

PROTECTION OF THE RIGHTS OF  
PERSONS WITH MENTAL DISABILITIES  
TO LIBERTY AND INFORMED CONSENT  
TO TREATMENT: A CRITIQUE OF  
*GORDON MADDOX MWEWA & OTHERS  
V ATTORNEY-GENERAL & ANOTHER*

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## Summary

*This article appraises the judgment of the High Court of Zambia in the case of Gordon Maddox Mwewa & Others v Attorney-General & Another. The discussion of the judgment concerns the Court's interpretation of the right of persons with disabilities to protection from involuntary detention and to informed consent to treatment. The judgment is analysed against international human rights standards on the rights of persons with disabilities to human dignity, informed consent to treatment, liberty and security of the person contained in the Convention on the Rights of Persons with Disabilities and international and comparative human rights jurisprudence on these rights. The authors argue that the Zambian High Court failed to properly apply constitutional principles on limitation of rights when it declined to declare unconstitutional Zambia's Mental Disorders Act, which allows involuntary detention and forced treatment of persons with mental disabilities.*

## 1 Introduction

This article appraises the judgment of the High Court of Zambia in the case of *Gordon Maddox Mwewa & Others v Attorney-General & Another* (*Mwewa case*)<sup>1</sup> delivered by the High Court of Zambia on 9 October 2017. The article appraises the judgment against international standards on the rights of persons with mental disabilities to protection from involuntary detention and medical treatment. The international standards on the rights

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1 2017/HP/204 (unreported).

FK Kalunga & CM Nkhata 'Protection of the rights of persons with mental disabilities to liberty and informed consent to treatment: A critique of *Gordon Maddox Mwewa & Others v Attorney-General & Another*' (2018) 6 *African Disability Rights Yearbook* 60-81 <http://doi.org/10.29053/2413-7138/2018/v6a3>

of persons with disabilities are set out mainly in the Convention on the Rights of Persons with Disabilities (CRPD). The article also uses international human rights and comparative jurisprudence and commentary on treaties concerning the right to liberty and protection from torture and inhuman or degrading treatment. The scope of the article has been motivated by the Court's application of interpretive principles on the limitation of rights to discern the content of the rights in a Zambian context.

The CRPD is the most comprehensive and authoritative human rights instrument that explicitly guarantees the rights of all persons with disabilities. Zambia has ratified the CRPD and, to a large extent, domesticated it using the Persons with Disabilities Act 2 of 2012. Zambia follows a dualist approach to international law. Ratified international instruments are not directly applicable to Zambia until they have been given effect through domestication by legislation or any other enforceable means.<sup>2</sup> Zambian courts, however, have used international law instruments that are not domesticated as persuasive authority.<sup>3</sup> The High Court in *Sara Longwe v Intercontinental Hotel*<sup>4</sup> extended the applicability of international law to Zambia by stating that the ratification of international and human rights instruments by the state without any reservation was clear testimony of the state's willingness to be bound by the provisions of the ratified instruments. On this basis, if an issue that is not covered by local legislation comes before a court, the court in its resolution of the dispute would 'take judicial notice of the treaty or convention'.

Zambia amended its Constitution in 2016 by enacting the Constitution of Zambia (Amendment) Act 2 of 2016. The amendment of the Constitution saw the repeal and replacement of most parts of the Constitution apart from Part III which contains the Bill of Rights. Article 128 of the amended Constitution also entrusted the Constitutional Court with original and final jurisdiction to hear matters relating to the violation of the Constitution, subject to article 28 which gives exclusive jurisdiction to the High Court in relation to matters arising out of the Bill of Rights. Two other important provisions that were introduced in the amendment that are important for this article are the inclusion of disability in the definition of discrimination in article 266 and the inclusion of section 8 which lists national values and principles to include human dignity, equality and non-discrimination. Article 9 of the Constitution states that the national values and principles shall apply in the interpretation of the Constitution and the law. Article 1 of the Constitution provides that the

2 Sec 2 of Zambia's Ratification of International Agreements Act 34 of 2016. The Act confirms the position stated by case law before its enactment; see *Zambia Sugar PLC v Fellow Nanzaluka* Supreme Court Appeal 82 of 2001, where it was held that international instruments on any law, although ratified and assented to by the state, cannot be applied unless they have been domesticated.

3 *Attorney-General v Roy Clarke* (2008) 1 ZR 38.

4 1992/HP/765 (HC).

Constitution is the supreme law of the land and that any other law that is inconsistent with the provisions of the Constitution is void to the extent of the inconsistency.

The CRPD, the Constitution of Zambia and the Persons with Disabilities Act of Zambia Act 6 of 2012 when read together provide for the right to dignity and freedom from cruel, inhuman and degrading treatment, the right to personal liberty, equal protection of the law and freedom from discrimination, all of which are violated when a person with a psychosocial or other mental condition is forcibly detained or treated without informed consent. Such treatment is commonplace in countries where guardianship laws still apply to persons with mental disabilities.

The seemingly conducive legal framework applicable to persons with disabilities in Zambia is tainted by the continued existence and use of the Mental Disorders Act. This Act is a typical example of guardianship laws that were enacted to create an exclusive and oppressive system of treatment and detention of persons with mental disabilities. The Act created and sustained a system whereby the dignity and worth of persons with mental disabilities were negated, rendering them non-existent and, as such, deemed to be incapable of meaningfully participating in determining their health outcomes. The ethos of the Mental Disorders Act therefore is contrary to that of the Persons with Disabilities Act, the amended Constitution of Zambia 2016 and the CRPD. It is on this basis, amongst others, that the continued existence of the Mental Disorders Act, Chapter 305 of the Laws of Zambia was challenged in the *Mwewa* case.

The article begins by giving an overview of the *Mwewa* case followed by a brief discussion of legal provisions on mental health in Zambia. It thereafter examines jurisprudence on the constitutional limitation of human rights. It proceeds to set out the normative content of the rights to legal capacity, and protection from torture, cruel, inhuman or degrading treatment and right to liberty of persons with disabilities. This is followed by an appraisal of the High Court judgment in the *Mwewa* case against the international standards and principles of constitutional limitation. It concludes that the Court misconstrued the principles of limitation of rights when it failed to declare Zambia's Mental Disorders Act unconstitutional on grounds of infringement of the petitioners' rights to legal capacity, protection from torture, cruel, inhuman and degrading treatment and the right to liberty.

## **2 *Gordon Maddox Mwewa & Others v Attorney-General & Others***

The petitioners in this case approached the High Court pursuant to article 28 of the Constitution alleging the violation of various of their rights protected by the Constitution. They alleged that Zambia's Mental

Disorders Act<sup>5</sup> was unconstitutional and interfered with the implementation of the Persons with Disabilities Act.<sup>6</sup> The petitioners prayed for an order to declare the Mental Disorders Act unconstitutional. They also prayed for declaratory relief to protect persons with mental disabilities from unlawful detention and violations of their rights, including the right to informed consent to medical treatment and admission to medical facilities. Notwithstanding the provisions of article 128 of the Constitution of Zambia, which authorises the Constitutional Court to determine matters related to violations or contraventions of the Constitution, the matter was commenced in the High Court as it retains the authority to determine challenges relating to violation of human rights. There was no challenge to the jurisdiction of the High Court to determine the matter, although the Court confirmed that it had jurisdiction to rule on the 'validity of constitutional references under article 28 of the Constitution'.<sup>7</sup>

The petitioners presented evidence by affidavit testifying of personal experiences of involuntary admission and treatment in medical facilities without being offered the protection of the law. They also testified to poor living conditions in medical facilities, inadequate food and clothing and instances of physical violence by hospital attendants and fellow patients. In addition to testimony of personal experience, the third petitioner, in his representative capacity as executive director of the Mental Health Users Network of Zambia, also submitted in evidence reports of research which the organisation had conducted showing the poor living conditions and treatment of persons with mental disabilities generally.

The Attorney-General did not file any answer in opposition to the petition nor did he submit any evidence on behalf of the government of the Republic of Zambia, but was permitted to file written arguments in court. The second respondent, the Zambia Agency for Persons with Disabilities (ZAPD), did not oppose the substantive allegations of the petition although it objected to the petitioners' prayer that the Court should order ZAPD to monitor the enforcement of the judgment of the Court, a part of the case which is not relevant to this article. In the absence of an answer or evidence in opposition, the matter was determined on written evidence and submissions by counsel without trial.

5 Ch 305 of the Laws of Zambia. The Mental Disorders Act was enacted in 1949 and last amended in 1965. Its long title reads: 'An Act to provide for the care of persons suffering from mental disorder or mental defect; to provide for the custody of their persons and the administration of their estates; and to provide for matters incidental to or connected with the foregoing.'

6 Act 6 of 2012.

7 *Mwewa* case (n 1) judgment 21.

## 2.1 Issues raised and arguments before the court

The Petitioners alleged that the Mental Disorders Act unjustifiably violated their constitutional rights, including the right to dignity under article 8; the right to liberty under article 13; protection from torture and inhuman or degrading treatment under article 15; and freedom from discrimination under articles 23 and 255 read together respectively.

On the protection of the right to dignity, the petitioners argued that the Mental Disorders Act violated their right to dignity in its use of derogatory terms to describe mental disability. They argued that section 5 of the Mental Disorders Act, which refers to persons with mental disabilities as 'mentally disordered or defective persons' and classifies mental disabilities using derogatory terms, in particular, 'idiot', 'imbecile', 'feeble-minded' and 'moral imbecile', violated their right to dignity. They argued that the right to dignity of persons with disabilities is recognised by section 4(a) of the Persons with Disabilities Act which mirrors the provisions of article 3 of the CRPD.<sup>8</sup> Counsel also relied on article 23 of the Constitution of Zambia which provides for the right to protection against discrimination. On this basis they prayed for an order to declare unconstitutional section 5 of the Mental Disorders Act which refers to persons with disabilities in dehumanising terms.<sup>9</sup> The petitioners also argued that section 5 of the Mental Disorders Act was unconstitutional. The Attorney-General conceded on the point that the Mental Disorders Act was enacted in 1949 when such derogatory language might have been acceptable.<sup>10</sup>

The High Court found section 5 of the Act which classifies mental illness in derogatory terms unconstitutional. The judge stated that the words in their ordinary meaning were 'offensive, derogatory and discriminatory'. However, the Court declined to declare the entire Mental Disorders Act unconstitutional. On the use of article 8 to establish the right to human dignity, the Court stated that

national values and principles ... cannot be taken as a forceful embodiment in measuring the compliance of the Mental Disorders Act to the Constitution because as aspirations, they do not attach any immediate obligation on the government to implement them.

On the right to liberty, the petitioners argued that the Mental Disorders Act violated their right to liberty which is guaranteed by article 13 of the Zambian Constitution. The right to liberty in article 13 of the Constitution is not absolute and is subject to limitations. The relevant part of article 13 provides:

8 *Mwewa* case judgment 10.

9 *Mwewa* case judgment 11.

10 *Mwewa* case judgment 28.

- (1) No person shall be deprived of his personal liberty except as may be authorised by law in any of the following cases:

...

- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of this care or treatment or the protection of the community.

The petitioners argued that the legal regime established under the Mental Disorders Act did not fall within the lawful limitation of the right to liberty of the person under article 13(1)(h) as it is manifestly unjust, contrary to other provisions of the Constitution and in any event impliedly repealed by the Persons with Disabilities Act.<sup>11</sup> On the implied repeal by the Persons with Disabilities Act, counsel for the petitioners relied on the provisions of section 3 of the Persons with Disabilities Act which provides:

Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of persons with disabilities as provided under this Act or any other matter specified or prescribed under this Act with respect to persons with disabilities, the provisions of this Act shall prevail to the extent of the inconsistency.

The petitioners took issue with section 6 of the Mental Disorders Act which provides for the detention of a person in an institution or other place subject to a warrant or order of the Minister, a judge or magistrate. Further, section 8 of the Act empowers any officer to apprehend a person presumed to be 'mentally disordered' or 'defective' without a warrant and to convey them to a hospital, prison or other place for observation. Section 9 provides for reauthorisation by a magistrate to detain a person apprehended pursuant to section 8. Section 10 does not require the affected person to be present at an inquiry or to make representations, even if the magistrate is empowered to interrogate such person. According to section 11 a magistrate is obliged and empowered to make an adjudication order for the detention of a person who the magistrate believes to be 'mentally disordered or defective' in addition to various other factors. These factors include if the person is 'not under proper, care, treatment or control'; if the person has 'acted in a manner offensive to public decency'; or if 'any person having care, treatment or control of the person consents'. In terms of section 13 of the Act persons subject to adjudication orders are subjected to 'control orders' for their 'control, care or detention'. The person subject to adjudication and control orders is not required to be present or granted the right to make representations. There is neither a provision for the mandatory regular review of control orders nor any explicit procedure to initiate a review of the control order by a person subject to the order, except for the limited right of appeal to the High Court in terms of section 30.

11 *Mwewa* case judgment 13.

The Attorney-General argued that there was no violation of rights instanced by the Mental Disorders Act as it covered a specific disability, namely, mental disability, which should be distinguished from the general provisions of the Persons with Disabilities Act. The Attorney-General also argued that it was a well-established principle of interpretation of law that a general law yields to a specific law where the law operates in the same field on the same subject.<sup>12</sup> Therefore, the Persons with Disabilities Act did not repeal the Mental Disorders Act. The Attorney-General also defended the provisions of sections 6 to 12 of the Mental Disorders Act as containing sufficient procedural safeguards, including the requirement of a warrant of arrest and the institution of an inquiry, to determine the mental condition of a person.<sup>13</sup>

The Court held that it had a duty to test the reasonableness of a constitutional limitation 'by exposing it to principles of fairness'.<sup>14</sup> After making this statement, the Court proceeded to state that sections 6, 8, 9, 30 and 31 of the Mental Disorders Act were regulatory in that they provide for the procedure of detention of persons with mental disabilities. The Court further noted that in certain circumstances the admission 'can be quite involuntary as affected persons are detained either at the behest of family members, members of the public or law enforcement agencies'.<sup>15</sup> The judge agreed that there could be an infringement of the rights of affected persons. She then applied what she called 'the principle of proportionality' in which she considered the need to strike a balance between the need for the detention of a person with a mental disability and the protection of the rights of the affected person. She then proceeded to find that this was a medical question which she did not have the expertise to resolve.<sup>16</sup> The Court nonetheless held that the aforementioned provisions of the Mental Disorders Act do not violate the right to liberty of persons with mental disabilities, but rather provide a 'platform under which issues of control, review, admission and detention can be addressed by a thorough review of the Mental Disorders Act'.<sup>17</sup>

Regarding the right to informed consent to treatment, the petitioners based their arguments on the right to dignity and liberty, the prohibition of torture and inhuman or degrading treatment and protection from discrimination. They also relied on the denial of informed consent as established in their various affidavits in support of the petition, which showed that the informed consent of persons with mental disabilities was not always sought. The Court held that the issue was more complex than it appeared and, as such, she could not declare the Mental Disorders Act

12 *Mwewa* case judgment 16.

13 *Mwewa* case judgment 17.

14 *Mwewa* case judgment 32.

15 *Mwewa* case judgment 33.

16 As above.

17 *Mwewa* case judgment 36.

unconstitutional based only on the evidence of the petitioners. The *verbatim* words of the Court are reproduced in the critique section below.

On the whole, the Court declined to declare the Mental Disorders Act unconstitutional on grounds that it violates the petitioners' rights to freedom from torture and inhuman or degrading treatment, the right to liberty, and the rights to dignity, legal capacity and informed consent to treatment. The dicta of the Court are analysed in later sections of the article. Before this analysis it is important to understand the principles of constitutional interpretation as established by Zambian case law and interpretation of statutes in Zambia.

### **3 Constitutional interpretation in Zambia**

Zambia's legal system is based on the English common law system. This is part of the colonial legacy of Zambia. It has a written Constitution which is supreme to other written law, customary law and practice.<sup>18</sup> According to article 1(1) of the Constitution 'any written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency'.

In *Patel v Attorney-General*<sup>19</sup> the High Court dealt with the issue of determining who bears the burden of proving whether a law or action taken under the authority of a law violates the Constitution. The Court held that once a petitioner proves that the law or action complained of violates their constitutional rights, the burden of proof shifts to the state to prove that the law or action complained of is 'necessary or expedient' or 'reasonably required' under the Constitution. The Court in this case was asked to make a determination on the scope of rights under sections 18, 19 and 22 of the then Zambian Constitution. Section 18 provided for protection against the compulsory acquisition of one's property; section 19 guaranteed protection against unlawful search; and section 22 guaranteed the right to freedom of expression. The applicant (Patel) alleged an infringement of his rights in sections 19 and 22 of the Constitution when a customs officer, purporting to exercise powers under the Exchange Control Regulations of 1966, opened his mail and sought to prosecute him for 'preparing to make a payment outside Zambia' contrary to the said regulations. The applicant's rights under section 18 of the Constitution could be limited pursuant to a law that is shown to be 'reasonably justifiable in a democratic state'. Sections 19 and 22 of the Constitution could be limited by a law which makes provision 'that is reasonably

18 Art 1(1) of the Constitution of the Republic of Zambia, Schedule to Chapter of the Laws of Zambia as amended by Constitution of Zambia (Amendment) Act 2 of 2016.

19 (1968) ZR 99.



required in the interests of defence, public safety, public order, public morality or public health', among others.<sup>20</sup>

The Court held that the test of proving whether or not an Act was 'reasonably required' was an objective one and the burden of proof rests with the state. The Court stated that the facts upon which a law may be 'necessary or expedient' or 'reasonably required' 'are peculiarly within the knowledge of the government and this is a further reason why I think that the onus of proving their existence should be placed on the state'.<sup>21</sup> After having pronounced itself on the burden of proof, the Court stated:<sup>22</sup>

Having said this, I should observe that, notwithstanding the learned Attorney-General's submission concerning the burden of proof, he has filed evidence of the facts upon which he relies and he has addressed argument to me in support thereof, so I do not think he will find himself at any disadvantage by reason of my decision on this point.

This case demonstrates the importance of submitting evidence in support of a law that the state seeks to support as falling within the limitations to rights contained in the Constitution.

In *The People v Bright Mwape and Fred M'membe*<sup>23</sup> the applicants were charged with defamation of the President pursuant to section 69 of the Penal Code, Chapter 87 of the Laws of Zambia. Section 69 of the Penal Code provides:

Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.

The applicants challenged section 69 of the Penal Code as being unconstitutional as it conflicted with article 20 of the Constitution of Zambia which guarantees the applicants' freedom of expression. The right to freedom of expression in article 20 is limited by article 20(3) which permits acts done under a law that is 'reasonably required in the interests of defence, public safety, public order, public morality or public health'. It also requires such limitation to be shown to be 'reasonably justifiable in a democratic society'.

In determining the issue of burden of proof, the High Court upheld the principle in *Patel*,<sup>24</sup> where it was established that the person who alleges that his or her rights have been violated by legislation has the obligation to

20 *Patel v Attorney-General* (n 19) 107.

21 *Patel v Attorney-General* 118.

22 *Patel v Attorney-General* (n 19).

23 (1995) SJ HPR/36/94.

24 *Patel v Attorney-General* (n 19).

prove that his or her rights have been infringed and that the infringing law does not fall within the limitations permitted by the Constitution. The state has the burden of proving that the law purporting to limit the constitutional rights is reasonably required and justifiable in a democratic society. The Court also stated that the required standard of proof in matters alleging constitutional invalidity is proof on a balance of probabilities. The Court declined to follow the Attorney-General's argument of presumption of constitutionality which would have the effect of shifting the burden of justifying a limitation of rights to the applicant. This case was decided without any facts of evidence being placed on the court record by the applicant. The Court stated that notwithstanding the lack of facts or evidence, the matter was properly before the court as the challenge was brought as a referral from the lower court pursuant to article 28 of the Constitution. The Court stated that it proceeded to determine the case in the absence of factual evidence because article 28 of the Constitution did not prescribe the method by which cases should be referred to the High Court from the lower court, although there was sufficient authority on how issues should be framed.<sup>25</sup> Based on the written submissions of the parties, which the court extensively referenced in the judgment, it was held that the applicants had failed to satisfy the Court on a balance of probabilities that section 69 of the Penal Code was not reasonably justifiable in a democratic state.<sup>26</sup>

The case of *The People v Bright Mwape and Fred M'membe* emphasises the required standard of proof in a constitutional limitation of rights, namely, proof on a balance of probabilities. It also affirms the finding in *Patel* that the state bears the burden of proving on a balance of probabilities that the law purporting to limit the rights of an applicant falls within the limitations permitted by the Constitution. The case also establishes that the standard of proof in a constitutional limitation challenge can be discharged without evidence of facts. The case was brought before the High Court by way of a constitutional challenge under article 28 of the Constitution. There is no definitive authority on whether the standard of proof would be satisfied on written submission in a matter that is commenced by way of petition under article 28 of the Constitution, as was the case in *Mwewa*.

In *Christine Mulundika & 7 Others v The Attorney-General*<sup>27</sup> the petitioners challenged the constitutionality of the Public Order Act, Chapter 104 of the Laws of Zambia. In particular, the petitioner challenged section 5(4) of the Act which requires any person who wishes to hold a peaceful assembly to obtain a permit from the police. The failure to obtain a permit when holding a peaceful assembly was criminalised by section 7 of the Public Order Act. The petitioners challenged the provisions requiring a permit and the criminalisation of its failure as being a contravention of their rights

25 *The People v Bright Mwape and Fred M'membe* (n 24)

26 *The People v Bright Mwape and Fred Mmembe* (n 24)

27 SCZ Appeal No 25 of 1995 (SJ)

to freedom of expression and to assembly and association, guaranteed by articles 20 and 21 of the Constitution of Zambia respectively. Article 21(2) of the Zambian Constitution limits freedom of assembly and association as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health

...

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

In construing the provisions of the Public Order Act, the Supreme Court held that the provisions of the Act were not reasonably justifiable in a democratic society. This is because the requirement of seeking prior permission to hold a peaceful assembly was an obvious hindrance to the fundamental freedoms of association, assembly and expression protected by the Constitution. The Court also held that rights have to be regulated and not denied. Since the regulating officer had authority to issue the permit, the Act gave the regulating authority the power to deny the enjoyment of rights, which was unjustifiable in a democratic society. In the second place the Supreme Court found the provisions of the Public Order Act, which required a permit to hold peaceful assemblies, unconstitutional in as far as they did not provide effective control over the exercise of power to grant or refuse a permit. The Supreme Court stated that 'fundamental constitutional rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms'.<sup>28</sup>

The Supreme Court in this case set the standard that a law limiting fundamental rights in a democratic society should meet. This standard goes beyond the evidential burden to include a broader test of lawfulness and constitutionality. This is another case that was decided based on written submissions. The Court held the provisions to be arbitrary in that it gave the power to determine what is 'reasonably necessary' to the police officer dealing with the application. The fact that the Act gave a wide discretion to the police officer determining the application was held to be arbitrary and, as such, unconstitutional. Therefore, a law that gives wide a discretion to an administrator to the extent of denying rights as opposed to regulating rights cannot be said to be reasonably justifiable in a democratic state. These determinations were made after recognising the normative

content of the freedom of expression against which the provisions of the Public Order Act were analysed.

From the above discourse, courts have established that in an application alleging an infringement of rights guaranteed by the Constitution, an applicant bears the burden of proving that the act complained of is discriminatory and does not fall within the limitations provided by the Constitution. The state bears the burden of proving that any legislation purporting to limit rights falls within the limitation provided by the Constitution and is not arbitrary so as to deny a right as opposed to regulating it. This burden of proof in both instances is satisfied on a balance of probabilities. Courts have been able to make these determinations based on evidence presented by the parties and, in some instances, on written submissions. There does not appear to be a clear precedent on whether the standard of proof is discharged on written submission in a matter that is commenced by petition under article 28 as all the cases discussed above, in which the court relied on written arguments, were referred to the High Court from the lower courts.

## **4 Construction of statutes in Zambia**

The interpretation of legislation is regulated by the Interpretation and General Provisions Act.<sup>29</sup> Section 2 of this Act states that its provisions apply to all written law unless a contrary intention appears in the Interpretation and General Provisions Act or the written law concerned. Section 16 of the Interpretation and General Provisions Act provides that '[w]here one written law amends another written law, the amending law shall so far as it is consistent with the tenor thereof, be construed as one with the amended written law'.

This means that a later statute which amends an earlier statute would be construed as one with the amended statute provided the construction of such statute as one is not inconsistent with the tenor of the amended statute. Further, being a common law legal system, courts are also guided by the rules of construction of statutes as developed by the English common law when interpreting statutes.

## **5 Normative content of the right to human dignity, liberty and security of the person and the right to health as they relate to persons with disabilities**

Persons with disabilities do not enjoy rights over and above those that apply to persons without disabilities. However, in recognising the special

29 Ch 2 of the Laws of Zambia.

vulnerabilities of persons with disabilities as well as the historical and systemic discrimination that persons with disabilities have suffered, the CRPD seeks to secure the full and equal enjoyment of all human rights and fundamental freedoms for all persons with disabilities.<sup>30</sup> Zambia ratified the CRPD in February 2010 and has partially domesticated it through the enactment of the Persons with Disabilities Act of 2012.

This section explains the normative content of the right to human dignity, the right to liberty and security of the person and the right to protection against torture and inhuman or degrading treatment as they are applied to persons with mental disabilities. The interpretation of rights has been drawn from communications before the Human Rights Committee, the African Commission on Human and Peoples' Rights (African Commission) and selected reports of UN Special Rapporteurs with mandates on the specific rights, which are used as persuasive authority by Zambian courts.

## 5.1 Human dignity

The CRPD couches the right to human dignity as 'dignity and respect of bodily integrity and autonomy' of persons with disabilities. Persons with mental disabilities are entitled to human dignity and respect when seeking or being offered medical treatment, in the same fashion as is accorded to persons without disabilities.<sup>31</sup> In *Purohit & Another v The Gambia*<sup>32</sup> the African Commission held:

Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect the right.

Any inhumane and degrading treatment that a person with disabilities may be subjected to as they receive health care services violates not only their right to dignity but also their right to health. Persons with disabilities, and in particular persons with mental disabilities, are entitled to make informed decisions on whether they should be admitted to a health institution and whether they accept the medical treatment being offered. Persons with mental disabilities in Zambia often suffer the ignominy of preventing them from making even the most basic decisions concerning their lives, often with serious implications for the enjoyment of their health rights. The violation of the right to health occurs when health professionals refuse to recognise the inherent right of persons with mental disabilities to make decisions concerning their health. Such treatment by health

30 Art 1 CRPD.

31 Art 25(d) CRPD.

32 (2003) AHRLR 96 (ACHPR 2003) para 57

professionals, which denies them legal capacity and consequently violates the health rights of persons with mental disabilities, amounts to inhumane and degrading treatment of persons with mental disabilities.

## **5.2 Right to health and the denial of informed consent to medical treatment**

The CRPD is instructive on the health rights of persons with disabilities, including persons with mental disabilities. Article 25 of the CRPD states:

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.

Article 25 of the CRPD guarantees the right to the highest attainable standard of health in similar terms as the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, article 25 of the CRPD goes further to specify what the right entails in the case of persons with disabilities. The right to health, which is of particular relevance to this article, entails that persons with mental disabilities are entitled to the highest attainable standard of health free from discrimination on the basis of their disability. The right to health of persons with mental disabilities thus also imposes an obligation to provide the same quality of care by health professionals. Such quality of care entitles persons with mental disabilities to make informed choices about their treatment, including admission to hospitals for such treatment.

The right to health is further enhanced by article 19 and the right to live in the community with support, in particular the right to community support services and access to community services (including medical services) on a basis of equality with others. This means that persons with disabilities have a right to disability support and to access health care at primary and all other care levels in the same way as everyone else. Access to health care at every level works as a preventive resource to curb crises so that people are treated before their condition reaches a critical stage. This would prevent many mental health users from needing hospitalisation and reduce the rates of chronic and acute mental health issues in society.

Article 12 of the CRPD recognises the right to equality before the law of all persons with disabilities. This includes the right to legal capacity, which is the recognition of the right by a person with disabilities to make decisions concerning their own lives. The United Nations (UN) Committee on the Rights of Persons with Disabilities has stated that the denial of legal capacity to persons with disabilities and their detention in health facilities without their informed consent constitute a violation of

their rights, including the right to liberty protected in articles 12 and 14 of the CRPD.<sup>33</sup>

### 5.3 Right to liberty and security of the person

Article 14 of the CRPD proscribes the unlawful or arbitrary deprivation of liberty of persons with disabilities. It further states that ‘the existence of a disability shall in no case justify a deprivation of liberty’.<sup>34</sup> Article 15 further stipulates that any deprivation of liberty of persons with disabilities is to be done in conformity with the law and that the existence of a disability should not under any circumstances justify a deprivation of liberty. The article demands a limitation of the right to liberty to be done in accordance with the law. Further, disability should not be a reason for depriving a person of their liberty. A law that is discriminatory in its application therefore would not be reasonably justifiable in far as it is applied on the ground of disability.

The fundamental rights to liberty and security of the person are important in relation to respect for a person’s dignity as well as their health. The Human Rights Committee emphasised not only what these rights entail but also to whom they apply, namely, ‘everyone’ (every human being). The UN Committee on the Rights of Persons with Disabilities further prepared Guidelines on Article 14 of the CRPD.<sup>35</sup> The Guidelines describe the rights to liberty and security of the person as ‘the most precious rights to which everyone is entitled’. It further states:<sup>36</sup>

In particular, all persons with disabilities, and especially persons with mental disabilities or psychosocial disabilities, are entitled to liberty pursuant to article 14 of the Convention ... article 14 of the Convention is in essence a non-discrimination provision. It specifies the scope of the right to liberty and security of person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise.

The right to health cannot be fully enjoyed if a person is coerced into receiving treatment. Thus, forced detention and forced treatment violate the fundamental rights to liberty and security.

33 UN Committee on the Rights of Persons with Disabilities General Comment 1 of 2014 on article 12: Equal Recognition before the law, 19 May 2014, CRPD/C/GC/1 paras 1 & 11.

34 Art 14.

35 UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, September 2015.

36 Paras 3-4 of the Guidelines (n 35).

## **6 Critique of the Court's judgment**

This section critically analyses the judgment of the High Court of Zambia in the *Mwewa* case against the normative content of the rights to human dignity, health and informed consent to treatment and liberty of the person. It also critically analyses the Court's interpretation of the relationship between the Mental Disorders Act of 1949 and the Persons with Disabilities Act of 2012 in respect of the rights of persons with mental disabilities, in response to the argument that the Mental Disorders Act had been tacitly repealed by the Persons with Disabilities Act.

### **6.1 Human dignity**

In the *Mwewa* case the petitioners alleged that the Mental Disorders Act violated their right to human dignity. The claim of a right to dignity was founded on article 8 of the Zambian Constitution which falls outside the Bill of Rights. Article 8 of the Constitution contains national values and principles. Article 8(d) states in that 'national values and principles are ... human dignity, equity, social justice, equality and non-discrimination'. The petitioners argued that the denial of legal capacity and informed consent to treatment violated their right to legal capacity which is recognised by article 8 of the Constitution.

In addressing this claim the High Court stated that while it is granted that constitutional values and principles influence the aspirations of society in the interpretation and application of the law, they cannot be taken as a forceful embodiment for measuring compliance with the Mental Disorders Act. This is so because as aspirations they do not attach any immediate obligation on the government to implement them.

The Court did not go further to apply its mind to the provisions of article 9 of the Constitution which states that the national values and principles shall apply to the interpretation of the Constitution and the law. Further, article 118 of the Constitution lists the principles by which courts should be guided. Article 118(f) states that 'the values and principles of this Constitution shall be protected and promoted'. Courts therefore have a positive obligation to promote and protect the values of the Constitution in interpreting the provisions of the Constitution and other laws. The Court thus failed to apply its mind to the principle of human dignity in construing the individual rights the petitioners alleged to have been violated pursuant to the Mental Disorders Act and raised in the petition as mandated by article 9 of the Constitution.



## 6.2 Right to health and denial of informed consent to medical treatment

The petitioners in the *Mwewa* case argued that the practice of subjecting them to treatment without their informed consent denied them their right to legal capacity in matters concerning their health, thereby violating the right to health of persons with mental disabilities. With regard to the assertion that the Mental Disorders Act violates the right to informed consent to medical treatment for persons with mental disabilities, the Court stated:<sup>37</sup>

I find that the issue raised in this claim is novel. It seeks to allow persons suffering from mental disabilities the right to informed consent to medical treatment. I take judicial notice that [there] are different types of mental disabilities and some might be more severe than others. It is not in every case that an affected person might be able to appreciate the severity of their illness so as to voluntarily give consent to medical treatment. However, in cases where patients have minor conditions, such persons should be allowed to consent to medical treatment. By saying so, I do not hold that the Mental Disorders Act is unconstitutional because it removes the right to informed consent to medical treatment. I can only hold to the contrary if there was medical evidence adduced to assist me in making an informed finding. In my view, this issue is more complex than it appears and I cannot on the basis of the petition as the only evidence make a finding. This claim accordingly fails.

By framing the issue of a denial of rights as a medical question, the Court in this case seems to give an arbitrary discretion to medical practitioners to determine the circumstances upon which medical treatment may be given without consent which, as argued by the petitioners, resulted in an infringement of their rights. By leaving this determination solely in the hands of medical practitioners without any objective or lawful guidelines, the Court failed to apply the test of constitutionality established in *Mulundika*,<sup>38</sup> where it was held that to pass the constitutional limitation test, a law has to be lawful in that it should not be arbitrary or give a wide discretion to the administrator so as to deny the right as opposed to merely regulating it.

The Court by its finding further refused to recognise that persons with mental disabilities are entitled to enjoy the right to informed consent. This finding could have been made, even in the absence of medical or any other evidence, on the basis purely of sections 4, 6, 8 and 27 of the Persons with Disabilities Act as well as the provisions of the CRPD. The Court failed to apply the standard established in the aforementioned precedent on the standard of proof for constitutional challenges. In the absence of evidence and convincing arguments by the Attorney-General on this issue, an

37 *Mwewa* case (n 1) judgment 40.

38 *Mulundika* (n 28).

obvious legal question was couched as a medical question without stating why the petitioners' evidence was insufficient for the Court to make a ruling. The Court's reference to the severity of the condition of the person with a disability denotes an acceptance of the ethos of the Mental Disorders Act which believes that certain categories of persons with disabilities are unable to make informed decisions concerning their health or other aspects of their lives. Even persons with severe mental conditions are not constantly in a state of crisis and should be able to give informed consent to medical treatment. However, one may also argue that by the Court's reference to the severity of a mental condition, it rather meant that a person who is not in a state of mental crisis is capable of giving informed consent. This would rightly mean that even a person with a severe mental condition can give informed consent when not in crisis. The CRPD recognises that such a person's consent to treatment should be sought by medical practitioners in the same way they seek consent from persons without disabilities. Reasonable accommodation, however, would have to be made to facilitate medical treatment for persons with mental disabilities who give advance orders or instructions regarding their treatment options. What is interesting is the way in which, in one part of the judgment, the Court states that if a person with a mental disability is able to give consent to treatment, the authorities are bound to give effect to their wishes. However, in another part of the judgment the Court finds the issue of informed consent by persons with mental disabilities to be a novel issue about which she is reluctant to make a ruling in favour of the petitioners without evidence from a medical practitioner. As noted above, the Court did not indicate why the evidence submitted by the petitioners was insufficient for this purpose or why they were not given the benefit of the doubt.

It should be noted that the Court's finding that persons with 'severe' forms of mental disability may not appreciate the severity of their illness in order to voluntarily give consent to medical treatment is erroneous. This is because, as stated above, even a person with a severe form of mental disability is not always in a state of mental crisis. Their condition can be explained to them and they can give advance orders on how to be treated when they are in a crisis or they can nominate a person of their choice to make treatment choices or decisions on their behalf when in a crisis. This is based on the principle of the 'will and preference' of persons with disabilities and not on the principle of 'the best interests of persons with disabilities' as espoused in the CRPD and the Persons with Disabilities Act.

### **6.3 Right to liberty and security of the person**

In the *Mwewa* case the petitioners contended that the Mental Disorders Act violated their rights and those of other persons with mental disabilities to liberty and security of the person. The petitioners argued that the Mental

Disorders Act violated the right of persons with disabilities to liberty and security of the person by permitting the detention of persons with mental disabilities to prisons and medical institutions on grounds of their disability and without providing proper safeguards. They also argued and tendered evidence to the effect that the Mental Disorders Act unconstitutionally and unlawfully permitted disability-based detention and involuntary admission to prisons and medical institutions, thereby violating their rights. Counsel for the petitioners argued that the Mental Disorders Act did not fall within the lawful limitation of the right to liberty permitted under article 13(1)(h) of the Constitution which authorises a limitation of the right to liberty as authorised by law. Counsel argued that the Mental Disorders Act was not a valid law for purposes of limitation as it is manifestly unjust and lacks legal certainty as there is no accepted definition, criteria or methodology for determining whether someone is of unsound mind.<sup>39</sup>

In determining the petition, the High Court held that the Mental Disorders Act did not violate the right to liberty and security of persons with mental disabilities as established by the Constitution. The Court stated that in determining whether the Mental Disorders Act violates the right to liberty and security of the person of persons with disabilities, it has a duty to test whether a restriction is reasonable by exposing it to the principles of fairness. In this regard sections 6, 8, 9, 30 and 31 of the Mental Disorders Act, which sanction involuntary detention and forced treatment of persons with mental disabilities, were found to be regulatory in that they state the procedure on detention and admission of persons with mental disabilities.

The High Court found that the Mental Disorders Act did not contravene the right to liberty guaranteed by article 13 of the Constitution of Zambia. However, the Court failed to properly apply the principles of limitation of rights. The Court stated that it had the responsibility of establishing whether or not the rights had been infringed by testing the alleged violations against principles of fairness. While conceding that the provisions of the Mental Disorders Act, which provide for the involuntary detention of persons with disabilities, could amount to an infringement of the petitioners' rights, the Court proceeded to consider what she termed 'the principle of proportionality'.<sup>40</sup> In expounding this principle, the Court stated:<sup>41</sup>

By this I mean to say that there needs to be a balance between the competing considerations on detention and admission to mental health institutions which appear to be involuntary on the one hand and the affected persons (*sic*) rights. In my view, there may be instances where it is necessary for the family,

39 *Mwewa* case judgment 13.

40 *Mwewa* case judgment 33.

41 As above.

community or law enforcement agencies to have a mental patient admitted without their consent especially where they suffer from severe disabilities or where it is obvious that an affected person is not capable of making an appropriate decision for their care and treatment. The decision to determine the detention or admission of mental patients to prisons or medical institutions is a medical question, and cannot be determined by this Court.

The Court failed to apply the established principles and guidelines on the limitation of rights. The Court instead devised its own 'principle of proportionality' which failed to properly construe the normative content of the rights to liberty and security of the person of persons with disabilities. Furthermore, even after conceding that the Mental Disorders Act lacked certainty on the definition and criteria of and the methodology for determining whether a person is of unsound mind or not, the Court relied on this lack of certainty to deny persons with disabilities protection from involuntary detentions. The Court further found that the decision whether or not a mental patient should be admitted to a prison or medical institution is a medical and not a legal issue. In so stating, the Court conflated the question of legal capacity with mental capacity. Contrary to the court's finding, the question of whether or not a person is capable of giving informed consent to treatment is a legal rather than a medical one. The Court's findings appear to have been made without due regard to the plethora of authority on the legal capacity of persons with mental disabilities to make decisions regarding their admission and treatment.

The Court's findings seem to represent or be influenced by the historical guardianship laws that were enacted to indiscriminately arrest, detain and take other action against persons with mental disabilities, allegedly 'in their best interests' and 'that of society'. They represent the charity model of addressing the plight of persons with disabilities. The Court also refused to rely on the undisputed evidence of the petitioners regarding the effect of the Mental Disorders Act on their rights to liberty and security of the person. This is in contravention of the principle that places the burden of proving that the restrictions are justifiable in a democratic state on the state.

#### **6.4 Tacit repeal by the Persons with Disabilities Act**

In the *Mwewa* case the petitioners contended, in the alternative to the constitutionality argument, that the Mental Disorders Act of 1949 had been tacitly repealed by the Persons with Disabilities Act, a later Act of 2012 which contains contradictory provisions and is based on a rights-based approach to disability. The Court held:

In a constitutional democracy like ours, all laws flow from the Constitution and all other laws rank *pari passu*. A subordinate piece of legislation such as the Persons with Disabilities Act cannot therefore void or repeal the Mental

Disorders Act. In other words, provisions of the Persons with Disabilities Act cannot be the basis for impeaching the Mental Disorders Act.

The Court found that the Mental Disorders Act had not been tacitly repealed notwithstanding its noting that the Act was an archaic piece of law that required a thorough review.<sup>42</sup>

The Court failed to give effect to section 3 of the Persons with Disabilities Act, which contains the following superiority clause:

Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of person with disabilities as provided in this Act ... the provisions of this Act shall prevail to the extent of the inconsistency.

Notwithstanding the refusal to declare the Mental Disorders Act unconstitutional, the proper construction would have been to construe the various provisions the Mental Disorders Act together with the Persons with Disabilities Act as though they had been amended by the latter Act. The Court therefore misconstrued principles of statutory construction stated in the Interpretation and General Provisions Act. According to principles of statutory construction, in the case of a latter statute regulating the same conduct, the latter statute has the effect of amending the former statute.

## 7 Conclusion

Persons with mental disabilities are human beings with same rights and dignity as any other human being. They are entitled to the protection of their dignity, liberty, security of the person, freedom from torture and inhumane or degrading treatment and freedom from discrimination on account of their mental disability. This means that they are entitled to fully and willingly participate in deciding whether they want to be admitted to a health facility for treatment and the type of treatment they prefer. They are entitled to make informed decisions on matters affecting their mental health, among others.

An analysis of the *Mwewa* case demonstrates that the High Court did not fully apply the rights-based approach in its interpretation, and that its approach to constitutional interpretation was also in some ways faulty. It also shows that the Court did not properly apply the principles of limitation and interpretation of rights when interpreting the petitioners' rights to liberty and security of the person and human dignity.

42 *Mwewa* case judgment 48.

The article sought to analyse the judgment of the Zambian High Court in the *Mwewa* case in relation to the rights of person with mental disabilities. The authors of this article were the advocates for the petitioners in this matter.