality before the law (ii) Law and order is better than anarchy (iii) Government according to law.⁶⁵

Under No (i) – Equality before the law, this has not been achieved for the disabled. For example under the protection of fundamental rights and freedom of the individual in the Zambian Constitution **Section 18 (20 (f))** a suspect is permitted to have the assistance of an interpreter if he cannot understand the language used at his trial. In the case of a disabled person i.e. one who is facing trial and one who is **deaf** the Courts do not provide interpreters or **SIGN LANGUAGE EXPERTS**. What is used is conventional sign language which may bring up communication break down and as such the ends of justice may not be met. The “due Process” of the Law is not followed, this is not equality before the Law, the Rule of Law is therefore violated and this does not constitute Good Governance on the part of the Zambian Government, it is a complete denial of the constitutional and fundamental right of the disabled being perpetrated by Government through the Judiciary.

⁶⁵ Ibid 4

The Zambian Government on good Governance and National Capacity Building further defines Good Governance (among others) as:

“free and fair elections at central and local Government levels”.

We have noted elsewhere in this paper, General Elections in Zambia can not be said to be “free and fair” as far as the voting rights of persons with disabilities are concerned. This is because, constructive barriers exist which make it difficult for the disabled to vote. For example the blind are sometimes denied their right to vote on the pretext that “Secrecy” will be undermined and usually the polling station are not accessible to persons with disabilities.

The National Capacity Building and Good Governance Document further defines good governance (among others) as: **“a culture of constitutional democracy.”** Constitutional democracy presupposes that society is **Plural** i.e. society has many and varied interest groups, who should be well represented in Government. But this is not so in the current Zambian politics in as far as human rights of persons with disabilities is concerned, because persons with disabilities in Zambia are not represented in Parliament.

Part V Section 68 of the constitution grants to the Republican President powers to nominate eight (8) members of Parliament to enhance representation in the National Assembly. The idea is that if he feels that a certain group of people or ethnic group is not well represented in Parliament then using his powers under this Section, he may nominate a member of such a group as a member of parliament. The disabled in Zambia are not represented in the National Assembly, not even in Cabinet. In the spirit of Constitutional Democracy enshrined in national Capacity Building and Good Governance why can't the President nominate a few disabled persons (from the eight) to enhance their representation in Parliament? Under the Ugandan Constitution for example, five

persons with disabilities are elected to parliament by persons with disabilities as their representatives.⁶⁶

While the Zambian Government has properly tackled gender equality under National Capacity Building, it does not however seem to have any programme whatsoever concerning the rights of the disabled as a minority group, neither does it state any clear cut or deliberate policy towards disablement.

⁶⁶ Newsletter of Southern Africa Federal of the Disability (SAFOD)

CHAPTER SIX

CONCLUSION

The study has attempted to assess the effectiveness of the persons with disabilities Act in promoting the Human Rights of the Disabled in Zambia and whether in fact the Act is in line with Good Governance and Human Rights. The positive aspects of the Act are the establishment of the trust Fund, the autonomy of the Agency, the reduction in the membership of the Agency and the retention of representatives or persons with disabilities which is commended as it enhances participation and influences the formulation of policies. In this case programmes are likely to be based on the actual needs of persons with disabilities.

Another significant development relates to the functions and role of the Agency which is empowered to initiate, coordinate and monitor policies and programmes, shifting from the passive role occupied by the Zambian Council for the Handicapped under the Handicapped Persons Act.

However in spite of the fact that the Act is a good step in the right direction, it is still faced with a lot of pitfalls, rendering it a half-baked piece of Legislation in so far as the rights of the disabled are concerned. The Act does not promote good governance and human rights of the disabled because it does not promote quality before the law which is an essential feature of the Rule of Law and good governance. The rule of law is violated when a disabled litigant or disabled suspect has to appear before the courts which are non-user friendly to the disabled. To bring with the courts (at least in Lusaka) are not structurally accessible to the disabled. Whoever designed the Courts did not take into consideration the non-accessibility of the Courts to the disabled litigants. But even when one is finally in the Court room the question remains (if they are deaf) will they receive their justice since the Courts have no sign language interpreters? Usually the Courts have relied on un-conventional sign language

i.e. not the Standard Sign Language. So if a deaf suspect will go through a trial they do not clearly understand, this is not equally before the Law and as such violates the Rule of Law and good governance as enshrined under National Capacity Building.

The tax rebate provided for in Section 24 is meant to promote the employment prospect of the disabled. But in actual sense, it implies that the employer has a choice, he may employ a disabled person or not employ at all. In trying to promote the employment prospects of the disabled most countries* have introduced a quota system and special seminars where employers are obliged to employ a certain percentage of persons with disabilities. Employers who do not meet their quota obligation are obliged to pay a levy for every unfilled quota. The money is used exclusively to promote rehabilitation and employment of persons with severe disabilities. The effectiveness of the quota system depends on the exact form and manner in which it is enforced.

On discrimination, the Act has merely prohibited it. But this does not in any way assist the disabled. The best that could have been done by the Act was to penalize anyone found guilty of discriminating the disabled. No real purpose is served by the current general provision prohibiting discrimination. Furthermore, before provision is made for enhanced employment prospects for the disabled, it would be cardinal that first of all, all structural barriers are eliminated from work places, otherwise this would be a mockery of policy. Since even if the disabled were to be employed in large numbers, practically it would still be difficult for them to actually work unless physical and architectural barriers are removed.

Section 6 of the Act gives a whole list of various functions to be performed by the Agency. The functions of the Agency are to promote rehabilitation, training and welfare, of the disabled, promote public awareness, promote

* Samanitha Beverly – A Right Approach to Disability discussion Paper No. 2 1999

research, promote programmes of the disabled etc. But on the other hand, the Act has not quite clearly and practically stipulated how in effect these functions will be achieved in practice i.e there does not seem to be any practical mechanism of fulfilling the functions. Above all the A

Act is silent on the Health of the disabled persons in most countries (Zambia included) are frequently denied access to appropriate health care which often amounts not only to a violation of their right to health but also implies a violation of their right to Life. The latter human right has been considered binding on all states by virtue of customary international law.** With increasing economic recession the situation deteriorates, since disabled persons are among the first who are accused of being a burden to society and thus become targets of severe economic cutbacks. It is within this context that the newly emerging debates on "euthanasia" and "Selective non-treatment of disabled infants" in some countries have been analyzed. The more intense the discussion becomes in many countries the clearer the socio-economic implications of these debates are revealed. For example in America these debates and practices have been analyzed as amounting to genocide of disabled and afflicted person.***

The Act in spite of all the seemingly ambitious provisions it contains, it does not seem to integrate the disabled in Senior National Development positions. If this were done, probably we would have seen a situation where the disabled begin to take up positions in the Zambian cabinet or is it that none of them qualifies? Especially so under Section 68 (1) of the constitution where the President can nominate people using his discretion to enhance representation in the National Assembly.

** Disability Frontline No. 21 1996

*** Single John, Pro-Disability Rights Movements

From this paper, we note that the Act has highlighted a number of issues affecting the disabled, but it has not provided for workable mechanisms of implementations. This in turn has not gone to address the real human rights of the disabled and as such good governance is far from being achieved as far as the rights of disabled are concerned. The net effect is that the Act is but a half-baked piece of Legislation or a window dressing operation to try and convince such institutions as the Donor Community that Zambia in fact respects the rights of the minority. The Act is simply, a mickey mouse operation- and unless it can be taken back to the drawing table, it shall simply remain a cosmetic piece of Legislation.

The plight of persons with disabilities in Zambia can be summarized as follows: "Disabled Protest,"^a "More Aid needed for persons with disabilities,"^b "Disabled Reject K175 million Complex,"^c "Deaf and Dumb, Little for Training chances," Disabled Reject "Kill Us, and Throw Our Burnt Ashes in River: Disabled Tell Minister,"^d This is the order of the situation of persons with disabilities in contemporary Zambia. Such headlines are not uncommon in the Country's news, media, and reflect the fact that the social welfare of the disabled is in disarray and something must be done to reduced the social imbalance. The best way could be through a well reduced legislation.

RECOMMENDATIONS

The general attitude of human rights law, domestic as well as international, is to treat disabled and non-disabled persons on the same footing of legal equality regarding the enjoyment of individual human rights. Increased awareness of the particular situation of disabled persons has induced a slow

- a. Times of Zambia. Wednesday July, 17 1990
- b. Zambia Daily Mail. Thursday May, 3 1990
- c. Zambia Daily Mail. Wednesday July, 1990
- d. Zambia Daily Mail. Tuesday August, 3 1991

gravitations at international level towards a recognition of “disabled persons rights”. This process has finally crystallized into the enacting of the Persons with Disabilities ACT No. 33 of 1996 of Zambia. However this ACT still needs some amendments in certain respects. Below are the recommendations put after a careful study of the ACT:-

i) Education

Parliament should immediately begin disbursing funds to learning institutions for the repair, servicing and purchasing of technical aids and appliance for persons with disabilities as enshrined in Section 23 (1).

ii) Physical and Mobility Constraints

Airports, railways and bus stations, should not present any barriers to the disabled, to this effect, there must be practical efforts to standardize planning conducive to the travelling needs of persons with disabilities.

iii) Public Transport vehicles e.g. buses should be standarized. For example, they should all have carriers for carrying wheelchair for disabled passengers.

iv) Social Security Scheme

A “disabled Persons” Scheme should be introduced in the national Pension Scheme ACT (NAPSA) to cater for persons with disabilities.

v) Beggary

Government should strictly enforce laws against beggary or false pretences regardless of whoever is found practicing it.

vi) Customs and Excise ACT

Regulations should be put in place to waive duty on all technical aids and appliances used by persons with disabilities, and this should include motor vehicles.

vii) Access to Information

To facilitate the full participation of disabled persons to enable them to exercise their Fundamental Human Rights, access to information is essential. To this end the Act should ensure that provision is made with the Act to ensure that all information is adopted to appropriate format. These information formats should include Braille Script, large print, audio-visual media and sign-language interpretation. Information channels should include television, radio, newspapers and postal services. Government should work with organizations of disabled persons to identify appropriate information formats and channels to reach disabled citizens in Zambia.

viii) Statistics

To facilitate the recruitment of disabled persons and to assist the private-sector in employing them, association of the disabled should identify and maintain listings of qualified disabled candidates. To this end it is Recommended that a comprehensive and accurate data and statistical bank be maintained showing all relevant statistics on disabilities.

ix) Grass root level

Local Community initiatives should be especially promoted. Disabled persons and their families should be encouraged to form grass-root organizations with governmental recognition of their importance and governmental support in the form of financing and training.

x) Participation in national Policy Making

Under Section 68 (1) of the Zambian constitution the Republican President should ensure that some qualified disabled persons are nominated to parliament to facilitate a fair representation of interests of the disabled. This is the stance that the Ugandan Parliament has taken, by having five disabled people to represent the disabled in parliament.

xi) Sign Language training

All law enforcement officers should be re-trained in the fundamental and unique human rights of the disabled. Further these officers ought to specifically learn sign language, Braille-reading, and should be well conversant with the provisions of the ACT.

xii) Media Accessibility

Government controlled print media, such as Times of Zambia and Daily Mail should have some copies printed in Braille to afford the blind access to public and vital information. News reading on television should always have sign language translators. Currently its only local news which sometimes has sign language translators.

xiii) Access to Justice

All Court rooms from local Courts to the Supreme Court should be re-designed to afford physical access to the disabled. Currently even the Supreme Court itself (Highest Court in the land) is non-accessible to the physically disabled-it has no ramps.

xiv) **The Republican Constitution**

Part III of the Zambian Constitution should expressly promote the Fundamental Human Rights of the disabled.

xv) **Development Programmes**

All national development programmes should include disability components. For example the ills of a free market affect the poor more than other groups. And this study has shown that the disabled are among the poorest.

xvi) **Law reform**

The current Act should have some provisions or mechanisms which periodically and systematically evaluates the functions of the Agency. The purpose of a periodic evaluation mechanism is to further the effective implementation of the functions of the Agency. This will assist in assessing the level of implementing the functions of the Agency and ensure the effectiveness to the Act.

xvii) **Court Hearing**

The Act should make provisions whereby for all Court hearing involving the disabled an officer of the Agency is present to ensure that nothing is done which might prejudice a disabled litigant on account of their disability. For example all Court hearing involving juveniles are conducted in camera, in the presence of a social worker to protect the interest of the juvenile. This can be done in the case of a disabled Litigants/Suspects by

having an officer of the agency attend court. The Government through the Ministry of Education was advocating for "Education for ALL by the year 2000."

But the "ALL" should include the disabled. This can be done by having user-friendly learning Institutions and Educational material suitable to the disable e.g writing frames for the Blind, Braille etc.

Finally if the law making organ in Zambia does not seriously and promptly address itself to the plight of the disabled, they will perpetually enjoy the status of being second class citizens. This is not only repugnant to international morality but also a social injustice.

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- 4 - U.N. Discrimination Convention III
- 5 - United Nations Education Scientific Cultural Organisation (UNESCO)
- 6 - United Nations Standard Rules in Equalization of Opportunities for the disabled (StRE)
- 7 - World Declaration on Education for All (WDEA)
- 8 - World Health Organisation
- 9 - World Programme of Action for the Disabled (WPA)