

CHAPTER 6

LEFT IN THE PERIPHERY: AN ANALYSIS OF VOTING RIGHTS FOR PERSONS WITH DISABILITIES IN ZIMBABWE

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Summary

In Zimbabwe, the right to vote is a constitutionally guaranteed right which can only be exercised by citizens who meet prescribed minimum requirements. Notwithstanding, the modalities meant to ensure that persons with disabilities participate in decision-making processes, usually through elections, are arguably inadequate. In the Zimbabwean context (and indeed in most African countries) the right to vote is underlined by a history of blatant racial exclusion and discrimination where the right was exclusively enjoyed by the white minority. Despite this regressive phenomenon; the 2013 constitutional dispensation makes a progressive clarion call for the inclusion of every citizen in the right to vote or to stand for public office, a move which underscores how a democratic society should function. Being a part of the international community, the country is also a signatory to international conventions such as the Convention on the Rights of Persons with Disabilities (CRPD), the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights; all of which deeply entrench the right to universal and equal suffrage. Consequently, this article examines the right to vote of persons with disabilities from a human rights perspective converse to an arguably untenable welfare model. Therefore, the overarching intent of the article is to succinctly analyse laws and where relevant, policies which seek to promote the participation of persons with disabilities in elections; identify practical barriers and enablers that can engender the participation of persons with disabilities; assess approaches and interventions that have been employed in Zimbabwe to increase the participation of persons with disabilities in elections and interrogate the possible impact of the said interventions.

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1 Introduction

The World Health Organisation (WHO) and the World Bank opine that approximately 15 per cent of the global population lives with some form of disability.¹ Historically, persons with disabilities have contended with challenges which have left them in the peripheries of society, removed from equal participation in more aspects than one.² Atikson et al³ observed that women with disabilities constitute 60 per cent of persons with disabilities and their plight is even worse because of additional barriers resultant from their gender and disability.⁴ Therefore, for countries to truly display their democratic processes, all citizens including those living with disabilities must have equal access to the vote, stand for public office and participate in electoral processes as election officials or observers.⁵ The right to vote is an indispensable civil and political guarantee. It underlies an open, democratic and transformative society endeavoured in several legal and policy instruments. Practically speaking, this right is foundational in nature meaning its realisation is intrinsically linked to the enjoyment and attainment of other enshrined fundamental rights. Importantly, it creates a platform for persons to exercise free will, stand for political office and choose their political representatives. Moreover, it essentially allows people to determine the course of life they desire. In the Zimbabwean context (and indeed in most African countries) the right to vote is underlined by a history of blatant racial exclusion and discrimination where the right was exclusively enjoyed by the white minority. Consequently, most modern democracies have taken strides to ensure that people enjoy this crucial right, but challenges are still abound in so far as persons with disabilities are concerned.

Although the international legal framework seeks to ensure that persons with disabilities enjoy the same rights that able-bodied people enjoy, the reality is that they usually face social, legal and most importantly, practical barriers in claiming and fully enjoying their voting rights.⁶ Persons with disabilities more often than others encounter enormous discrimination and marginalisation. They have limited access to education, healthcare, and their participation in the economic and political

- 1 World Health Organisation and World Bank 'World report on disability' (2011) http://who.int/disabilities/world_report/2011/en/ (accessed 15 November 2019).
- 2 Global Initiative to Enfranchise People with Disabilities 'The Bill of Electoral Rights for citizens with disabilities' http://www.electionaccess.org/rs/Bill_English.htm (accessed 28 March 2019); International Foundation for Electoral Systems (IFES) 'Accessible elections for persons with disabilities in five Southeast Asian countries' (2013); 'Equal opportunities for persons with disabilities' <http://www.electionaccess.org> (accessed 28 March 2019).
- 3 V Atkinson et al 'Equal access: How to include persons with disabilities in elections and political processes' (2014) 375.
- 4 Atkinson et al (n 3 above) 375.
- 5 Atkinson (n 3 above) 375.
- 6 Disability Right Advocates (2013) 'Blind and visually impaired face barriers in voting' www.dralegal.org (accessed 15 November 2019).

dimension is minimal if not non-existent thereby making them vulnerable to poverty more than the able-bodied.⁷ Thus, to resolve this disparity the formulation of domestic legal and policy framework must comply with international standards, promote and protect the rights of persons with disabilities, and play a complementary role to societal behaviour change programmes which seek to alter perceptions of and/or about persons with disabilities.⁸

Additional barriers that hinder the equal participation of persons with disabilities in society include communication barriers, for deaf or dumb people and this significantly limits access to information. Physical barriers may limit access to buildings and in some cases, access to buildings where voting is taking place thereby depriving them of their right to cast votes for their preferred candidates for public office.⁹ Furthermore, attitudinal barriers which include stereotypes and stigma of persons with disabilities limit access to public life and may affect the confidence of those intending to stand for public office.¹⁰ In some African countries,¹¹ communities believe that persons with physical or psychological disabilities are possessed by evil spirits or victims of witchcraft due to their 'evil' actions.¹² As a result of this families of such persons may not register them as citizens or may limit their participation in social, economic and political processes thereby depriving them of the rights that able-bodied members of the society enjoy.¹³

Against this background, this article considers the right to vote of persons with disabilities. As such, the overarching intent of the paper is to examine laws and policies which seek to promote the participation of persons with disabilities in elections; identify barriers and enablers of participation of persons with disabilities; assess approaches and interventions that have been employed in Zimbabwe to increase the participation of persons with disabilities in elections; and interrogate the possible impact of implemented interventions. Although several approaches will be discussed, a human-rights approach will be the premise for analysis of the domestic regulatory framework in assessing whether it complies with international standards for the treatment of persons with disabilities and ensuring that they are not excluded from political

7 Disability Right Advocates (n 6 above).

8 Zimbabwe Human Rights Forum 'Rights of persons with disabilities' (2015) 1.

9 Inclusion International 'Inclusive civic engagement: An information toolkit for families and persons with intellectual disabilities' (2015) <http://electionaccess.org/en/media/news/39/> (accessed 15 November 2019).

10 Election Access (October 2016) 'Political Participation of Persons with Disabilities in Remote and Rural Areas' <http://electionaccess.org/en/media/news/40/> (accessed 26 November 2019).

11 Inclusion International (n 9 above).

12 V Atkinson et al (n 3 above).

13 DL Cogburn 'The grand challenge of disability and development in ASEAN' in DL Cogburn & T Kempin Reuter (eds) *Making disability rights real in Southeast Asia: Implementing the UN Convention on the Rights of Persons with Disabilities in ASEAN* (2017).

participation. The aftermath of the harmonised elections held in 2018 may set in motion electoral reforms as the country prepares for the 2023 elections. As such, the article illuminates gaps in legal and policy framework which significantly limits the equal participation of persons with disabilities in political life so that these can be remedied before the next election to achieve a truly democratic, just and egalitarian society.

2 The right to vote for people with disabilities: The Zimbabwean context

Since Zimbabwe gained its independence from the clutches of its colonial masters in 1980, it has had four censuses. However, it is observed that from all four censuses, there are no official, reliable statistics on the prevalence of disability or the kinds of disability in the country.¹⁴ A study conducted in 2007 estimated that there are about 1.4 million people with at least one form of disability in Zimbabwe.¹⁵ In 2012, the Housing and Population Report recorded that the national disability prevalence stood at 2,9 per cent of which 55 per cent were women and 45 per cent were men.¹⁶ According to the recent Inter-censal Survey, disability prevalence stands at 9 per cent, with 10 per cent of persons with disabilities being women while their male counterparts constitute 8 per cent respectively.¹⁷ However, the credibility of these statistics is often questioned leading to assumptions that there might not be any reliable statistics on the prevalence of disability in Zimbabwe.¹⁸

The contentious nature of the estimates on the prevalence of disability in Zimbabwe is partly attributable to the fact that there is no universally agreed upon definition of what constitutes a disability.¹⁹ This is demonstrated by the varieties of estimates that have been presented above. Nonetheless, the lack of a universally accepted definition of disability makes it difficult not to question the accuracy of the estimates on persons with disabilities. Peta and Moyo concur with our reasoning and importantly submit that 'the conceptualization and definition of disability has been a complex, controversial, multidimensional and evolving issue dating back to the 17th century'.²⁰ For example, one study could limit its scope to rural Zimbabwe and focus on physical disabilities only while another could focus on urban Zimbabwe and limit the scope to physical

14 E Mandipa & G Manyatera 'Zimbabwe' (2014) 2 *African Disability Rights Yearbook* 287.

15 T Choruma 'The forgotten tribe: Persons with disabilities in Zimbabwe' (2007) <http://www.progressio.org.uk/sites/default/files/Forgotten-tribe.pdf> (accessed 15 November 2019).

16 Mandipa & Manyatera (n 14 above).

17 Zimbabwe National Statistics Agency 'Inter-censal demographic survey' (2017) 7.

18 Choruma (n 15).

19 As above.

20 C Peta & A Moyo 'The rights of persons with disabilities in Zimbabwe' in A Moyo *Selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) 86.

and mental disability. Both studies would present findings and statistics, but those would not provide a complete picture on the prevalence of disability. However, common forms of disability in Zimbabwe include physical impairments, mental impairments, hearing impairments, speech and functional disabilities, intellectual and sensory impairments.²¹ We subscribe to the definition of disability contained in the Convention on the Rights of Persons with Disabilities (CRPD), which unequivocally states that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.²²

Statistically at least, persons with disabilities constitute one of the most marginalised, socially excluded and poor groups.²³ They are disadvantaged in every sense of the word. This is worsened by systemic attitudinal, deep-seated, institutional and environmental barriers and these militate against their ability or attempts to meaningfully participate in the social, economic and political facets of society.²⁴ In most cases, it is assumed and expected that persons with disabilities are heavily dependent on their families to the extent that some are considered a burden to their caregivers. With current high levels of unemployment,²⁵ many of those who live with disabilities tend to be perceived as an economic burden especially in rural areas because they are unable to contribute productively to the running of the homestead. These notions are prominent in rural areas where causes of disability are often associated with witchcraft or wrongdoing towards the ancestors. It is because of these perceptions that persons with disabilities are ostracised and in the case of women and girls; sexually violated and often without recourse.

In 2009, the Short-Term Emergency Recovery Programme (STERP) was launched by the government and this policy indirectly addressed disability through financial support to add onto the disability allowance.²⁶ Furthermore, the Medium-Term Plan (MTP), Zimbabwe's national economic and development strategy from 2011 to 2015 also provided for the issuing of grants to assist the upkeep of persons with disabilities. However, this national policy was limited in that it did not invest in the

21 Choruma (n 15 above) 11.

22 See art 1 CRPD.

23 Choruma (n 15 above).

24 R Lang & D Charowa *DFID scoping study: Disability issues in Zimbabwe* (2007) 28.

25 Zimbabwe National Statistics Agency (n 17 above). See also '93,4 percent Zimbabweans are employed: ZIMSTAT' *The Zimbabwe Mail* 27 May 2018 <https://www.thezimbabwemail.com/business/934-percent-zimbabweans-are-employed-zimstat/> (accessed 15 November 2019). Nonetheless, the employment statistics which is estimated at between 5,18% and 90% are highly contested.

26 SA Nilsson 'Disability rights in Zimbabwe' <http://www.msc.st/docs/HRBA-Disability-Zimbabwe-revised-2011-01-30.doc> (accessed 26 November 2019).

economic empowerment of persons with disabilities or provide initiatives for income generation.²⁷

The importance of the right to vote cannot be overemphasised regardless of whether one is a person with a disability or not.²⁸ It is the choice of every citizen to choose whoever they want to represent their interests at all levels of government. Voting is essentially a manner in which an individual asserts his/her place in society.²⁹ This is of significance to persons with disabilities because their interests are usually not represented adequately at a governmental level. When such a process is denied to an already disadvantaged group because of accessibility or practical challenges, the level of their expression and participation in society is also limited.

More recently, during the 2018 elections several attempts were made to include persons with disabilities in the political process. An example of such was the provision of disability-friendly electoral booths. This can be considered as a progressive step in relation to persons with disabilities' right to vote. Furthermore, there was the assisted-voter programme which significantly enhanced the participation of persons with disabilities in the elections. Although due to these attempts, 55 000 voters were assisted in one way or another, some concerns were raised that the assisted-voter programme was a tool to intimidate voters into casting votes in a certain direction.³⁰ These concerns are legitimate because we respect the sanctity of voting and once more than one person is in the booth, it degrades that sanctity and exposes the process of voting to abuse.

In as much as these attempts are a step in the right direction, it is important to note that not all disability is physical and that there are some forms of disability that can be included in the voting process without it being under the umbrella of assisted voting. In September 2017, Senator Nayamaybo Mashavakure, who was the representative for persons with disabilities, appealed to the Zimbabwe Electoral Commission (ZEC) to make use of sign language and braille voter education and polling material.³¹ However, this application was dismissed by the High Court in May 2018 and the reason was that there was no need for ZEC to print ballot papers in braille because the assisted-voter programme was already in place and was deemed adequate in the inclusion of persons with disabilities in the electoral process.³² This decision can be criticised because, as already mentioned, assisted voting is susceptible to abuse and if there are other alternatives, they must be explored. Moreover, the low

27 Mandipa & Manyatera (n 14 above) 296.

28 *August v Electoral Commission* 1999 3 SA 1 (CC) para 17.

29 M Waterstone 'Political Participation for People with Disabilities' in *Critical Perspectives on Human Rights and Disabilities Law* (2011) 378.

30 The Zimbabwe 2018 Commonwealth Observer Group Report (2018) 31.

31 As above.

32 As above.

level of inclusion of persons with disabilities is also demonstrated in the small number of those who contested for public office in the 2018 harmonised elections. Out of 23 presidential hopefuls, only one candidate, Elton Mangoma was a person with a disability.³³

This is incongruent with recent efforts to build inclusive and just societies. For example, the last 40 years have been characterised by the emergence of advocacy groups particularly for the rights of persons with disabilities, both in developing and developed countries. Consequently, civil society organisations (CSOs) have been instrumental in this regard and as such constitute a critical component of the development and recognition of the rights of persons with disabilities. As such, the foundation of advocacy for civil society has been the migration from the perception of persons with disabilities from the health and charity approach to the human-rights approach.³⁴ This approach ensures the equality and inclusion of persons with disabilities in social, economic and political aspects. The impact of the work of CSOs has been such that governments have had to re-evaluate their legislation and policy in the regulation of persons with disabilities.³⁵ Furthermore, civil society has played a pivotal role in their work with bilateral and multilateral institutions in the development of policy and operational modalities which are enablers to the successful inclusion of persons with disabilities in all areas of life.

Legal and policy framework is the basis upon which we can determine if political processes, like the election of representatives for or standing for election for a public office, are inclusive of disability rights in a society and therefore democratic. The right to universal and equal suffrage is enshrined in inter alia, the Universal Declaration of Human Rights³⁶ (UDHR); the International Covenant on Civil and Political Rights (ICCPR);³⁷ and the CRPD. The CRPD is the first contemporary international legal instrument to depart from a health or charity-based approach to an inclusive, human-rights approach to disability. This methodology confers persons with disabilities with rights equal to their able-bodied counterparts, and this is embedded in their right to participate in the country's political activities.³⁸

Secondly, the UDHR was adopted in 1948 by the United Nations (UN) as the first non-binding international legal document which recognises inalienable rights of all human beings. Article 21 of the UDHR provides that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.³⁹ Although

33 Commonwealth (n 30 above) 31.

34 Commonwealth (n 30 above).

35 Lang & Charowa (n 24 above) 13.

36 Adopted 10 December 1948, UNGA Res 217 A (III).

37 Adopted 16 December 1966, entered into force 23 March 1976 999 UNTS 171.

38 Cogburn (n 13) 19.

39 Art 21 UDHR.

specific groups like persons with disabilities are not explicitly mentioned in the UDHR, the word 'everyone' in article 21 is read to be inclusive of every human being, regardless of whether they are able-bodied or not, rich or poor, educated or not. The UDHR therefore plays a pivotal role since it guarantees access to fundamental rights to all human beings.

The ICCPR adds with equal force that all people have a right to participate directly or indirectly in government and public affairs and this covers not only the election of representatives, but the right to stand for election for public office. However, like the UDHR, the ICCPR also does not explicitly refer to disability, but prohibits discrimination '... on any ground such as race, colour, sex ... or other status'.⁴⁰ The words used in the ICCPR show that it does not provide a closed list of grounds upon which discrimination can be founded. With that said, a logical conclusion that can be drawn from it is that disability can be considered as another status to support a claim of unlawful discrimination under the ICCPR.

The CRPD contains comprehensive rights of persons with disabilities. It also codifies their invaluable voting rights. It adopts an expansive definition of disability which goes beyond physical to include sensory, intellectual and psychosocial disabilities. Article 6 of the CRPD importantly recognises the marginalisation of women with disabilities especially in political and public life. The fact that the CRPD has an estimated 90 per cent member state ratification demonstrates broad consensus on the rights enunciated in the Treaty.⁴¹ Article 29 of the CRPD recognises and protects the right of persons with disabilities to fully participate in political and public life, that is as voters or candidates. This provision upholds the right to take part in political life in broader terms including 'participation in nongovernmental organisations and association concerned with the public and political life of the country'.⁴²

The CRPD also protects and promotes the right to equal recognition before the law, including legal capacity of persons with disabilities.⁴³ In as much as most countries have ratified the CRPD; legal barriers to political participation remain for persons with one or more forms of disability for many countries. As a result, persons with disabilities tend to be dependents with minimal independence, regardless of their age, thereby side-lined from public life because of these legal barriers and stigma.⁴⁴ This argument is best illustrated by the case below.

40 Art 26 ICCPR.

41 See the CRPD www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html (accessed 15 November 2019).

42 Art 29 CRPD.

43 Art 12 CRPD.

44 Atkinson et al (n 3 above) 380.

In *Bujdosó v Hungary*,⁴⁵ six Hungarian nationals were placed under partial and general guardianship due to their intellectual disabilities and their names were also removed from the electoral register. This meant that they were unable to cast their vote in the parliamentary and municipal elections in 2010 and therefore disenfranchised.⁴⁶ They took exception against this and contended that they were able to understand politics and were entitled at law to participate in elections regardless of their status.⁴⁷ They also argued that the ban was unjustifiable under article 29 of the CRPD, when read conjunctively with article 12 of the same instrument. Their major submission was that the restriction was discriminatory as it was motivated by disability. Alternatively, the six were excluded 'on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment'.⁴⁸

The Committee on the Rights of Persons with Disabilities' approach reiterates the view that people with intellectual disabilities are unable to participate in political discourse in most jurisdictions. The Committee has expressed its position regarding how the plight of people with intellectual disabilities was considered by most state parties to the CRPD. It has also demonstrated its apprehension of the exclusion of people with intellectual or psychosocial disabilities from voting⁴⁹ and the exclusion of persons who are under some form of 'guardianship'.⁵⁰

It is clear from the above discussion that international law enjoins states to respect, protect and fulfil the rights of persons with disabilities. In the main, persons with disabilities have unequivocal rights to participate at all levels of political and public life especially when their interests are directly or indirectly involved. Therefore, states must refrain from any unjust limitation(s) or interference with access to political rights of persons with disabilities. States are also discouraged from enforcing discriminatory laws and instead are urged to adopt legal frameworks to enhance political participation of persons with disabilities. Therefore, since Zimbabwe is a signatory to the CRPD, it must align all domestic laws with this international standard to ensure that persons with disabilities are not left on the margins of society by safeguarding their voting rights.

In the regional context, the African Charter on Human and Peoples' Rights [1981/1986] (ACHPR) is instructive on the matter. The ACHPR is a binding regional legal instrument adopted by the Organisation for

45 Communication No 4/2011, views adopted on 9 September 2013 (20 September 2013) UN Doc CRPD/C/10/D/4/2011.

46 Para 2.

47 Para 3.

48 Art 2 CRPD.

49 See Concluding Observations on the initial report of China adopted by the Committee at its 8th session, 17-28 September 2012, CRPD (15 October 2013) UN Doc CRPD/C/CHN/CO/1 (2013) para 45.

50 CRPD (n 49 above) para 35.

African Unity (OAU) in Kenya⁵¹ on 27 June 1981. It entered into force on 21 October 1986. It is also known as the 'Banjul Charter'. This instrument secures inalienable human and peoples' rights and duties. For example, article 1 mandates states to 'recognize the rights, duties and freedoms' and enjoins them to 'adopt legislative or other measures to give effect to them'.⁵² Article 2 confers these rights and freedoms to every individual regardless of 'race, ethnic group, colour, sex, language, religion, political or any other opinion, natural and social origin, fortune, birth or other status'. This provision prohibits discrimination on the basis of listed grounds. Unlike section 56 of the Constitution its scope is broad because of the term 'or other status'. As such, we also read in 'disability' under the ACHPR. Article 13 of the ACHPR states succinctly that:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.⁵³

Article 13 of the ACHPR therefore is in tandem with the UDHR, ICCPR and CRPD since it encompasses political rights. Article 19⁵⁴ also states with equal force and sagacity that all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another'. The ACHPR importantly creates an enforcement mechanism through the establishment of the African Commission on Human and Peoples' Rights (African Commission) to promote human and peoples' rights and ensure their protection.⁵⁵

The African Charter on Democracy, Elections and Governance (2007/2012) (ACDEG) also provides guidance on the matter. The Democracy Charter or ACDEG was adopted in Ethiopia on 30 January 2007 and entered into force on 15 February 2012. It places emphasis on

51 Now the African Union (AU).

52 The African Commission on Human and Peoples' Rights considered art 1 of the ACHPR in several communications: *Commission Nationale des Drois de l'Homme et des Libertes v Chad Institute for Human Rights and Development in Africa v Angola* (2000) AHRLR 66 (ACHPR 1995) para 20; *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46 (holding that: 'Article 1 gives the Charter the legally binding character always attributed too international treaties of this sort. Therefore, a violation of any provision of the Charter automatically means a violation of article 1. If a state party to the Charter fails to recognize the provisions of the same, there is no doubt that it is in violation of this article. Its violation, therefore, goes to the root of the Charter.');

Lawyers for Human Rights v Swaziland (2005) AHRLR 66 (ACHPR 2005); *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 164, 215; *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011) AHRLR 90 (ACHPR 2011).

53 *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1999); *Jawara* (n 52 above); *Lawyers for Human Rights v Swaziland* (n 52 above); *The Nubian Community in Kenya v Kenya* Communication 317/06 (2015); *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

54 *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Gunme v Cameroon* (2009) AHRLR 9 (ACHPR 2009).

55 See art 30 ACHPR.

'good governance, popular participation, the rule of law and human rights'.⁵⁶ Its objectives are captured in article 2 and include the holding of 'regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments'.⁵⁷ Article 6 enjoins state parties to 'ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility'. Article 8 requires states to 'eliminate all forms of discrimination based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance'.⁵⁸ It also mandates countries to 'adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, persons with disabilities, refugees and displaced persons, and other marginalized and vulnerable social groups'.⁵⁹ As such, this peremptory obligation is in tandem with international standards discussed above.

Article 8(2) may be construed as imposing a positive obligation on states to initiate practicable measures in place to enable persons with disabilities to vote. The Democracy Charter's choice of words is instructive. The use of the word 'shall' is indicative of a binding obligation. Article 10(3) like the ACHPR and section 56 of the Constitution enjoins states to 'protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society'. Chapter 7 of the Charter contains substantial rules on democratic elections in Africa. Article 31 adds with equal force and mandates states to promote participation of social groups with special needs like people with disabilities in the governance process. Another positive addition is the Protocol to the African Charter on Human and Peoples' Rights of Persons with Disabilities which concretises the rights of persons with disabilities in Africa.

Consequently, the international and regional orders envisage an egalitarian and just world, where everyone including persons with disabilities is endowed with rights to participate in political activities and therefore can vote. This recognition is infused with human-rights principles and must trickle down to change domestic regulatory frameworks which are still informed by a welfare approach. The above discussion also highlights that more must be done to guarantee and implement voting rights of persons with disabilities in Zimbabwe. The next section considers how national law purports to achieve this endeavour.

56 See the Preamble Democracy Charter.

57 See arts 2(3) and 3(4) of the Democracy Charter respectively.

58 Art 8(1) of the Democracy Charter.

59 Art 8(2) Democracy Charter.

3 National framework on persons with disabilities

The previous section examined some background considerations and relevant international instruments on voting rights of persons with disabilities in Zimbabwe. It did so by *inter alia*, providing empirical evidence and a definition of disability. Resultantly, this part builds on and discusses national and regional perspectives on disability voting rights in Zimbabwe. It specifically seeks to answer the legal question whether or not voting rights of persons with disabilities⁶⁰ are equally protected in our law. The article coincides in time with a new legal culture which breaks away from a bleak past to one based on justification⁶¹ and founding principles and values.⁶² It therefore examines the issue from the lens of the 2013 Constitution and appropriate electoral laws like Electoral Act (Chapter 2:3); the ACHPR; the ACDEG; the Southern Africa Development Community (SADC); Principles and Guidelines Governing Elections (SADC Principles); and the African Union Declaration on Principles on Principles Governing Democratic Elections in Africa 2002.⁶³ The paper also considers disability laws like the Disabled Persons Act (DPA).⁶⁴ We start this section by providing a crisp summary of challenges faced by persons with disabilities in elections.

Zimbabwe achieved a democratic milestone in 1980 when all eligible citizens cast their vote. This first historic universal election signalled a move towards good governance. However, the neo-colonial period is also characterised by contested political rights. Although our laws guarantee everyone the right to vote; persons with disabilities still encounter enormous electoral related challenges even in the post 2013 constitutional dispensation.

This regressive paradigm is captured by Munemo⁶⁵ who records an avalanche of electoral hurdles. These include *inter alia*, lack of privacy in the voting process; being assisted to vote by total strangers; lack of braille ballots or enlarged print for easy reading; unavailability of magnifying material; inaccessible polling stations; being prevented from voting for different reasons; lack of information on the electoral procedures; lack of trained personnel to help people with visual impairment; lack of transport

60 This term will be used synonymously with 'vulnerable and special interest group'.

61 See secs 2, 44, 45, 46 of the Constitution.

62 Sec 3 of the Constitution.

63 Hereinafter referred to as 'the Democracy Charter'.

64 [Chapter 17: 01]. Other statutes like the Mental Health Act [Chapter 15:12]; War Victims Compensation Act [Chapter 11:16]; Criminal Law (Codification and Reform) Act [Chapter 9:23]; Social Welfare Assistance Act [Chapter 17:06]; and State Service (Disability Benefits) Act [Chapter 16:05] complete the disability framework, but they are not directly relevant to political rights.

65 ET Munemo 'Enhancement of access and inclusion of people with visual impairments in the electoral process in Zimbabwe' PhD Thesis, Zimbabwe Open University, 2015. See also B Virendrakumar et al 'Disability-inclusive elections in Africa: A qualitative systematic review' (August 2017).

to polling stations; and fear of political violence on the part of the visually impaired.⁶⁶

The subject under review in this study has been considered by other researchers, but in a broader context.⁶⁷ In the main, most empirical research findings in Zimbabwe record with concern that: 'Access and inclusion of [persons] with disabilities in the electoral processes seems to be regarded as a charity issue rather than a human rights issue'.⁶⁸ Consequently, this aspect of conventional wisdom is an affront to a potentially transformative polity and gives rise to vital questions. At the heart of the deliberation is the extent to which laws guarantee voting rights of persons with disabilities. In our considered view, the legal system in respect to the issue under review straddles between progression and regression. We note the general optimism encapsulated in the Constitution's text, and scepticism that most (if not all) statutes passed before its adoption are misaligned with its imperatives. Resultantly, we survey these key instruments and thereafter discuss barriers persons with disabilities encounter at different stages of the election cycle.

3.1 The Constitution

The Constitution of Zimbabwe Amendment (No 20) Act, 2013⁶⁹ marks a significant shift from 'welfare' to 'human rights based' approach in the context of vulnerable and special-interest groups.⁷⁰ Practically speaking, the scope of the 2013 Constitution as it relates to voting rights is more liberalised and improved compared to its predecessor, the 1979

66 Munemo (n 65 above) 4.

67 E Sackey 'Disability and political participation in Ghana: An alternative perspective' (2014) 17 *Scandinavian Journal of Disability Research* 366; International Foundation for Electoral Systems *Elections in Zimbabwe: Frequently asked questions* (2013); Inclusive International *CRPD compliance Analysis: Kenya. A country-level review of compliance with CRPD article 29* (2015); WA Oluchina 'The right to political participation for people with disabilities in Africa' (2015) 3 *African Disability Rights Yearbook* 309; J Fiala-Butora et al 'The democratic life of the union: Toward equal voting participation for Europeans with disabilities' (2014) 55 *Harvard International Law Journal* 71; J Ballington (ed) *The implementation of quotas: African experience* (2004) 125; CEDAW General Recommendation 23: Political and public life (1997) UN Doc A/52/38 para 5; M Schulze *A handbook on the human rights of persons with disabilities: Understanding the UN Convention on the Rights of Persons with Disabilities* (2009) 14; European Agency for Fundamental Rights 'The right to political participation of persons with intellectual disabilities and with mental health problems in the European Union' (2010) 15-21; MK Mbondenyei 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 183; African Commission on Human and Peoples' Rights 'Working group on older persons and people with disabilities' <http://www.achpr.org/mechanisms/older-disabled/> (accessed 26 November 2019); H Combrinck 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) 2 *African Disability Rights Yearbook* 75.

68 Munemo (n 65 above) 3.

69 For ease of reference the term 'Constitution' or '2013 Constitution' will be used.

70 Munemo (n 65 above).

Constitution. Moreover, the adoption of the Constitution embodies the country's commitment towards obligations enshrined in the CRPD and it can be argued that this constitutional embodiment constitutes partial fulfilment of voting rights for the special groups under consideration in this article. We draw lessons from article 4(a) of the CRPD which mandates the adoption of appropriate legislative initiatives for the implementation of the rights recognised in the Convention. Moreover, article 4(b) of the CRPD requires states to take positive steps to reform existing laws that perpetuate discrimination against persons with disabilities. It enunciates the fundamental rights of 'everyone' including persons with disabilities.⁷¹ Notwithstanding this, the scope of the present article is limited only to constitutional provisions relating to voting rights of persons with disabilities. And in this regard it is essential to note that the Constitution is the supreme law of the land.⁷² In the main, section 2 of the Constitution aptly states that:

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

Thus, by virtue of the operation of the provision cited above, all electoral laws, conduct and practices must comply with the indomitable law in the country. The justification for this is that the Constitution imposes a duty on the state and every person to respect, protect, promote and fulfil fundamental rights.⁷³ As such, the Constitution has been hailed as progressive in the context of disability rights. This averment is supported by Manatsa⁷⁴ whom after having conducted an extensive review of disability legislation called for its alignment with the Constitution. His study presents a compelling argument for a human rights-based approach to disability. In the main, Manatsa draws a comparison between the Lancaster House (1979) and 2013 Constitution and highlights weaknesses in the repealed Constitution. Several constitutional provisions can also be cited to reinforce the view that the new legal order calls for an inclusive, equal, just, free and fair society. These include the Preamble which unequivocally states in part, that:

71 As above.

72 As above.

73 Sec 44 of the Constitution.

74 P Manatsa 'Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?' (2015) 4 *International Journal of Humanities and Social Science Invention* 25.

We the people of Zimbabwe,

United in our diversity by our common desire for freedom, justice and equality

...

Recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law,

Reaffirming our commitment to upholding and defending fundamental human rights and freedoms,

...

Determined to overcome all challenges and obstacles that impede our progress,

Cherishing freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny,

...

Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work.

Resultantly, it can be argued that the Preamble contains a remarkable constitutional vision. The elimination of all barriers for persons with disabilities to exercise their enshrined right to vote comports with this constitutional directive. Constitutionally speaking, persons with disabilities must generally be accorded all inalienable rights subject to justifiable and reasonable legal limitations. This logic justifies the need to take positive measures to ensure the realisation of rights. This comes after several researchers have revealed various challenges associated with the political rights persons with disabilities. Although cited briefly above they will be ventilated further below.

Cognisant of this, the Constitution enlists the welfare and rights of persons with disabilities as a national priority.⁷⁵ For example, section 22(1) provides with force and brevity that:

- (1) The State and all institutions and agencies of government at every level must recognize the rights of persons with physical or mental disabilities, in particular their right to be treated with respect and dignity.
- (2) The State and all institutions and agencies of government at every level must, within limits of resources available to them, assist persons with physical or mental disabilities to achieve their full potential and to minimize the disadvantages suffered by them.
- (3) In particular, the State and all institutions and agencies of government at every level must –
 - a) ...

75 See Chap 2 of the Constitution.

- b) Consider the specific requirements of persons with all forms of disability as one of the priorities in development plans;
- c) Encourage the use and development of forms of communications suitable for persons with physical or mental disabilities;
- d) ...

In the same spirit, the Constitution also enjoins the state to ‘promote and advance the use of all languages used in Zimbabwe, including sign language, and must create conditions for the development of those languages’.⁷⁶ This provision is intrinsically connected to the right to vote because it makes it possible especially for visually-impaired citizens to get essential voting information and thus exercise their vote.

The Constitution contains an elaborate Declaration of Rights (DoR) and imposes a duty on ‘the state and every person, including juristic persons, and every institution and agency of the government at every level must protect, promote and fulfil the rights’ enshrined in the Constitution.⁷⁷ Importantly, section 83 contains the ‘rights of persons with disabilities’ and they are progressively realisable.⁷⁸ Unlike its predecessor that erroneously listed ‘physical disability’ as a ground for discrimination, the 2013 Constitution stipulates disability as an independent to found discrimination.⁷⁹ This is in tandem with article 29 of the CRPD discussed above. The former position not only ignored other manifestations of disability, but was premised on an erroneous welfare model.⁸⁰

Section 67 of the 2013 Constitution further stipulates that ‘every Zimbabwean citizen has the right to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law’,⁸¹ and ‘to make political choices freely’.⁸² It is a constitutional requirement that elections must be ‘conducted by secret ballot’.⁸³ The state is mandated to:

[T]ake all appropriate measures, including legislative measures, to ensure that all eligible citizens, that is to say the citizens qualified under the Fourth

76 Sec 6(4) of the Constitution.

77 Sec 44 of the Constitution.

78 Section 83 provides that: ‘The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realize their full mental and physical potential, including measures-

(a) to enable them to become self-reliant;

(b) to enable them to live with their families and participate in social, creative or recreational activities;

(c) to protect them from all forms of exploitation and abuse;

(d) to give them access to medical, psychological and functional treatment;

(e) to provide special facilities for their education; and

(f) to provide State-funded education and training where they need it.’

79 Sec 56(3) of the Constitution.

80 Munemo (n 65 above).

81 Sec 67(1)(a) of the Constitution.

82 Sec 67(1)(b) of the Constitution.

83 Sec 155(1)(b) of the Constitution.

Schedule, are registered as voters; ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote, and must facilitate voting by persons with disabilities or special needs.⁸⁴

Finally, the Constitution is the 'ultimate' law. Principally, it confers obligations on both natural and juristic persons. Its promulgation has opened a window of opportunity in the persons with disabilities realm since it recognises their voting rights. It marks a significant shift from a conservativist to a conventionally sound approach anchored on human rights and the rule of law. However, the discourse may appear utopian if key structural reforms are not adhered to. The subsequent section grapples with relevant statutes.

In our view, the language used in some constitutional provisions like section 83 falls short when pitted against conventional human-rights language. The manner in which it is couched exposes it to criticism that it does not create rights, but gives directives relating to be taken by relevant parties to meet the 'needs of persons with disabilities'. As such, the Constitution must use appropriate language which reinforces voting rights of persons with disabilities. In its present state it fails to achieve the intended purpose of ensuring the enjoyment of equal voting rights.

3.2 The Disabled Persons Act (DPA)

The Disabled Persons Act is also couched in orthodox language. In our view, it falls squarely in the category of law which must be re-examined. The statute makes provision for the welfare and rehabilitation of disabled persons, provides for the appointment and functions of a Director of Disabled Persons' Affairs⁸⁵ and the establishment and functions of a National Disability Board.⁸⁶ According to section 2 of the Act, 'disabled person' covers:

[A] person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability, which gives rise to physical, cultural or social barriers inhibiting him from participating at an equal level with other members of society in activities, undertakings or fields of employment that are open to other members of society.⁸⁷

The National Disability Board is endowed with expansive functions.⁸⁸ They include amongst others, competence to develop policies and measures to adhere and give practical effect to international standards

84 Sec 155(2)(a) & (b) of the Constitution.

85 Sec 3 of the Act.

86 Sec 4 of the Act.

87 Sec 2 of the Act.

88 See generally sec 5 of the Act.

relating to the rights of persons with disabilities.⁸⁹ We also take note of the need to ‘prevent discrimination against disabled persons resulting from or arising out of their disability’.⁹⁰ Although the Act appears to be in sync with section 56 of the Constitution and international instruments, it is, however, embodied in an impugned statute. We say so because the Act promotes a welfare approach to disability rights. It must be overhauled or reformed to be in tandem with contemporary human rights-based approaches.

3.3 Electoral Act Chapter 2:13⁹¹

The Electoral Act fleshes out electoral law as informed by the Constitution. Section 3(b) of the Act confers citizens with several invaluable rights. It codifies international imperatives since it guarantees citizens’ political rights. It also importantly acknowledges the need to facilitate the right indiscriminately.⁹² This principle of democratic elections comports with section 56(3) of the Constitution which states that:

Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, *disability* or economic or social status, whether they were born in or out of wedlock. (Our emphasis)

Section 57 of the Act regulates the manner of voting.⁹³ Firstly, voting must be by ballot and must be conducted in a manner that is stipulated in the electoral law. Secondly, it must contain the names of the nominated candidates in alphabetical order. However, most persons with disabilities find it cumbersome if not impossible to cast their vote in the way prescribed in section 57(c)(i); (ii) and (iii) of the Act. On a positive note, the Act has created a window of opportunity for these to receive assistance from persons of their choice or those assigned to them by officials at the polling station. Moreover section 59 of the Act regulates voting by ‘illiterate or

89 Sec 5(b)(iii) of the Act. Note, however, that the Act uses the term ‘welfare and rehabilitation’ and is silent about fundamental rights and freedoms as has become a norm. It is our guided submission that this statute falls at the first hurdle when pitted against the spirit and objects of the 2013 Constitution (see secs 2, 3, 22, 44, 45, 46, 56, 83 and the whole of Chapter 4 for contextual construction). The new constitutional order envisages a transformational-egalitarian, just, tolerant and peaceful society. It peremptorily requires everything (laws, practices, conduct and custom) to comport to it without any condition whatsoever.

90 Sec 5(b)(iv) of the Act.

91 The discussion is cognisant with Amendment 6/18.

92 Sec 3(b)(i) of the Act.

93 Sec 57 of the Electoral Act.

physically handicapped voters'.⁹⁴ In our view, the impugned provision flouts international and constitutional standards discussed in this paper. Although this provision purports to guarantee the rights of persons with disabilities, it is couched on the language which falls short of constitutional requirements.

Section 59(1)(a) of the Act confers an illiterate or physically handicapped voter with a right to receive assistance from a person of their choice. This provision obliges the presiding officer to facilitate this arrangement. The voter may also be assisted by two electoral officers or employees of the ZEC and a member of the ZRP. There is no indication in the Act to suggest that the 'helper' must be a registered voter, but he or she must identify himself or herself to the presiding officer by producing proof of identity and complete requisite forms as prescribed in section 59(1)(b) of

- 94 Sec 59 of the Electoral Act states that: (1) Upon request by a voter who is illiterate or physically handicapped and cannot vote in the way set out in section 57, a presiding officer shall –
- (a) permit another person, selected by the voter, to assist the voter in exercising his or her vote; or
 - (b) in the absence of a person selected by the voter, assist the voter in exercising his or her vote in the presence of two other electoral officers or employees of the Commission and a police officer on duty.
 - (2) A person permitted to assist a voter in terms of subsection (1)(a) –
 - (a) need not be a registered voter but shall not be a minor, electoral officer, accredited observer, chief election agent, election agent or a candidate in the election; and
 - (b) shall identify himself or herself to the presiding officer by producing proof of identity, and shall complete and sign the register referred to in subsection (3); and
 - (c) shall not be permitted to assist more than one voter in any election.
 - (3) For the purposes of subsection (2)(b), every presiding officer shall keep a special register in which shall be recorded the name of every person whom the presiding officer permits to assist a voter in terms of subsection (1)(a), relevant particulars of the proof of identity produced by that person, and the name of the voter assisted by that person.
 - (4) A presiding officer permitted to assist a voter in terms of subsection (1)(b), together with the other persons there mentioned, shall there and then mark the ballot paper in accordance with the voter's wishes and place the ballot paper in the ballot box, and if the wishes of the voter as to the manner in which the vote is to be marked on the ballot paper are not sufficiently clear to enable the vote to be so marked, the presiding officer may cause such questions to be put to the voter as in his or her opinion, are necessary to clarify the voter's intentions.
 - (5) No person other than –
 - (a) the person selected by the voter in terms of subsection (1)(a) shall take part in assisting an illiterate or physically handicapped voter, and no person who is entitled to be in a polling station shall attempt to ascertain how the voter is voting:
Provided that, in the case of a voter who is visually impaired, the presiding officer shall observe the casting of the vote in order to ensure that the voter's intention is respected by the person assisting him or her;
- or
- (b) the presiding officer selected by the voter in terms of subsection (1)(b) and the persons there mentioned shall assist an illiterate or physically handicapped voter.
 - (6) The presiding officer shall cause the name of every voter who has been assisted in terms of subsection (1)(a) or (b), and the reason why that voter has been assisted, to be entered on a list.

the Act. This person can only assist one voter. There is also guidance in the Act how the presiding officer can assist the voter.

The Act prescribes that the presiding officer:

Shall there and then mark the ballot paper in accordance with the voter's wishes and place the ballot paper in the ballot box, and if the wishes of the voter as to manner in which the vote is to be marked on the ballot paper are not sufficiently clear to enable the vote to be so marked, the presiding officer may cause such questions to be put to the voter as in his or her opinion, are necessary to clarify the voter's intentions.

Statutory protection is afforded to persons with disabilities in the context of voting. This purpose is achieved in several ways. Firstly, the Act restricts persons who should render assistance to persons with disabilities to those who were duly selected by the voter, following a laid-out procedure. From the wording of the statute this appears to be a peremptory obligation since negative wording is employed. The Act states in uncertain terms that:

No person other than the person selected by the voter in terms of subsection (1)(a) shall take part in assisting an illiterate or physically handicapped voter, and no person who is entitled to be in a polling station shall attempt to ascertain how the voter is voting.

However, this rule is not cast in stone. There is a requirement that the presiding officer should guarantee the protection, respect and promotion of the voting rights of persons with disabilities.

The electoral law is clear in the case of visually-impaired voters where the presiding officer must 'observe the casting of the vote in order to ensure that the voter's intention is respected by the person assisting him or her'. In our view, by virtue of conferring a right to choose people who can assist them on voting day (to cast their vote) on persons with disabilities, the electoral law appears to be guaranteeing their rights as enjoined in the Constitution. Moreover, the law mandates the presiding officer to create a register of all voters with disabilities. In our considered view, this requirement is in tandem with the Constitution, but practically speaking a lot needs to be done as highlighted in this case study.

From an implementation perspective, the Act is also accompanied by subsidiary legislation.⁹⁵ Read cumulatively with other electoral laws, they are also geared towards the promotion, protection and respect of voting rights of persons with disabilities in the country. In the main, we argue that although the Constitution and other statutes recognise the rights of persons with disabilities, a lot more can still be done to achieve legal dictates on

95 See Electoral Act; Consolidated Electoral Regulations 2018; Electoral Regulations 2005; Electoral (Special and Postal voting) Regulations, 2013; Electoral (Voting Registration) regulations 2013.

disability rights in elections. Moreover, there are pertinent obligations placed on the ZEC and other stakeholders to make sure voting rights of persons with disabilities are attained. We emphatically reiterate the need to consider some of the issues discussed below.

4 Are voting rights of people with disabilities equally protected under legislation?

Consequently, the legal issue for determination is whether or not the voting rights of persons with disabilities are equally protected in our law. The answer to this legal question is not clear-cut. As a preliminary point, we take into account a study conducted by Munemo which revealed that there were 700 000 potential voters with disabilities in 2008. It further recorded that only 25.6 per cent of persons with disabilities managed to vote that year with a staggering 75 per cent failing due to physical and infrastructural barriers.⁹⁶ It also reveals that: 36.7 per cent of persons with disabilities were not registered on the voters' roll; 16.5 per cent were unwilling to vote; 11.75 per cent were afraid of political violence; and 25.66 per cent filed electoral related complaints.⁹⁷ According to Virendrakumar⁹⁸ electoral barriers manifest themselves in three layers, but interrelated stages in the electoral cycle: a pre-election period; an election period; and a post-election period respectively.

The preliminary stage can also be regarded as a preparatory phase where 'support for an accessible election' is peremptory. Peculiar challenges that relate to it include: pre-election assessments that do not address election access issues; discriminatory election law; limited budgetary allocated for reasonable accommodations; inaccessible polling centres selected; poll workers not trained on administering the vote to persons with disabilities; difficulties in securing a national identification card; voter registration conducted in inaccessible locations; voter education and information on political party platforms or candidates not distributed in accessible formats; persons with disabilities not included as observers; and a lack of persons with disabilities' experience in advocacy for voting rights.

Furthermore, persons with disabilities encounter enormous challenges during the election period. These range from electoral observers' failure to monitor access issues; political parties failing to address issues important to voters with disabilities or recruit candidates with disabilities; party manifestos that are not in accessible formats; inaccessible polling stations; security forces not sensitised on how to provide a safe environment for

96 Munemo (n 65 above) 5.

97 Munemo (n 65 above).

98 B Virendrakumar et al *Disability-inclusive elections in Africa: A qualitative systematic review* (2017).

voters with disabilities; media outlets failing to disseminate information in accessible formats; and an inaccessible complaints adjudication process.

The final stage in Virendrakumar's conceptualisation is the post-electoral period. Challenges that have been identified encompass the fact that persons with disabilities are usually left out in the 'lessons learned' process; unfamiliarity with electoral rights; civic education that does not address the rights of persons with disabilities and is not distributed in accessible formats; and selection criteria for election commissioners that is not disability inclusive. Cognisant of these concerns, the Institute for Democracy and Electoral Assistance developed an election toolkit which contains guidelines to promote, protect, respect and fulfil voting rights of persons with disabilities. As such, electoral laws must be assessed taking into account legal questions below.⁹⁹

In Zimbabwe, the electoral law confers voting rights on persons with disabilities.¹⁰⁰ As discussed above, these voting rights are legally actionable. Legally speaking, section 56 of the Constitution and the Electoral Act outlaws discrimination based on the ground of disability. In principle, this is in tandem with the international legal framework which saliently provides for equal rights and opportunities to vote for persons with disabilities, without any unreasonable restrictions. Conversely, as will be seen below, the right to vote is accompanied by a bundle of duties, which if unfulfilled renders it a futile academic exercise.

Moreover, the legal framework also facilitates voter registration for persons with disabilities as prescribed.¹⁰¹ The international order inductively calls on states to eliminate discrimination in electoral practices. Consequently, this legal imperative urges countries to ensure persons with disabilities' access to national identification documents and that adequate infrastructure is availed. In Zimbabwe, the plight of persons with disabilities arguably reached zenith on the eve of the 2018 harmonised elections when the Zimbabwe Electoral Commission (ZEC) introduced the Biometric Voter Registration system. Although this novel registration model created positive opportunities in our electoral system, it has been acutely criticised by several stakeholders including civil society organisations (CSOs) and persons with disabilities respectively. The major premise lodged against it is that it violated the law since it failed to consider the special needs of persons with disabilities.

99 See D Tocinardi & M Wally 'International obligations for elections: Guidelines for legal frameworks' (2014) 303.

100 Arts 25-26 ICCPR.

101 Arts 2.2 and 25 ICCPR.

Another shortfall flowing from this dispensation relates to the legal provisions to safeguard the secrecy of the vote for persons with disabilities.¹⁰² The secrecy of the vote of this special group is controversial. In our view, there are two equally important considerations. Firstly, there is an acknowledgement at law that persons with disabilities must exercise their right to vote without coercion or undue influence. Secondly, some of them may face intractable barriers such that there is need for another person to assist them to exercise their right to vote. In the subsequent case, the extent of involvement of the aide becomes a crucial issue. In our country, the subject of voting aides has caused heated debates. Allegations range from the fact that the previous regime erroneously used members of the Zimbabwe Republic Police (ZRP), ZEC and agents to facilitate the voting process. The argument is made against ‘assisted voting’ in the context of persons with disabilities mainly that it may seriously jeopardise the secrecy of the vote. This premise is discussed further below.

The law also purports to realise the voting rights of persons with disabilities through provisions that require polling stations to be accessible to this group.¹⁰³ Although Zimbabwe has not yet domesticated the CRPD, its domestic laws still require polling stations to be accessible to persons with disabilities. In the preceding discourse, we discussed constitutional provisions and emphasised the need to align major disability laws with the Constitution which is the supreme law of the land. Practically speaking, these laws must be amended or repealed to infuse constitutional dictates. In the election’s context, there is need to require disability institutions to take certain steps and work collaboratively with the ZEC to facilitate access to polling stations. As the situation currently stands, this may be impossible due to the welfare innuendos imbedded in the impugned laws discussed in this article.

In principle persons with disabilities are also granted an equal right to stand for political office.¹⁰⁴ We reiterate the point that equality is a cross-cutting theme in the legal architecture. Consequently, that is why the law imposes a duty on the state to eliminate discrimination in the ground of disability. Notwithstanding, persons with disabilities still find it difficult to stand for office because of barriers like limited infrastructure, violence and so on. The 2018 post-election violence evinces this point.

Whether or not there are measures to support elected officials with disabilities to effectively exercise their mandate is subject to debate.¹⁰⁵ However, a holistic analysis of the Constitution and other statutes may support the view that elected officials with disabilities receive support to execute their mandate. However, there is a difference between what the

102 Art 25 ICCPR; art 29 CRPD.

103 Art 2.2 ICCPR; art 29 CRPD.

104 Art 25 ICCPR; art 29 CRPD.

105 Art 2.2 ICCPR; art 27.1 CRPD.

law says and what happens in practice. The other issue relates to the question if persons with intellectual disabilities and those under guardianship are enfranchised.¹⁰⁶ Equally so, the law also provides special measures for women with disabilities to exercise their electoral rights.¹⁰⁷ The Electoral Amendment Act and Electoral Regulations make provision for special voting.

In our law, persons with disabilities have the inalienable right to freedom of association.¹⁰⁸ The Constitution bestows this right on 'everyone'. In the context of disability especially voting rights, it is important to enable persons with disabilities to associate freely, lobby and advocate for their right to vote. In practice, this has manifested itself through disability associations which usually play the role of watchdogs during elections.

Furthermore, the Electoral law provides general guidelines on civic and voter education. There are generic provisions prescribing civic and voter education, but not specifically concerning persons with disabilities.¹⁰⁹ This issue is also controversial. Civic and voter education is regulated under the Electoral Act. A few days before the 2018 harmonised elections CSOs challenged certain sections of the Act since it barred them from sensitising the electorate. The Act does not prescribe civic and voter education concerning the right to vote. However, it has been done on an ad hoc basis. In our view, the issue of voter education is intrinsically linked to successful implementation of voting rights of persons with disabilities. Therefore, the country should act expeditiously to fulfil its legal obligations in this regard.

Our argument is buttressed by the fact that despite various interventions, persons with disabilities still encounter enormous challenges in exercising their voting rights. This observation was made by a representative of persons with disabilities in the Senate in Zimbabwe, as follows:

I have put it to ZEC that we need things like sign language, voter education material in braille and that registration centres be easily accessible. Even the tables need to be friendly to those who are physically challenged and the personnel who are conducting the registration process. [I] Personally can't see and [I] would need an electronic system that tells me the information I have entered.¹¹⁰

106 Arts 25-26 ICCPR.

107 Art 7 Convention on the Elimination of All Forms of Discrimination against Women; art 3 ICCPR.

108 Art 22 ICCPR; art 29(b) CRPD.

109 Art 25 ICCPR; art 13 UNCAC.

110 'PLWDS raise concerns over 2018 vote' *Daily News* 19 September 2017 <https://www.dailynews.co.zw/articles/2017/09/19/plwds-raise-concerns-and-2018-vote> (accessed 26 November 2013). See also the Zimbabwe Human Rights Commission www.zhrc.org.zw/your-rights/ (accessed 15 November 2019).

The averment is corroborated by others. One of them is Machakaire¹¹¹ who posits that persons with disabilities firstly face the challenge that the electoral system/practices are flawed as this group relies heavily on others to exercise their vote. We argued above that the use of voting aides may affect the secrecy of the vote especially when members of the security services are involved. In our view, persons with disabilities should give free, prior and informed consent in relation to the parties who will assist them on Election Day. The author further argues that this is a cause for concern since there are almost 125 000 people in Zimbabwe who are blind.¹¹² The second challenge he cites concerns voting booths that are not fit for purpose since they do not have ramps to enable access to people with wheel chairs.¹¹³ This claim is supported by Mbanje¹¹⁴ who argues with brevity that:

[V]oting rights for people living with disability continue to be trampled on as there are no measures and facilities to ease the voting process, a situation which has forced this group to get assistance from aides.¹¹⁵

According to other reports¹¹⁶ challenges facing persons with disabilities are deep-seated and generated controversy during the constitutional making process that led to the 2013 Constitution.¹¹⁷ For example, The Voice of America published an article in March 2013 where it alleged that some persons with disabilities lacked identity documents.¹¹⁸ If this averment is correct, it implies some citizens never participated in the referendum. Therefore, this proves as cogent the argument that voting rights of persons with disabilities still face enormous challenges in our jurisdiction.

Furthermore, the European Union Observer Mission Final Report on the Republic of Zimbabwe's Harmonised Elections 2018¹¹⁹ has added to the list of challenges. In the main, it found that 'persons with disability

111 'Challenges facing voters with disabilities' *Daily News* 27 May 2018 <https://www.dailynews.co.zw/articles/2018/05/27/challenges-facing-voters-with-disabilities> (accessed 26 November 2019).

112 As above.

113 As above.

114 'People living with disability demand full voting rights' *News Day* 9 July 2018 <https://www.newsday.co.zw/2018/07/people-living-disability-demand-full-voting-rights/> (accessed 15 November 2019).

115 Mbanje (n 113).

116 See Voice of America 'Zimbabweans living with disabilities lack identity documents: Won't vote in referendum' (5 March 2013) <https://reliefweb.int/report/zimbabwe/zimbabweans-living-disabilities-lack-identity-documents-wont-vote-referendum> (accessed 26 November 2019).

117 As above.

118 As above.

119 This report is available at http://www.veritaszim.net/sites/veritas_d/files/EU%20Election%20Observers%20Final%20Report%20Zimbabwe%202018-.pdf (accessed 15 November 2019).

have reserved representation but further administrative reform could help improve their access to a secret ballot'.¹²⁰

Another issue that the EU Observer's Report raises involves Zimbabwe's failure to align its domestic laws with the CRPD. This follows the country's accession to this legal instrument in 2013. This subsequent claim confirms Manatsa's findings that disability laws¹²¹ are misaligned with the new constitutional order. As already stated above, the argument is that these laws reflect welfare rather than a rights-based perspective as required by the Constitution. Although the Zimbabwe ZEC and the government argues that it is committed to upholding the Constitution and thus promoting disabilities rights, the EU found that braille ballot papers, tactile ballot guides or other assistive measures have never been provided for persons with visual and other impairments¹²² and there were difficulties in gaining access to some polling stations.

Another issue relating to voting rights of persons with disabilities which arose after the 2018 harmonised elections concerns the election of two members of Senate, one man and one woman, to represent persons with disabilities. The elections were conducted pursuant to Statutory Instrument 126 of 2018, the Electoral (Prescribed Associations and Institutions) Notice, 2018 which set out a list of institutions and private voluntary organisations which were entitled to participate in the electoral challenge. It was amended by Statutory Instrument 138A, the Electoral Notice which removed 18 duplications from the list. The European Union observed that a total of 170 delegates were invited to participate, of whom 134 were present on the day. There was some speculation that the lack of full participation may have been due to the violence, which had taken place in the City on 1 August.

It also noted that the franchise of this election does not extend to persons with disabilities, as only representations of prescribed bodies may nominate candidates and vote. This is therefore a source of grievance to some persons with disabilities, as the electorate for the two senatorial positions is very small. An argument is made that the election could be conducted in concert with the general harmonised elections with persons with disabilities all eligible to vote for their representative.¹²³

120 European Union Observers Final Report (n 119 above) 31.

121 For example, the Disabled Persons Act, 1992.

122 European Union Observers Final Report (n 119 above) 31.

123 European Union Observers Final Report (n 119 above) 32.

5 Recommendations

We concur with the findings of the European Union's Observer Report that Zimbabwe must incorporate the CRPD into domestic law.¹²⁴ This must be done in accordance with the 2013 Constitution. This step will guarantee that voting rights of persons with disabilities are promoted and protected as peremptorily enjoined in article 1 of the CRPD.

Secondly, we acknowledge with concern the decision of the High Court in July 2018 where the court held that braille was impractical as levels of braille literacy are low amongst those with visual impairments.¹²⁵ The court missed a brilliant opportunity to change the disability landscape in the country.

Furthermore, we argue that the High Court's decision stunted legal precedent and should have followed the 2008 Supreme Court decision which struck down provisions of the Electoral Act which required that persons requiring assistance to cast their vote should be assisted by the Zimbabwe Republic Police (ZRP) officers and others on electoral duty, denying the voter any choice of assistance.¹²⁶

Practically speaking, the legislature must amend disability laws to ensure their compliance with the Constitution. At the time of writing, we ascertained that the Attorney-General's Office had produced a first draft of the Persons with Disabilities Bill which was submitted to the Ministry of Public Service, Labour and Social Welfare and relevant stakeholders. However, we do not anticipate a long wait before public release of the Bill since it should be approved by the Cabinet Committee on Legislation and then the Cabinet.

We reiterate the need for collaborative partnerships amongst stakeholders to ensure that focus is not on physical disability at the expense of other manifestations.

Moreover, the government of Zimbabwe should take practical measures to address all the barriers at different stages (pre-election period, election period and post-election period) of the election cycle, as discussed above. Firstly, the government and relevant stakeholders should address access-related issues, repeal discriminatory laws, ensure that financial resources are available to promote reasonable accommodation, train poll workers to administer the vote to persons with disabilities, facilitate access to identity documents, address issues related to voter education and include persons with disabilities as electoral observers.

124 European Union Observers Final Report (n 119 above) 31.

125 European Union Observers Final Report (n 119 above) 32.

126 As above.

Additionally, political parties should recruit persons with disabilities as candidates, ensure that manifestos are in accessible format, security forces must provide a safe environment for persons with disabilities and media outlets must provide information in accessible format and overall there must be an accessible adjudication process. Finally, persons with disabilities must be involved in the aftermath of the election.

6 Conclusion

In sum, Zimbabwe seeks to build an egalitarian and inclusive society as espoused in the 2013 Constitution. Although the Constitution's text is infused with a transformative culture and underlined by a human rights-based approach to disability; the legal system (mostly implementing statutes) is still largely repugnant in that it promotes a welfare model. As such, our study concludes that persons with disabilities still continue to live in the periphery of society as their voting rights are unrealised. We surveyed the international and national legal framework and cited pressing barriers related to the issue under review. Realistically speaking, the article may create a platform for constructive debate and importantly legislative reforms in this realm as the country prepares for the next harmonised elections in 2023. The legislature appears to be heeding the call for legislative reform as it is in the process of drafting the Persons with Disabilities Bill 2019.¹²⁷ Notwithstanding this, the authors are not privy to the contents of the Bill as it has not been released for public comment.

127 Correspondence with legislative watchdog Veritas (on file with the authors).