

Survivors of Sexual Assault with Intellectual Disabilities:

Accommodating Difference in the Courtroom

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## **Abstract**

This thesis examines the capacity to testify and access justice of witnesses with intellectual disabilities who have been sexually assaulted, focusing on the situation in Zimbabwe. Witnesses with intellectual disabilities are undoubtedly different from other witnesses. Their ability to communicate verbally may not match that of other witnesses, and their behavior in the witness stand cannot be interpreted in the same way as that of other witnesses. Through the rigid application of rules of criminal evidence and procedure to witnesses with intellectual disabilities, the criminal justice system sometimes perpetuates inequality and discrimination. The testimonial competence and credibility of witnesses with intellectual disabilities are often challenged. This is a result of an inappropriate response to difference whereby difference gives rise to the misconception that persons with intellectual disabilities do not make reliable witnesses in court. Using critical disability theory's understanding of disability as resulting from the interactional process between a person with impairment and the environment, it is contended that incompetence to act as a witness and the reliability of a witness are not inherent in the individual with impairment. The environment, which includes the rules of evidence and procedure, also plays a part in making a witness incompetent or unreliable. As such, it is contended that one response to difference consists in the modification of the environment to enable the witness to give effective testimony.

This thesis identifies specific provisions in the rules of evidence and criminal procedure in Zimbabwe, South Africa, Botswana, and Namibia which perpetuate inequality and discrimination in the justice system, thereby hindering access to justice. Chapter one begins by exploring Critical Disability Theory and the intersection of

gender and disability. It also discusses the utility of a human rights approach in criminal cases. Chapter two analyzes whether judicial assessments of testimonial competence adequately recognize the legal capacity of witnesses with intellectual disabilities. Chapter three addresses methods through which witnesses with intellectual disabilities may be accommodated to give effective testimony. Chapter four concludes by discussing the lessons that may be taken away for Zimbabwe.

### **Résumé**

Cette thèse porte - avec un intérêt particulier sur la situation au Zimbabwe - sur la capacité de témoigner et l'accès à la justice des témoins souffrant d'une déficience intellectuelle et ayant été victimes de violences sexuelles. Les personnes souffrant d'une déficience intellectuelle représentent en effet une catégorie bien particulière de témoins : leur capacité à communiquer verbalement peut ne pas correspondre à celle d'autres témoins, et par conséquent leur comportement à la barre des témoins ne peut être interprété de la même manière. Au travers de l'application stricte des règles de preuve et des procédures pénales aux témoins souffrant d'une déficience intellectuelle, le système de justice pénale perpétue parfois les inégalités et la discrimination à leur endroit. La capacité à témoigner et la crédibilité de cette catégorie bien particulière de témoins sont souvent contestées. Ces contestations sont le résultat d'une réaction inappropriée face à la différence, cette différence donnant lieu à la fausse impression que les personnes souffrant d'une déficience intellectuelle ne font pas des témoins fiables dans un tribunal. Utilisant la théorie de l'invalidité critique du handicap, qui conçoit le handicap comme le résultat du processus interactionnel entre une personne ayant une déficience et son environnement, ce texte soutient que la capacité à témoigner

et la fiabilité d'un témoignage ne sont pas inhérents à la personne ayant une déficience. L'environnement, qui inclut notamment les règles de preuve et de procédure, joue également un rôle en rendant un témoin incompetent ou peu fiable. En tant que tel, il est ici soutenu qu'une possible réponse face à la différence réside en la modification de l'environnement afin de permettre au témoin de donner un témoignage efficace.

Cette thèse identifie les dispositions spécifiques aux règles de preuve et de procédure pénale au Zimbabwe, en Afrique du Sud, au Botswana et en Namibie, qui perpétuent les inégalités et les discriminations au sein même du système judiciaire, restreignant ainsi l'accès à la justice. Le premier chapitre commence par explorer l'intersection entre le genre et le handicap au travers du prisme de la théorie critique sur l'incapacité. Il traite également de l'utilité d'une approche fondée sur les droits de la personne dans les affaires pénales. Le deuxième chapitre analyse dans quelle mesure les évaluations judiciaires visant à juger de la capacité d'un individu à témoigner reconnaissent adéquatement la capacité juridique du témoin souffrant d'une déficience intellectuelle. Le troisième chapitre traite quant à lui des méthodes pouvant aider les témoins souffrant d'une déficience intellectuelle à témoigner de manière efficace. Enfin, le quatrième chapitre traite des leçons que le Zimbabwe pourrait en tirer.

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## Table of Contents

### Introduction: Setting the Scene

A. Background Story .....	9
B. The Nature of the Problem.....	10
Prevalence of Sexual Assault amongst Women with Intellectual Disabilities.....	10
The Prominence of the Principle of Orality in the Adversarial Process.....	12
Testimonial Competence.....	15
The Right of Access to Justice.....	16
Rights of the Accused Person versus Rights of the Victim.....	17
C. Research Objectives.....	18
D. Research Questions.....	18
E. Methodology.....	19
F. Scope.....	19
G. Definition of Intellectual Disability.....	21
H. Chapter Outline.....	22

### Chapter One: Critical Disability Theory: Formulating an Appropriate Response to Difference

1.1 Introduction.....	23
1.2 Theoretical Framework.....	24
1.2.1 Critical Theory.....	24
1.2.2 Critical Legal Studies.....	25
1.2.3 Identity Jurisprudences.....	27
1.2.4 Critical Disability Theory: Understanding Disability.....	28
1.2.5 Critical Disability Theory: Valuing Difference.....	31
1.2.6 Gendered Disability.....	32
1.3 A Human Rights Approach in Criminal Law.....	36
1.3.1 Recognizing the Equality of Persons with Intellectual Disabilities.....	36
1.3.2 Inequality in Sexual Assault Cases.....	39
1.3.3 The three models of equality.....	41
1.4 Conclusion.....	44

### Chapter Two: Recognizing Legal Capacity: Competence to Testify

2.1 Introduction.....	46
2.2 Legal Capacity under article 12 CRPD: A Paradigm Shift.....	48
2.2.1 The Significance of Capacity to have Rights (Identity).....	50
2.2.2 The Significance of Capacity to Act (Agency).....	52
2.2.3 Legal Capacity and the Environment.....	53
2.3 Testimonial Competence in Zimbabwe, South Africa, Namibia and Botswana.....	55
2.3.1 Interpretation of Section 194 of the South African Criminal Procedure Act...56	
2.3.2 The Dual Approach to Assessment of Competence.....	62
2.3.3 Truth and Falsehood: Application of Different Standards?.....	68

2.4 Conclusion.....	79
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### Chapter Three: Responding to Disability Inequality

3.1 Introduction.....	81
3.2 The Elasticity of the Concept of Reasonable Accommodation.....	83
3.2.1 Reasonable Accommodation versus Universal Design.....	89
3.2.2 Reasonable Accommodation in Practice: The Example of Israel.....	90
3.2.3 Building on the Victim Friendly Program.....	93
3.3 The Adequacy of Protective Measures for Vulnerable Witnesses.....	97
3.4 Specific Areas where Accommodation is needed.....	102
3.4.1 Credibility of Witnesses and the Environment: Witness Preparation.....	103
3.4.2 The Sexual Assault Victim Empowerment Program.....	106
3.4.3 The Training of Magistrates and Judges.....	108
3.4.4 Cross-Examination and the Type of Questions Asked.....	110
3.5 The Amendment of Domestic Provisions in Zimbabwe.....	112
3.5.1 The Procedure for Admonition.....	114
3.5.2 The Amendment of the Section Providing for Incompetence.....	115
3.5.3 Assessing Competence during Trial.....	115
3.6 Conclusion.....	116

### Chapter Four: Conclusion

4.1 A Multi-Faceted Response to a Multi-Faceted Dilemma.....	121
4.2 Amending the Rules Relating to Competence to Testify.....	122
4.3 Amending the Procedure for Admonition of Witnesses.....	123
4.4 Assessing a Witness's Testimonial Competence.....	125
4.5 Providing Reasonable Accommodations at Trial.....	127
4.6 Protective Measures.....	128
4.7 Witness Preparation.....	129
4.8 Cross-Examination.....	130
4.9 The Role of the CRPD.....	131



## INTRODUCTION: SETTING THE SCENE

This is the reality of the justice system for persons with disabilities ... since sometimes the justice system remedies inequality and discrimination, and sometimes it is the justice system itself that perpetuates that very inequality and discrimination.<sup>1</sup>

### A. Background Story

Emma is a 28 year old female with an intellectual disability.<sup>2</sup> She lives in a rural village in Zimbabwe with her mother and two younger siblings, Jessica aged 15 years and Justin aged 10 years. Emma only attended primary school up to grade four and she could not pursue her education because the village school does not have teachers who are qualified to teach a student with an intellectual disability. During weekdays, while her siblings are at school and her mother is at work selling vegetables at the local market, Emma is often left home alone.

One day Emma's uncle, who lives nearby, came to visit Emma's family. Emma suddenly became withdrawn and uncomfortable never lifting her gaze in his presence. After his departure, Emma's mother inquired from her why she had been so rude to her uncle but Emma remained silent. She later revealed to her sister Jessica that her uncle had touched her breasts and had forcibly had sex with her on more than one occasion while their mother was at work.

Due to her disability, Emma has problems communicating verbally and has a limited vocabulary. She has developed her own way of communicating with her family

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<sup>1</sup> Stephanie Ortoleva, "Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System" (2010 – 2011) 17 ILSA J Int'l & Comp L 281 at 285.

<sup>2</sup> Emma's story is fictional, but her circumstances are emblematic of those typically experienced by women with intellectual disabilities who have been sexually assaulted and are required to testify against the accused in a criminal trial.

using a mixture of gestures and words. She is unable to concentrate for long periods of time. Experts say that her mental age is equivalent to that of an 8-10 year old child.

## **B. The Nature of the Problem**

### *Prevalence of Sexual Assault amongst Women and Girls with Intellectual Disabilities*

Emma's story, though fictional, depicts a reality that is experienced by too many women with intellectual disabilities in different parts of the world.<sup>3</sup> Indeed, the leading international treaty applicable to this phenomenon, the *Convention on the Rights of Persons with Disabilities*<sup>4</sup> recognizes that women and girls with disabilities:<sup>5</sup>

are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.<sup>6</sup>

Research shows that women and girls with intellectual disabilities are especially vulnerable to sexual abuse.<sup>7</sup> One study indicates that individuals with intellectual disabilities are four to ten times more likely to be sexually abused than their non-

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<sup>3</sup> Scottish Government, *Adults with Learning Disabilities and the Criminal Justice System: Their Rights and Our Responsibilities* (Edinburgh: Scottish Government, 2009) <<http://www.scotland.gov.uk/Resource/Doc/273687/0081801.pdf>>; Claire Edwards, Gillian Harold & Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (2012) [http://www.nda.ie/cntmgmtnew.nsf/0/378104926A5AB35A802579C900409963/\\$File/NDA\\_Access\\_to\\_Justice.pdf](http://www.nda.ie/cntmgmtnew.nsf/0/378104926A5AB35A802579C900409963/$File/NDA_Access_to_Justice.pdf)

<sup>4</sup> *Convention on the Rights of Persons with Disabilities and its Optional Protocol*, 6 December 2006, UN GAOR, 61<sup>st</sup> Sess. Item 67 (b), UN Doc A/61/6111, 2515 UNTS 3 (entered into force 3 May 2008) [CRPD].

<sup>5</sup> *Ibid* at art 1. (The CRPD does not define the term disability, but lists several types of disabilities which are encompassed in the term "persons with disabilities". These include people who have "long-term physical, mental, intellectual, or sensory impairments").

<sup>6</sup> *Ibid* at preamble para q.

<sup>7</sup> Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: Toronto: UBC Press, 2006) 267 at 279.

disabled counterparts.<sup>8</sup> More recently in *R v DAI*<sup>9</sup>, Chief Justice McLachlin of the Supreme Court of Canada acknowledged the prevalence of sexual assault by stating that “[s]exual assault is an evil. Too frequently, its victims are the vulnerable in our society – children and the mentally handicapped.”<sup>10</sup> The high rate of sexual abuse<sup>11</sup> suffered by people with intellectual disabilities has been attributed to the fact that they are less likely to turn down sexual advances and less likely to report incidents of sexual abuse due to their disability.<sup>12</sup> Other reasons that have been advanced to explain the prevalence of sexual offences against women with disabilities in general, which are also applicable to women with intellectual disabilities, include social myths, learned helplessness, dependence, and the abuser’s controlling influence.<sup>13</sup> Research also indicates that most people with intellectual disabilities are sexually abused by people they know<sup>14</sup> including friends, neighbors, family members, and in an institutional setting, support staff.<sup>15</sup> The complainant is often dependent on the perpetrator for one reason or another and this heightens the difficulty in reporting these cases to the police. Indeed some perpetrators may intentionally seek out individuals with intellectual disabilities because they are perceived as passive, vulnerable and less likely to be

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<sup>8</sup> Dick Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H Brookes, 1994) at

<sup>9</sup> *R v DAI* 2012 SCC 5, [2012] 1 SCR 149, McLachlin CJ [DAI].

<sup>10</sup> *Ibid* at para 1. (the term “handicapped” is no longer recommended).

<sup>11</sup> In this paper, I will make use of the term sexual assault because that is the terminology that is used in Canada. In certain parts, particularly the ones dealing with African provisions, the term rape will be used because this is the term that is used for sexual assault in such jurisdictions.

<sup>12</sup> Michael Gill, “Rethinking Sexual Abuse: Questions of Consent and Intellectual Disability” (2010) 7 Sexuality Research & Social Policy 201 at 203.

<sup>13</sup> Daniel B Rosen, “Violence and Exploitation against Women and Girls with Disability” in Florence L Denmark et al, eds, *Violence and Exploitation against Women and Girls* (Boston: Blackwell Publishing, 2006) 170 at 172.

<sup>14</sup> Gill, *supra* note 12.

<sup>15</sup> *Ibid*.

believed should they make a report.<sup>16</sup> It is unclear how many of these cases are reported to the police and how many are prosecuted. What is known, however, is that there are some that reach the criminal court for prosecution. This thesis is primarily concerned with what happens when these cases reach the criminal courts. In particular, it is concerned with the interaction of complainants with intellectual disabilities with the criminal justice system.

In order to better understand the dynamics of the interaction between complainants with intellectual disabilities and the criminal justice system, it is necessary to contextualize the analysis by examining the main features of the relevant system.

### *The Prominence of the Principle of Orality in the Adversarial Process*

In countries such as Zimbabwe, South Africa, Botswana and Namibia<sup>17</sup> which adhere to the common law justice system, the adversarial<sup>18</sup> process is a main feature of the criminal justice system.<sup>19</sup> Countries which do not adhere to the adversarial system adhere to the inquisitorial system.<sup>20</sup> The main difference between the adversarial and the inquisitorial systems is the role of the parties.<sup>21</sup> In an inquisitorial system, such as that in France, the judge is the “master of the proceedings”<sup>22</sup> or “*dominus litis*.”<sup>23</sup> This means that it is the judge who does most of the questioning in court.<sup>24</sup> In an adversarial

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<sup>16</sup> *Ibid* at 204.

<sup>17</sup> This is a list of the countries that will be examined in this thesis. It is not an exhaustive list.

<sup>18</sup> This is also referred to as the accusatorial system.

<sup>19</sup> Peet M Bekker et al, *Criminal Procedure Handbook*, 6<sup>th</sup> edition, (Lansdowne: Juta & Company Ltd, 1994) at 14.

<sup>20</sup> Andrew Sanders, Richard Young & Mandy Burton, *Criminal Justice*, 4<sup>th</sup> ed (Oxford: Oxford University Press, 2010) at 13.

<sup>21</sup> Bekker et al, *supra* note 19 at 14.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

process, however, the prosecution is the *dominus litis* and its members decide what charge to prefer and which court is appropriate to hear the case.<sup>25</sup> The role of the trier of fact, which may be a magistrate or a judge, is likened to that of an impartial “umpire”<sup>26</sup> because he/she listens to the evidence that is adduced by the parties, ensures that procedural rules are followed and pronounces a verdict at the end of the case.<sup>27</sup> The prosecution’s role is to prepare the case to be brought before the court and prove the defendant’s guilt beyond a reasonable doubt.<sup>28</sup> The role of the defence counsel is to defend the accused person through cross-examination of state witnesses and the production of evidence on behalf of the accused person.<sup>29</sup> The role of the witness is to testify about all that they know concerning the case before the court.<sup>30</sup> So crucial is the role of the witness that successful prosecution is largely dependent on witness testimony.<sup>31</sup>

The witness in an adversarial trial is usually required to appear in person in court and give oral evidence.<sup>32</sup> The adversarial process attaches great weight to the principle of orality which has been described as “a foundation of the adversarial trial”.<sup>33</sup> During an adversarial trial, evidence is presented to an unprepared judge or jury and great importance is placed on oral testimony because of the perceived potential of cross-

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Sanders, Young & Burton, *supra* note 20 at 13.

<sup>29</sup> Bekker et al, *supra* note 19 at 14.

<sup>30</sup> Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001) at 1.

<sup>31</sup> *Ibid.*

<sup>32</sup> There are limited circumstances where a witness may not give oral evidence.

<sup>33</sup> Ellison, *supra* note 30 at 11.

examination to expose inconsistencies and inaccuracies in the testimony.<sup>34</sup> The judge or jury also decides on the reliability of a witness by observing her demeanor and behavior in the witness stand.<sup>35</sup> In cases where the witness is also the victim (accusatory witness/complainant) greater emphasis is placed on the “physical proximity of the accused”<sup>36</sup> making oral testimony more important in such cases.

For witnesses with intellectual disabilities however, the procedural requirements regulating how they give evidence, such as the requirement for oral testimony may present a problem.<sup>37</sup> The prominence of the principle of orality is based on an assumption that all witnesses possess ability for effective oral communication.<sup>38</sup> This is not true for witnesses with intellectual disabilities. Furthermore, the requirement for giving oral evidence in person is based on an assumption that all demeanor and human behavior is rational and may be interpreted in the same way.<sup>39</sup> Witnesses with intellectual disabilities present a particular challenge to these basic assumptions because they are different. For example, they may not be able to effectively communicate orally and their demeanor and behavior differs from that of a witness without an intellectual disability to such a degree that it cannot be interpreted in the same way. Neta Ziv succinctly sums up the challenge by asserting that:

People with disabilities – in particular cognitive and mental disabilities – pose a unique challenge to evidence law. Some of the central elements upon which the rules of evidence are based, such as memory and

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<sup>34</sup>*Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Neta Ziv, “Witnesses with Mental Disabilities: Accommodations and the Search for Truth” (2007) 27:4 Disability Studies Quarterly <<http://www.dsqsds.org/article/view/51/51>.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

recollection, credible behavior and reliable conveyance of information, may differ when offered by persons with mental disabilities...<sup>40</sup>

Therefore, rules governing how evidence is given may present problems for complainants with intellectual disabilities. This may sometimes lead to a finding that people with intellectual disabilities cannot act as witnesses in court. In other words, the fact that they are different may lead to their being declared incompetent witnesses.

### *Testimonial Competence*

More important than how they give evidence is whether they give evidence at all or whether their evidence is received by the court. Only witnesses who are competent to give evidence may testify before the court.<sup>41</sup> The testimonial competence of witnesses with intellectual disabilities is frequently challenged because of a misconception that their disability makes them incompetent and unreliable witnesses.<sup>42</sup> A finding of incompetence means that the complainant does not get to testify or that the court does not accept her testimony. Without her evidence, the chances of a successful prosecution may be seriously compromised. This challenge, however, goes beyond the outcome of a case and affects what has been described as “the most basic ‘human right’”<sup>43</sup> the right of access to justice.<sup>44</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> Martin Hannibal & Lisa Mountford, *Criminal Litigation* (Oxford: Oxford University Press, 2007) at 301.

<sup>42</sup> GH Gudjonsson, GH Murphy & ICH Clare, “Assessing the Capacity of People with Intellectual Disabilities to be Witnesses in Court” (2000) 30 *Psychological Medicine* 307 at 307.

<sup>43</sup> Mauro Cappelletti & Bryant Garth, “Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 *Buff L Rev* 181 at 185.

<sup>44</sup> *CRPD*, *supra* note 4 at art 13.

### *The Right of Access to Justice*

The *Convention on the Rights of Persons with Disabilities* is the first international human rights treaty to contain a substantive right of access to justice.<sup>45</sup> Article 13 of the CRPD provides that:

[s]tates Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.<sup>46</sup>

The CRPD goes on to state that:

[I]n order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>47</sup>

This right of access to justice is usually framed in International Human Rights Law as the right to an effective remedy.<sup>48</sup> The right to access to justice is crucial for the protection of human rights because it has a bearing on the enjoyment of other rights.<sup>49</sup> Cappelletti and Garth effectively summarize the importance of this right by noting that “the possession of rights is meaningless without mechanisms for their effective vindication.”<sup>50</sup> The inclusion of a substantive right of access to justice in the CRPD was not fortuitous, but was a response to the “specific rights experience of persons with

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<sup>45</sup> Ortoleva, *supra* note 1 at 292.

<sup>46</sup> CRPD, *supra* note 4 at art 13(1).

<sup>47</sup> *Ibid* at art 13(2).

<sup>48</sup> See eg the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2(3) (a), (entered into force 23 March 1976) [ICCPR].

<sup>49</sup> Cappelletti & Garth, *supra* note 43 at 185.

<sup>50</sup> *Ibid*.



disability”<sup>51</sup> in particular, the numerous barriers they face to accessing justice. Rape is viewed as a violation of a woman’s right to equality.<sup>52</sup> Women with disabilities have a right of bodily integrity and a right to be free from violence, and enjoyment of the right to access to justice is important for the vindication of these rights when they are violated. The criminal justice system has the task of balancing the rights of the accused person with those of the victim of crime.

### *Rights of the Accused Person versus the Rights of the Victim*

The criminal law is a branch of national law which labels certain actions as crimes which are punishable by the state.<sup>53</sup> The punishment involves the deprivation of liberty through the passing of prison sentences, the deprivation of property, and in some jurisdictions the loss of life through capital punishment.<sup>54</sup> Therefore, the “arrest, trial and punishment of a wrongdoer interferes with individual rights.”<sup>55</sup> Accordingly, there are safeguards put in place to protect the rights of the accused person. One such safeguard is the right to a fair trial or the right to due process which is protected both under domestic law and under international law.<sup>56</sup> This is where the difficulty arises for victims of crime with intellectual disabilities for quite often a lot of questions are raised about whether or not their testimony would infringe the accused person’s right to a fair trial. Despite the legitimacy of concerns about the right to a fair trial, it must be borne in

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<sup>51</sup> Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30 Hum Rts Q 494 at 512.

<sup>52</sup> Bronwyn Pithey, “The Personal is the Political: Disclosure of Rape Complainants Personal Records” in L Artz & D Smythe, eds, *Should We Consent? Rape Law Reform in South Africa* (Cape Town: Juta, 2008) 99 at 116.

<sup>53</sup> Jonathan Burchell, *Principles of Criminal Law* (Lansdowne: Juta & Company Limited, 2005) at 1.

<sup>54</sup> *Ibid* at 5. (I leave to one side debates about whether or not capital punishment is a violation of the right to life because this is beyond the scope of the present thesis).

<sup>55</sup> *Ibid* at 113.

<sup>56</sup> See e.g. ICCPR, *supra* note 48 at art 14.

mind that crime also involves the infringement of the victim's rights.<sup>57</sup> Quite often however, the rights of the victim are not paramount.<sup>58</sup> Indeed it has been recognized that the "forensic encounter in a criminal case is only between the state and the accused."<sup>59</sup> The victim is unfortunately sometimes left quite out of the picture, so to speak. The challenge for the criminal law therefore, is to strike a balance between the accused person's fair trial rights and the victim's rights. My analysis in this paper aims to contribute to how this delicate balance may be achieved in the criminal justice system.

### **C. Research Objectives**

The primary objective of this thesis is to contribute to the realization of the right of access to justice for women with intellectual disabilities who have been sexually assaulted. I will proceed on the premise that the eradication, or at the very least the reduction, of inequality and discrimination in the criminal justice system will improve access to justice. I will therefore, seek to achieve this objective by analyzing the rules of evidence and criminal procedure with a view to firstly, identifying the procedures that can perpetuate inequality and discrimination and secondly, putting forward possible solutions to this problem.

### **D. Research Questions**

I intend to establish that rules of criminal evidence and procedure can perpetuate inequality and discrimination. I will do this by answering the following research questions:

1. What is the exact nature of the problem?

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<sup>57</sup> *Ibid* at 113.

<sup>58</sup> *Ibid* at 11.

<sup>59</sup> Burchell, *supra* note 53 at 11.

2. Do competency assessments perpetuate inequality and if so, how?
3. How can witnesses with intellectual disabilities be accommodated at trial?
4. Do these accommodations infringe on the accused person's right to a fair trial?

## **E. Methodology**

I will utilize information has been gathered from a review of the literature and case law.

## **F. Scope**

While it is true that the issues discussed in this thesis are of relevance to witnesses with intellectual disabilities in general, not just women who have suffered sexual assault, the focus on survivors of sexual assault is intentional. This is because sexual assault is generally difficult to prove. It often occurs behind closed doors and between two people making it a question of his word against hers. In circumstances where the sexual assault is not reported immediately, there will be little in the way of scientific forensic evidence such as semen and other forms of DNA, and any visible *indicia*, such as bruising, may have healed. At issue in a sexual assault trial is the question of consent,<sup>60</sup> and consent is about the subjective state of mind of the complainant.<sup>61</sup> Benedet and Grant aptly summarize this by stating that “the focus becomes her testimony as to her state of mind and whether the other evidence is consistent or inconsistent with this testimony.”<sup>62</sup> This makes the victim's testimony of crucial importance. To further compound the problem, sexual assault allegations have historically been treated with a

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<sup>60</sup> Janine Benedet & Isabel Grant, “More than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on Promise to Tell the Truth” (2013) 25 CJWL 31 at 32.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

level of suspicion because they are regarded as highly susceptible to fabrication.<sup>63</sup> An American judge puts it thus:

There are few crimes in which false charges are more easily or confidently made than in rape. Experience has shown that unfounded charges of rape are brought for a variety of motives. The adage “[h]ell hath no fury like a woman scorned” is frequently encountered in rape prosecutions.<sup>64</sup>

All the above factors make the testimony of the complainant in a sexual assault case of particular importance, hence the focus on survivors of sexual assault.

The scope of this thesis is further limited to issues at trial. But here it should be recalled that many sexual assault cases are not reported and, when they are, a number do not proceed to trial because of the misconception that complainants with intellectual disabilities are not credible witnesses.<sup>65</sup>

This thesis is also limited to a focus on solutions in the criminal justice system. However, the importance of the formulation of methods of prevention of sexual assault warrants a mention. This cannot be dealt with in detail in this thesis due to space constraints but it is an important method of tackling the problem of the prevalence of sexual assault amongst women with intellectual disabilities.

Though commonly used, the term “intellectual disabilities” is often not well understood. For that reason, I now turn to discuss the definition of intellectual disability.

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<sup>63</sup> *Ibid.*

<sup>64</sup> Morris Ploscowe, *Sex and the Law* (New York: Prentice-Hall, 1951) at 187.

<sup>65</sup> Gudjonsson, Murphy & Clare, *supra* note 42.

## G. Definition of Intellectual Disability

The American Association of Intellectual and Developmental Disabilities define intellectual disability as “a disability characterized by significant limitations *both* in intellectual functioning *and* in adaptive behavior, which covers many everyday social and practical skills.”<sup>66</sup> It is characterized by intellectual functioning with an IQ test score of around 70 to 75.<sup>67</sup> This affects “mental capacity, such as learning, reasoning, problem solving and so on.”<sup>68</sup> Intellectual disabilities are also characterized by limitations in adaptive behavior which affects “conceptual skills” such as “language and literacy; money, time, and number concepts; and self-direction.”<sup>69</sup> It also affects “[s]ocial skills” which include interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.”<sup>70</sup> Lastly, it affects practical skills including “activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.”<sup>71</sup> Intellectual disabilities manifest before the age of 18.<sup>72</sup>

The World Health Organization defines intellectual disability as:

significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in

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<sup>66</sup> American Association of Intellectual and Developmental Disabilities, online: AAIDD <<http://aaid.org/intellectual-disability/definition#.UgWsE6z3Mzo>> [emphasis added].

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

a reduced ability to cope independently (impaired social functioning), and begins before adulthood, with a lasting effect on development.<sup>73</sup>

## **H. Chapter Outline**

In chapter one I set out the theoretical framework for the conceptualization of the issues at stake. The focus here is on critical disability theory as a tool for shedding light on theoretical insights that can be used in the criminal justice context. I also discuss the utility of a human rights approach in criminal cases. In chapter two, I analyze whether judicial assessments of testimonial competence adequately recognize the legal capacity of witnesses with intellectual disabilities. Chapter three addresses methods through which witnesses with intellectual disabilities may give effective testimony. I do this by analyzing the concept of reasonable accommodation and how it differs from already existing protective measures for vulnerable witnesses. In chapter four I conclude with a discussion of the lessons that may be taken up by Zimbabwe.

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<sup>73</sup> World Health Organization, “Definition: Intellectual Disability”, online: World Health Organization Regional Office for Europe <<http://www.euro.who.int>>

## CHAPTER ONE - CRITICAL DISABILITY THEORY: FORMULATING AN APPROPRIATE RESPONSE TO DIFFERENCE

### 1.1 Introduction

Women with intellectual disabilities are undoubtedly different both from their non-disabled counterparts as well as from women with other types of disabilities. They are different not only because they are women with disabilities, but also because they are women with a disability that is generally perceived as the worst kind of disability.<sup>74</sup> There exists hierarchies within the disabled community and intellectual disabilities are at the bottom rung of that hierarchical order.<sup>75</sup> There is therefore, a heightened level of stigma attached to intellectual disabilities.<sup>76</sup> However, the disability is not the only source of difference, for to argue that would be to allow the disability to become the whole and subsume the other characteristics of an individual.<sup>77</sup> This ultimately gives an incomplete portrayal of their rights experience. Indeed, another source of difference is simply being women.<sup>78</sup> How should the criminal justice system respond to this difference?

In order to better serve their interests as witnesses in the criminal justice system, there is a need to formulate an appropriate response to this difference within the rules of evidence. The appropriate response can only be formulated after understanding not only the meaning of disability in general, but also the specific rights experience of women with intellectual disabilities. This is a necessary first step, but it is not the only step.

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<sup>74</sup> Harold Hongju Koh & Lawrence O Gostin, "Introduction: The Human Rights Imperative" in Stanley S Herr, Lawrence O Gostin & Harold Hongju Koh, eds, *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 1 at 2.

<sup>75</sup> Mark Deal, "Disabled People's Attitudes toward Other Impairment Groups: A Hierarchy of Impairments (2003) 18:7 Disability & Society 897 at 898.

<sup>76</sup> *Ibid.*

<sup>77</sup> Sampson, *supra* note 7 at 267.

<sup>78</sup> *Ibid.*

There is also a need to go beyond the explanation stage and explore how their rights can be better protected.

In this chapter I discuss critical disability theory as a means of understanding disability and formulating an appropriate response to difference. I also argue that a “gendered disability”<sup>79</sup> approach is necessary to fully understand the rights experience of women with intellectual disabilities. I conclude by arguing that a human rights approach aimed at achieving equality in the criminal justice system is the best way to positively take difference into account.

## **1.2 Theoretical Framework**

The theoretical framework of this thesis is based on Critical Disability Theory. Critical Disability Theory is “an emerging framework for the study and analysis of disability issues.”<sup>80</sup> It is part of a group of theories falling within the category of Critical Theory.<sup>81</sup> In order to fully appreciate the significance of Critical Disability Theory to the project of the realization of the rights of persons with disabilities, it is important to first look at the features of Critical Theory in general.

### **1.2.1 Critical Theory**

Critical theory can be traced back to the work of scholars who were part of the Frankfurt School.<sup>82</sup> The term “critical theory” was coined in 1937 by Max Horkheimer

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<sup>79</sup> Sampson, *supra* note 7.

<sup>80</sup> L Hosking, “Critical Disability Theory” (Paper delivered at the 4<sup>th</sup> Biennial Disability Studies Conference at Lancaster University, September 2-4 2008) [unpublished] at 1.

<sup>81</sup> *Ibid* at 2.

<sup>82</sup> Douglas Kellner, “Critical Theory Today: Revisiting the Classics” (1993) 10 *Theory, Culture and Society* 43 at 43.



during the Presentation of his essay “Traditional and Critical Theory”.<sup>83</sup> Critical Theory was developed as a way of challenging the dominant social theories.<sup>84</sup> It therefore developed “in polemics with contemporary theory”.<sup>85</sup> Horkheimer’s Critical Theory was contrasted with the existing social theories that he referred to as “traditional theories”<sup>86</sup>. Critical Theory was skeptical of positivism and recognized that not only was positivism “reproducing existing social relations”<sup>87</sup> but it was also impeding change.<sup>88</sup> Critical Theory therefore endeavors to do more than just explain or criticize the existing social order; it pursues the goal of achieving social change. The core characteristic of all Critical Theory is that it must be:

... explanatory, practical, and normative, all at the same time. That is, it must explain what is wrong with current social reality, identify the actors to change it, and provide clear norms for criticism and achievable practical goals for social transformation.<sup>89</sup>

When Critical Theory was first formulated, it was not applied to the study of law.<sup>90</sup> It was first applied to the study of law in the 1970s in the United States of America.<sup>91</sup>

### 1.2.2 Critical Legal Studies

The Critical Legal Studies Movement, as it became known, joined legal realism with Critical Theory.<sup>92</sup> Legal realism is concerned not with what the law is said to do, but

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Kellner, *supra* note 82 at 43.

<sup>86</sup> Hosking, *supra* note 80 at 2.

<sup>87</sup> Kellner, *supra* note 82 at 44.

<sup>88</sup> *Ibid.*

<sup>89</sup> J Bohman, “Critical Theory” The Stanford Encyclopaedia of Philosophy <http://plato.stanford.edu/archives/spr2005/entries/critical-theory/> at 1

<sup>90</sup> Hosking, *supra* note 80 at 3.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

how the law actually works in practice.<sup>93</sup> Legal realists reject the notion that judges simply apply the law as it is found in statutes and case law and arrive at a decision through an objective process of legal reasoning. They argue that law is:

Inherently indeterminate and legal decisions are understandable only by taking into consideration, along with traditional sources of law, factors outside those sources, including the personalities of the participants in a judicial proceeding and ideological trends and political pressures of the day.”<sup>94</sup>

Critical Legal Studies reject the liberal conception of law as a discipline that is quite apart from forms of social control and argues instead that law is an “integral part”<sup>95</sup> of existing forms of social control. Contrary to liberalism which views law as a set of rules which determine the scope of application, critical legal studies sees law as more than just rules.<sup>96</sup> Law is seen as rules and the factors external to those rules such as the socio-economic and political environment.<sup>97</sup> Critical Legal Studies make a claim that law is a reflection of the values of society and of the class and power relations that prevail in any given society.<sup>98</sup> It is these values and interests that in turn influence judicial decision-making. Judicial decision-making is therefore, far from being an objective application of neutral legal rules through the use of legal reasoning, but rather is also a reflection of the societal interests that are dominant in any given society at any given time. That being the case, then “the analysis of law must account for both the purpose and effect of a law in its social context.”<sup>99</sup> This focus on social context is what led to the expansion of Critical Legal Studies which emerged out of the perceived

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<sup>93</sup> Ibid at 4.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* at 5.

limitations and inadequacy of Critical Legal Studies in exposing the “underlying structural biases of society”.<sup>100</sup> The result was the formulation of what are called “identity jurisprudences.”<sup>101</sup>

### **1.2.3 Identity Jurisprudences**

The 1980s and the 1990s were marked by the emergence of what Hosking calls “identity jurisprudences”.<sup>102</sup> These include Feminist Legal Theory, Queer Theory, and Critical Race Theory. As noted earlier, these were formulated in response to the perceived shortcomings of Critical Legal Studies. For example, Critical Race Theory emerged out of the inadequacy of Critical Legal Studies in accounting for the role that race played in the legal institutions and society at large in America.<sup>103</sup> Therefore, it recognized the role played by identity in the disadvantaging of particular groups of people. Critical Disability Theory can therefore, be said to be another one of the “identity jurisprudences.”<sup>104</sup> It focuses on disability and the role it plays in societal stratification. Critical Disability Theory challenges liberal views and conceptions of disability which are based on “able-bodied norms”<sup>105</sup> and which view disability as “misfortune.”<sup>106</sup> It therefore seeks to re-conceptualize disability and shape our understanding of what disability really means.

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

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Richard Devlin & Dianne Pothier, “Introduction: Toward a Critical Theory of Dis-Citizenship” in Pothier & Devlin, *supra* note 7, 1 at 2.

<sup>106</sup> *Ibid.*

### 1.2.4 Critical Disability Theory: Understanding Disability

In pursuing its goal of “genuine inclusiveness”, Critical Disability Theory offers a particularly useful understanding of disability.<sup>107</sup> Throughout the 20<sup>th</sup> century, the paradigm that dominated an understanding of disability was the formulation of disability as an “individual pathology.”<sup>108</sup> This is sometimes referred to as the medical model.<sup>109</sup> According to this formulation, disability was seen as something that was inherent in the person with impairment because the main focus was on “individual functional abilities and capabilities”.<sup>110</sup> Within this paradigm disability was a “personal misfortune”<sup>111</sup> that attracted pity and charity and was to be prevented or treated.<sup>112</sup>

As a result of this model, the law’s response to and treatment of persons with disabilities was as objects of charity on whose behalf various social policies were implemented.<sup>113</sup> Critical disability theory is disenchanted with liberalism because it jeopardizes the goal of equality for persons with disabilities.<sup>114</sup> Devlin and Pothier put it quite succinctly when they state that “[t]o start from the perspective that disability is misfortune is to buy into a framework of charity and pity rather than equality and inclusion.”<sup>115</sup>

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<sup>107</sup> *Ibid.*

<sup>108</sup> Marcia H Rioux & Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy” in Pothier & Devlin, eds, *supra* note 7, 47 at 49.

<sup>109</sup> Hosking, *supra* note 80 at 6.

<sup>110</sup> Rioux & Fraser, *supra* note 108 at 50.

<sup>111</sup> Hosking, *supra* note 80 at 6.

<sup>112</sup> Rioux & Fraser, *supra* note 108 at 50.

<sup>113</sup> Rioux & Fraser, *supra* note 108 at 50.

<sup>114</sup> Devlin & Pothier, *supra* note 105 at 10.

<sup>115</sup> *Ibid.*

In recent years, however, the dominant paradigm has become the understanding of disability as a social construct.<sup>116</sup> In response to the sheer inadequacy and undesirability of the medical model of disability, the “social pathology”<sup>117</sup> of disability was formulated. Under this model, disability is not inherent in the individual, but is a social construct.<sup>118</sup> This means that disability is not necessarily a result of impairment, but is a result of the combined effect of impairment and the environment which does not accommodate the needs of persons with disabilities. This formulation of disability as a result of the interaction between an individual with impairment and the environment is the one that is relied on in the *CRPD*.<sup>119</sup> Critical Disability Theory subscribes to this social model of disability.<sup>120</sup>

At this point, it is important to clarify that the model that is relied on by Critical Disability Theory is a mixture of the medical model and the social model.<sup>121</sup> This approach is somewhat realistic because it acknowledges the role played, and contribution made, by impairment.<sup>122</sup> One of the critiques of the earlier version of the social model is that it claimed that impairment made no contribution to disability and that disability was entirely a social construct.<sup>123</sup> It distinguished between impairment and disability and treated the two as entirely separate and distinct, treating disability as something that resulted only from the environment. Tremain rightly argues that

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<sup>116</sup> Rannveig Traustadottir, “Disability Studies, the Social Model and Legal Developments” in Oddny Mjoll Arnardottir & Gerard Quinn, eds, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff Publishers, 2009) 3 at 9.

<sup>117</sup> Rioux & Fraser, *supra* note 108 at 49.

<sup>118</sup> Traustadottir, *supra* note 116.

<sup>119</sup> *CRPD*, *supra* note 4 at preamble para e.

<sup>120</sup> Devlin & Pothier, *supra* note 105 at 6.

<sup>121</sup> Hosking, *supra* note 80 at 7.

<sup>122</sup> Hosking, *supra* note 80 at 7.

<sup>123</sup> Shelley Tremain, “Foucault, Governmentality, and Critical Disability Theory: An Introduction” in Shelley Tremain, ed, *Foucault and the Government of Disability* (Michigan: The University of Michigan Press, 2005) at 9-10.

impairment cannot be left out of the equation because, for example, it is not argued that black people are disabled because the environment causes them to experience social disadvantage.<sup>124</sup> It would seem that the only people who can claim to be disabled are those with impairment, and therefore it is “implicit”<sup>125</sup> that impairment also contributes to the disadvantaging.<sup>126</sup> This is why the social model relied on by Critical Disability Theory that treats disability as a result of the interaction between a person with impairment and his/ her environment is preferable.

Like all Critical Theory, Critical Disability Theory seeks not only to be explanatory, but to effect change. Devlin and Pothier aptly describe Critical Disability Theory in the following terms: “Its goal is not theory for the joy of theorization, or even improved understanding and explanation; it is theorization in the pursuit of empowerment and substance, not just formal equality.”<sup>127</sup> If disability is a problem inherent in the individual with impairment, then the responsibility to eliminate the social disadvantage of disability lies with the individual.<sup>128</sup> However, if disability is understood as a social construct, then the responsibility shifts from the individual with impairment to the community.<sup>129</sup> There is still a need to take this a step further, and clarify the exact nature of the responsibility that is on the wider community. This is because there are several responses to difference that are open to the community and

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<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid at*

<sup>127</sup> Devlin & Pothier, *supra* note 105 at 8.

<sup>128</sup> *Ibid at* 12.

<sup>129</sup> Devlin & Pothier, *supra* note 105 at 12.

these include “pity, charity, surgical intervention, accommodation, and transformation.”<sup>130</sup>

### 1.2.5 Critical Disability Theory: Valuing Difference

Part of the transformative power of Critical Disability Theory is that it values difference. Martha Minow speaks of the “dilemma of difference” which refers to the difficulty in knowing when to ignore difference and when to take it into account.<sup>131</sup> For sometimes taking difference into account can be seen as perpetuating marginalization, but at other times, ignoring the difference usually has the effect of marginalizing the person.<sup>132</sup> But when disability is understood as the interaction between the person and his/her environment, then necessarily, the person’s difference must be taken into account in order to understand the full impact of the social environment and the barriers it creates. Critical Disability Theory “recognizes and welcomes the inevitability of difference and conceives of equality within a framework of diversity.”<sup>133</sup> As stated by Devlin and Pothier, “disability demands a coming to terms with difference.”<sup>134</sup> Indeed Critical Theory in general subscribes to the notion that difference cannot be ignored. As Devlin and Pothier put it,

Critical theory generally challenges the assumption that difference can be ignored. Critical race theorists, for example, challenge the notion... that the American constitution should be color-blind. They argue that to ignore race is to perpetuate racism.<sup>135</sup>

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<sup>130</sup> *Ibid.*

<sup>131</sup> Martha Minow, *Making All the Difference: Inclusion and Exclusion in American Law* (Ithaca, NY: Cornell University Press, 1990) at 20.

<sup>132</sup> Hosking, *supra* note 80 at 11.

<sup>133</sup> *Ibid.*

<sup>134</sup> Devlin & Pothier, *supra* note 105 at 12.

<sup>135</sup> Devlin & Pothier, *supra* note 105 at 12.

When it comes to disability, exclusion usually results from ignoring difference.<sup>136</sup> This is because disability is so unique that the difference cannot be ignored without serious consequences. Consider, for example, a business establishment that claims that it does not discriminate by opening its doors to everyone, yet its premises are physically inaccessible to some; the result for a person with a physical disability, despite the rhetoric of inclusion, is that they are necessarily excluded because the building is inaccessible. Taking difference into account however, means that the owner of that establishment would have to make the building accessible. The challenge, as Devlin and Pothier put it, is “to pay attention to difference without creating a hierarchy of difference – either between disability and non-disability or within disability.”<sup>137</sup> I would contend that taking difference into account entails more than just taking the impairment into account. For women with disabilities especially, the goal of equality would be better served by also taking into account their other characteristics.

### **1.2.6 “Gendered Disability”<sup>138</sup>**

Sampson argues that there is a need to specifically look at disability from a “gendered” lens in order to better protect the equality rights of women with disabilities. Indeed, the CRPD also highlights the importance of taking what it terms a “gender perspective”<sup>139</sup> in all efforts to ensure that persons with disabilities enjoy their human rights.<sup>140</sup> Similarly, Benedet and Grant also underscore the importance of this gendered approach to disability for two reasons. The first is that women make up the majority of sexual

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Sampson, *supra* note 7 at 267.

<sup>139</sup> CRPD, *supra* note 4 at preamble para s.

<sup>140</sup> *Ibid.*



assault complainants and secondly, historically, the credibility of sexual assault complainants has been called into question.<sup>141</sup> Gendered disability is defined as “a relational experience that is constructed to the disadvantage of women with disabilities.”<sup>142</sup> It is true that within the category “disabled” is a diverse population. Those same persons with disabilities are also members of other types of social classifications such as gender. The term “hybrid intersectionality”<sup>143</sup> is used to describe “the intersection of an axis of privilege with an axis of subordination”.<sup>144</sup>

The singly burdened will often simultaneously be in a privileged position relative to others who experience additional axes of subordination. For example, a gay man is privileged in contrast to a lesbian by gender while both are disadvantaged by sexual orientation. The gay man is said to be singly burdened whilst the lesbian is burdened on 2 axes.<sup>145</sup>

Sampson notes that there is a gap in the available scholarly comment, in that Disability Theory and Feminist Legal Theory are not adequate for analyzing the equality rights of women with disabilities.<sup>146</sup> The recognition of the fact that people can be members of several social groups at the same time allows for a more complete analysis of the exact nature and extent of the social disadvantage that is being experienced by persons with disabilities. Sampson puts it quite succinctly when she says, “a gendered disability analysis ... exposes the importance of examining the distinctive experiences of gendered disability discrimination so as to maximize the value of equality rights law for women with disabilities.”<sup>147</sup> Matsuda recognizes the

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<sup>141</sup> Benedet & Grant, *supra* note 60 at 32.

<sup>142</sup> Sampson, *supra* note 7 at 268.

<sup>143</sup> Hosking, *supra* note 80 at 9.

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

<sup>145</sup> *Ibid* at 9-10.

<sup>146</sup> Sampson, *supra* note 7 at 268.

<sup>147</sup> *Ibid.*

usefulness of the “reality and detail of oppression”<sup>148</sup> as a starting point for engaging in “mainstream debates about law and theory.”<sup>149</sup> The usefulness lays in the fact that it is the reality of the lived experiences of “outsiders”<sup>150</sup>, in this case women with intellectual disabilities, which challenge the professed neutrality of the law.<sup>151</sup> Taking into account the reality of women with intellectual disabilities therefore provides a useful starting point that illuminates the exact nature and extent of the dilemma faced by these women.

Sampson includes in the list of things that can be taken into account in order to give context to the gendered experience of women with disabilities things like, “poverty, extreme vulnerability to sexual violence, invisibility within public life, and a minimization of the value of the lives of women with disabilities”<sup>152</sup>

The courts generally recognize that rape is a gendered crime.<sup>153</sup> Sampson notes that rape or sexual assault against women is a result of a patriarchal form of male control over females.<sup>154</sup> According to Sampson:

“The act of rape is not an end in itself, but a means of enforcing prescribed gender roles in society and maintaining the social hierarchy in which men retain control. However, sexual assault is not experienced in a uniform and universal fashion. Racialized women have clearly articulated the differences associated with their experience of sexual violence as an exercise of power and control rooted in racism and sexism, the effects of which cannot be separated.”<sup>155</sup>

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<sup>148</sup> Mari J Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11 Women’s Rts L Rep 7 at 9.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> Sampson, *supra* note 7 at 269.

<sup>153</sup> *Ibid.* at 278; *R v Seaboyer* [1991] 4 SCR 595 at 648 – 49; *R v Osolin* [1993] 4 SCR 595 at 669.

<sup>154</sup> Sampson, *supra* note 7 at 278.

<sup>155</sup> *Ibid.*

According to feminists, sexual abuse is about men “exerting power and domination over women.”<sup>156</sup> If it is accepted that rape is a gendered crime, then it necessarily follows that the rape of a woman with a disability is a gendered disability crime.<sup>157</sup> The complainant’s status as a woman and a person with a disability are:

indivisible and come together in a way that creates a distinctive life experience – one that puts women with disabilities at an increased risk of experiencing sexual assault and being denied the full and equal benefit and protection of the criminal law.<sup>158</sup>

So, what is the nature of the experience that women with intellectual disabilities face? Women with intellectual disabilities, especially severe intellectual disabilities, can be said to be so different from the socially constructed norm that their status as “other” is so exaggerated that sexual predators may consider them “easy target[s]”<sup>159</sup> that can be violated without consequence.<sup>160</sup> In other words, there is a distinction between us and the “others”; the others being those who are different from the socially constructed norm. Because of their status as “other” women with intellectual disabilities are not equally valued.<sup>161</sup> Sometimes this plays out in the criminal justice system through the application of evidence rules that perpetuate inequality and discrimination against women with intellectual disabilities.”<sup>162</sup>

A contextualized analysis of gendered disability discrimination is therefore of utmost importance. It tells us that there is a multi-layered dilemma with which these women are faced. One layer of the dilemma is the cross-cutting issues of disability and

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<sup>156</sup> Gill, *supra* note 12 at 202.

<sup>157</sup> Sampson, *supra* note 7 at 278.

<sup>158</sup> *Ibid* at 279.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid* at 278.

gender. The other layer is the criminal justice which has to balance the rights of the accused person and the rights of the victim. Without this contextualized analysis of gendered disability, the law remains unresponsive to the inequality experiences of these women and serves to enforce and perpetuate them.<sup>163</sup> Furthermore, without this contextualized analysis, the need for wider preventive measures to be effected in society is not clearly seen. From a theoretical standpoint, it has been shown that taking difference into account is of utmost importance. I now turn to explore how difference can be taken into account within the criminal legal framework.

### **1.3 A Human Rights Approach in Criminal Law**

A human rights approach that seeks an equality and non-discrimination agenda in relation to survivors of sexual assault with intellectual disabilities is important for two reasons. The first is that it is a particularly effective way of recognizing the humanity and equality of persons with intellectual disabilities. Indeed, Robinson states that “intellectual disability is a rights issue first and a medical matter second.”<sup>164</sup> The second reason is that it is generally accepted that sexual assault is about men exerting power over women – a form of inequality.<sup>165</sup> These are dealt with in turn.

#### **1.3.1 Recognizing the Equality of Persons with Intellectual Disabilities**

All human beings are born free and equal in dignity and rights.<sup>166</sup> This principle of the inherent dignity and equality of all humanity carries “special meaning<sup>167</sup>” when it

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<sup>163</sup> *Ibid* at 281 – 282.

<sup>164</sup> Mary Robinson, “Foreword” in Herr, Gostin & Koh, *supra* note 74, v at vii.

<sup>165</sup> Pithey, *supra* note 52.

<sup>166</sup> *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, (1948) at art 1.

<sup>167</sup> Koh & Gostin, *supra* note 74 at 3.

comes to disability.<sup>168</sup> This is due to the inequality and discrimination with which persons with disabilities, including intellectual disabilities have historically been faced.<sup>169</sup> The CRPD reaffirms the dignity and equality of all human beings in the following terms:

*Recalling* the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.<sup>170</sup>

In response to the inequality and discrimination that persons with disabilities have historically encountered, the CRPD emphasizes the importance of the principles of equality and non-discrimination. These principles are referenced in various parts of the Convention including the preamble<sup>171</sup> the purpose,<sup>172</sup> general principles<sup>173</sup> and general state obligations<sup>174</sup>. For this reason equality and non-discrimination have been described as the “primary principles permeating the whole Convention.”<sup>175</sup> Nilsson describes the equality principle in the CRPD, as one that “underpins the entire Convention.”<sup>176</sup> It is important to note that the principles of equality and non-discrimination are closely related to one another in that the prohibition of discrimination is intended to secure the principle of equality.<sup>177</sup> In that sense therefore, as Arnardottir puts it, they “connote the

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> CRPD, *supra* note 4 preamble para a.

<sup>171</sup> *Ibid* at preamble paras a, b, c, e, f, h, p, r, and x.

<sup>172</sup> *Ibid* at art 1.

<sup>173</sup> *Ibid* at art 3.

<sup>174</sup> *Ibid* at art 4.

<sup>175</sup> Commissioner for Human Rights, Thematic study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, UNGAOR, 10<sup>th</sup> Sess, UN Doc A/HRC/10/48, (2009) at 37.

<sup>176</sup> Nilsson, “Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities” Commissioner for Human Rights Issue Paper (Strasbourg, Commissioner for Human Rights, 2012) at 12 <[www.commissioner.coe.int](http://www.commissioner.coe.int)>

<sup>177</sup> *Ibid* at 41.

same idea and can be seen as simply the positive and negative statements of the same principle.”<sup>178</sup>

The inequality and discrimination to which persons with disabilities have been subjected has been said to be due to that fact that they are different from their non-disabled counterparts.<sup>179</sup> To be more precise, I would contend that difference in and of itself need not be problematic because diversity is one of the main characteristics of humanity. Discrimination arises from the fact that difference has been equated with “inferiority”.<sup>180</sup> It is this equation of difference with inferiority that equality measures are designed to challenge.<sup>181</sup> Regardless of how different persons with intellectual disabilities may be, they are born free and equal in dignity and rights.<sup>182</sup> Quinn puts it aptly when he states that “all persons not only possess inestimable inherent self-worth but are also inherently equal in terms of self-worth, regardless of their difference.”<sup>183</sup> This means that they are “entitled”<sup>184</sup> to respect and equal treatment “even if that equality does not entail identical treatment under the circumstances.”<sup>185</sup> This leaves no room for a response of pity which according to Gill, “jeopardizes respect.”<sup>186</sup> This is what makes a human rights approach recognizing the equality of persons with intellectual disabilities important. Treating people with intellectual disabilities as equals

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<sup>178</sup> Oddny Mjoll Arnardottir, “A Future of Multidimensional Disadvantage Equality?” in Arnardottir & Quinn, *supra* note 116, 41 at 43.

<sup>179</sup> Koh & Gostin, *supra* note 74 at 3.

<sup>180</sup> Rosemary Kayess & Phillip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8 Human Rights Law Review 1 at 8.

<sup>181</sup> *Ibid.*

<sup>182</sup> UDHR, *supra* note 166.

<sup>183</sup> Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (New York: United Nations, 2002) at 15.

<sup>184</sup> Koh & Gostin, *supra* note 74.

<sup>185</sup> *Ibid.*

<sup>186</sup> Gill, *supra* note 12 at 206.

forces us to take cognizance of the inherent dignity and worth of persons with intellectual disabilities, regardless of how different they may be.<sup>187</sup> This puts the onus for change on the environment as opposed to the individual with impairment.<sup>188</sup> It is therefore crucial that the principles of equality and non-discrimination be at the forefront when it comes to victims of sexual assault with intellectual disabilities. When equality and respect for persons with intellectual disabilities are at the forefront, “difference need not mean legal difference.”<sup>189</sup> This means that if the law responds appropriately, there is no need for it to create or perpetuate differences in treatment between disabled and non-disabled people. The criminal justice system needs to uphold the norms of equality and respect for the dignity of all human beings particularly in sexual assault cases. This is because sexual assault is a crime which is about inequality between men and women.<sup>190</sup>

### **1.3.2 Inequality in Sexual Assault Cases**

Secondly, the equality approach is important because it is widely accepted that rape and other forms of sexual violence are crimes involving the human right to equality because they are largely perpetrated against women and girls.<sup>191</sup> If it is accepted that the crime of rape is about equality, then an approach in the criminal law that ensures that this right is realized is required. It is true that one of the main objectives of the criminal law is to

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<sup>187</sup> Michael L Perlin, “‘A Change is Gonna Come’: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law”, (2008 – 2009) 29 N III U L Review 483 at 483-4.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid* at 20.

<sup>190</sup> Pithey, *supra* note 52.

<sup>191</sup> *Ibid.*

punish the offender.<sup>192</sup> Indeed, it is this element of punishment that distinguishes criminal proceedings from civil proceedings.<sup>193</sup> However, the agenda of protecting the human rights of women with disabilities is one that should be accommodated by the criminal law. This is because one of the “principal values that underpin criminalization is maintaining or retaining human and civil rights.”<sup>194</sup> For example, the law protects the right to life by criminalizing killing and the right to bodily integrity by criminalizing crimes such as rape.<sup>195</sup> Crimes such as sexual assault, assault, and public violence all involve “forms of conduct that in one way or another violates the victim’s rights of person, dignity or property. It is this harm to the victim that provides the reason for punishing the conduct concerned.”<sup>196</sup> Pursuing a human rights agenda in the form of seeking equality for women with disabilities is very much in line with the criminal law. It is in seeking this right to equality that the criminal law can positively take difference into account.

If the right to equality is to be taken seriously, then an understanding of the nature of the inequality as well as how it is created and maintained is very crucial.<sup>197</sup> This is in line with the approach taken by Critical Disability Theory and gendered disability of prioritizing context. Without a full understanding of the context of the inequality, the law may unwittingly maintain and perpetuate inequalities, for example, through the application of rules of criminal evidence that regulate the manner in which

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<sup>192</sup> Lovemore Madhuku, *An Introduction to Zimbabwean Law* (Harare: Weaver Press, 2010) at 36.

<sup>193</sup> *Ibid.*

<sup>194</sup> Burchell, *supra* note 53 at 49.

<sup>195</sup> *Ibid.* Here, I use the term rape instead of sexual assault because of my reliance of a South African text for authority on this point. The text uses the term rape because this is the term that is used for sexual assault in South Africa.

<sup>196</sup> *Ibid.*

<sup>197</sup> Pithey, *supra* note 52.



evidence is produced in a criminal trial.<sup>198</sup> Taking difference into account is therefore very important for achieving equality through the provision of appropriate accommodations<sup>199</sup> and this is why Critical Disability Theory serves to realize the equality agenda the equality agenda. However, this argument would be incomplete if it ended there, for there is a need to recognize that there are different conceptions of equality and not all of them are effective in addressing the needs of women with intellectual disabilities.

### 1.3.3 The Three Models of Equality

#### *Formal Equality*

Formal equality which focuses on “even-handedness”<sup>200</sup> is a conception of equality that in effect ignores difference.<sup>201</sup> Also known as the equal treatment model, it seeks to treat everyone the same and in so doing ignores any differences between human beings.<sup>202</sup> It is important to note that seeking an equality agenda does not mean that difference should be ignored, neither does it mean that we should seek to eradicate difference – for this would not be possible.”<sup>203</sup> Rather, it means that a “genuinely equal society is one that has a positive approach to and positively accommodates human difference.”<sup>204</sup> This means that difference has to be taken into account. Indeed, ignoring difference has very negative results for persons with disabilities. Consider as an

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<sup>198</sup> Hannibal, *supra* note 41 at 31.

<sup>199</sup> Theresia Degener, “Disability as a Subject of International Human Rights Law and Comparative Discrimination Law” in Herr, Gostin & Koh, *supra* note 116, 151 at 153.

<sup>200</sup> Quinn & Degener, *supra* note 183 at 15.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

example a setting where there are two students sitting an examination. One of the students is sight impaired and the other is not. Both students are given an examination question paper that is not in Braille. Needless to say, the student with sight impairment will fail the examination simply because the examination question paper is inaccessible to her. They have both been treated the same, but the student with sight impairment has been greatly disadvantaged as a result of that same treatment. Under the formal equality model, it is sufficient for the community to argue that they have discharged their duty by applying an even-handed approach. The result however, is the perpetuation of further inequality. This is a conception of equality that is not capable of being an adequate response to difference precisely because it ignores difference and is therefore, not recommended in the context of women with intellectual disabilities. Indeed, as Nilsson notes, the CRPD moves beyond the formal equality model to a model of equality that is closely related to the understanding of disability as a result of the interaction between a person with impairment and the environment.<sup>205</sup>

### *Equality of Opportunity*

The second conception of equality is the equality of opportunity model.<sup>206</sup> This is based on the premise that everyone is entitled to equally access opportunities and participates in the social, economic and cultural spheres of life.<sup>207</sup> All that is required under this model is the removal of legal and institutional barriers that hinder this equality of

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<sup>205</sup> Nilsson, *supra* note 176 at 12.

<sup>206</sup> Marcia H Rioux & Christopher A Riddle, "Values in Disability Policy and Law: Equality" in Marcia H Rioux, Lee Ann Bassar & Melinda Jones, eds, *Critical Perspectives on Human Rights and Disability Law* (Leiden: Martinus Nijhoff Publishers, 2011) 37 at 44.

<sup>207</sup> *Ibid.*

opportunity.<sup>208</sup> This model is based on the assumption that once barriers are removed, then those groups of people, who were previously discriminated against, can achieve substantive equality.<sup>209</sup> Quinn and Degener criticize this model on the basis that it assumes that everyone is able to function in society.<sup>210</sup> They note that this model tends to exclude the needs of the group of people who lack this capacity, either totally or in part. These people may not be able to function despite the removal of barriers.<sup>211</sup> This is a conception of equality that may not fully cater for the needs of some witnesses with intellectual disabilities.

### *Equality of Results/Outcome*

The third conception of equality is equality of results/outcome.<sup>212</sup> It is contended that this is the model that best meets the needs of witnesses with intellectual disabilities.<sup>213</sup> Also known as substantive equality,<sup>214</sup> this model recognizes first of all that everyone has the right to participate equally in society, regardless of their differences. This takes into account the varying means of participation that people have because of their individual characteristics and provides for appropriate accommodation to enable participation.<sup>215</sup> Sampson argues that substantive equality entails a contextualized understanding of the equality analysis.<sup>216</sup> Focusing on substantive equality is important because its goal is to seek equality of results.<sup>217</sup> For this reason, this is the preferred

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<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> Quinn & Degener, *supra* note 183 at 18.

<sup>211</sup> *Ibid.*

<sup>212</sup> Rioux & Riddle, *supra* note 206 at 49.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> Rioux & Fraser, *supra* note 108 at 54.

<sup>216</sup> Sampson, *supra* note 7 at 268.

<sup>217</sup> *Ibid.*

model of equality that is likely to account for the needs of women with intellectual disabilities in court.

#### **1.4 Conclusion**

As shown above, women with intellectual disabilities are different from the socially constructed norm. The difference stems from the impairment and from being women. What I hope to have demonstrated in this chapter is that taking difference into account is a necessary part of securing the rights of women with intellectual disabilities. How that difference is taken into account is what is important. It is possible to take difference into account in a negative way. For example, the medical model of disability does take difference into account, but by proceeding on an understanding of disability as inherent in the individual, the taking into account of difference does not further the rights of persons with disabilities because the wider community responds by trying to change the individual while the environment remains unchanged. It has already been shown that ignoring difference is simply not a viable option. Taking difference into account in a positive way is the end goal. Critical Disability Theory is very useful for this because it acknowledges that taking difference into account is important. It is capable of producing a positive response to difference because of the understanding of disability it relies on. Disability is seen as the result of the interaction between a person with impairment and her environment. This places an obligation on the wider community to respond to difference, not by trying to cure the individual, but by altering the social environment. In the criminal justice system, this positive response to difference can be achieved through pursuing substantive equality. It is important now to move from

theory to practice and consider how the criminal justice system perpetuates inequality and discrimination.

## Chapter Two – Recognizing Legal Capacity: Competence to Testify

### 2.1 Introduction

It is indisputable that persons with disabilities encounter the criminal justice system in different capacities, including, as defendants, witnesses, or complainants.<sup>218</sup> Their interaction with the criminal justice system is not always one that occurs on an equal footing with their non-disabled counterparts.<sup>219</sup> For this reason the CRPD expressly includes a requirement for state parties to take measures to “facilitate their effective role as direct and indirect participants, including as witnesses”<sup>220</sup> in the legal system in order for them to access justice on an “equal basis with others”.<sup>221</sup> For persons with intellectual disabilities, especially, participating in the legal system as witnesses has historically been problematic.<sup>222</sup> They have traditionally been considered as incompetent witnesses due to misconceptions that they are unreliable as witnesses.<sup>223</sup> In very simple terms a competent witness is one who may “lawfully give evidence.”<sup>224</sup> Persons with intellectual disabilities could not lawfully give evidence because the law in earlier times disqualified as a class/group people with all forms of “mental defects”<sup>225</sup> from acting as witnesses. This was based on a superstitious belief that the condition was “an infliction sent from heaven.”<sup>226</sup> Fortunately, this perception no longer holds. With the advancement of scientific knowledge, more is now known about intellectual disabilities and mental illness and the absolute rule of exclusion from testifying has

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<sup>218</sup> Ortoleva, *supra* note 1 at 299.

<sup>219</sup> *Ibid* at 287.

<sup>220</sup> CRPD, *supra* note 4 at art 13(1).

<sup>221</sup> *Ibid* .

<sup>222</sup> John Henry Wigmore, *Evidence in Trials at Common Law* (Boston: Little, Brown and Company, 1979) vol 2 at 498.

<sup>223</sup> *Ibid*.

<sup>224</sup> *Dladla v The State* AR483/09 at para 10, Madondo J [Dladla].

<sup>225</sup> Wigmore, *supra* note 222 at 498.

<sup>226</sup> *Ibid* at 492.

been modified across many jurisdictions.<sup>227</sup> This move symbolizes the gradual recognition within the criminal law of the testimonial competence of persons with intellectual disabilities. Instead of legal provisions barring people with intellectual disabilities as a class or group from being competent to testify, there now exists provisions that provide instead for the assessment of testimonial competence on a case by case basis.<sup>228</sup>

It is important to note that testimonial competence is about legal capacity. Those deemed to have legal capacity can testify and those deemed to lack legal capacity may not testify. This means that the gradual recognition of the testimonial competence of people with intellectual disabilities is synonymous with the recognition of their legal capacity. This is an important move towards addressing the stark inequality that previously characterized provisions relating to testimonial competence. But does the current approach to assessing the testimonial competence of persons with intellectual disabilities fully recognize their legal capacity? Does it enable them to participate in the legal system on an equal basis with others?

Using legal provisions from selected Southern African countries including Zimbabwe, Botswana, Namibia and South Africa, I argue that the approach taken falls short of legal capacity as it is constructed under the CRPD.<sup>229</sup> This is because it fails to take into account the understanding within the CRPD of disability as a result of the interaction between a person with impairment and her environment. The case-by-case approach to assessing competence involves assessing only the individual to the

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<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

<sup>229</sup> CRPD, *supra* note 4 at art 12.

exclusion of the environment. The underlying assumption in this approach is that incompetence inheres in the individual. The law is therefore preoccupied with asking the question whether the particular individual is competent to testify. By failing to take account of the environment and continually perceiving of incompetence as inherent in the individual, achieving equality will be an unrealizable goal. To achieve equality, it is important to take into account the environment.

This chapter is divided into three parts. The first part analyses the construction of legal capacity under article 12 of the CRPD arguing that the paradigm shift lays in the fact that legal capacity is constructed to encompass both the capacity to have rights and the capacity to act. The second part analyzes a provision dealing with the competence of witnesses that is common in the southern African countries under examination. It then deals with the approach taken by the relevant courts in assessing competence. The last part analyzes the requirement for witnesses to demonstrate the difference between truth and falsehood before they can be admonished to give evidence.

## **2.2 Legal Capacity under article 12 CRPD: A Paradigm Shift**

The construction of legal capacity under article 12 of the CRPD challenges the dominant societal and legal norms to such a great extent that it has been described as “emblematic of the paradigm shift of the convention.”<sup>230</sup> During the drafting of the CRPD, the exact construction of legal capacity was subject to much debate.<sup>231</sup> At issue was the question whether legal capacity involves both the capacity to have rights (identity) and the capacity to act (agency). The Committee on the Rights of Persons

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<sup>230</sup> Gerard Quinn, “Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD” (Paper delivered at Harvard Law School, 20 February 2010), [unpublished] at 4.

<sup>231</sup> Amita Dhanda, (2006 – 2007) 34 *Syracuse J Int’l Law & Com* 429 at 438.



with Disabilities is yet to consider the exact meaning of legal capacity under article 12, however, this question was analyzed by a group of experts in 2008 who drew up a legal opinion concluding that article 12 embodies both elements of identity and agency.<sup>232</sup>

The element of identity is seen in the subparagraph that reads:

States Parties reaffirm that persons with disabilities have the right to *recognition everywhere as persons* before the law.<sup>233</sup>

The term “as persons before the law”<sup>234</sup> embodies the identity element showing that legal capacity means the capacity to have rights. In order to have rights, one must be recognized as a person before the law.

The agency element can be seen in the following subparagraph:

States Parties shall recognize that persons with disabilities *enjoy legal capacity on an equal basis* with others in all aspects of life.<sup>235</sup>

The phrase “enjoy legal capacity on an equal basis with others”<sup>236</sup> embodies the element of agency, meaning effective capacity to act. In that respect therefore, article 12 is similar in construction to article 15 of the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>237</sup> which embodies both elements of identity and agency. But why is this important?

I would contend that the elements of identity and agency necessarily have to be simultaneously present in any concept of legal capacity that is capable of enabling the

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<sup>232</sup> Leeds Legal Opinion on Article 12 of the CRPD < <http://disability-studies.leeds.ac.uk/files/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf>>.

<sup>233</sup> CRPD, *supra* note at art 12(1) [emphasis added].

<sup>234</sup> *Ibid.*

<sup>235</sup> CRPD, *supra* note 4 at art 12(2) [emphasis added].

<sup>236</sup> *Ibid.*

<sup>237</sup> *Convention on the Elimination of all Forms of Discrimination against Women*, GA res 34/180, 34 UNGAOR Supp (No 46) at 193, UN Doc A/34/46 (entered into force 3 September 1981).

real realization of rights. If legal capacity refers to a “person’s power or possibility to act within the framework of the legal system,”<sup>238</sup> then legal capacity is necessarily about legal personhood.<sup>239</sup> Indeed it is only through this personhood that one can act. One must have rights and be able to act, for having rights when one cannot act may undermine those rights and one cannot act without a recognized identity that enables one to hold rights in the first place. The unification of both elements of identity and agency in article 12 is to be applauded. In order to fully grasp the paradigm shift and the exact extent to which article 12 challenges dominant societal and legal norms, I will now examine these two elements separately, solely for the purpose of making my argument about the extent to which article 12 challenges dominant societal and legal norms clearer.

### **2.2.1 The Significance of Capacity to have Rights (Identity)**

Legal capacity forces us to rethink the type of society that we value.<sup>240</sup> As mentioned above, legal capacity is about legal personhood. The concept of personhood has been described as “foundational”<sup>241</sup> to the paradigm shift in article 12 of the CRPD.<sup>242</sup> The relevant question now becomes what is at stake in talking about legal personhood? Quinn answers this question succinctly when he says, “the issues at stake actually transcend disability and cut to the heart of what we mean to be human.”<sup>243</sup> What then does it mean to be human? By what criteria do we ascribe personhood? What does the identity of a person with legal capacity look like? The dominant concepts of legal

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<sup>238</sup> Nilsson, *supra* note 176 at 7.

<sup>239</sup> *Ibid.*

<sup>240</sup> Quinn, *supra* note 230 at 9.

<sup>241</sup> *Ibid* at 4.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

personhood place great importance on rationality.<sup>244</sup> This is exclusionary because persons with intellectual disabilities in particular, may not always act rationally, at least according to legal benchmarks.<sup>245</sup> Furthermore, it is based on false premises<sup>246</sup> whereby it is assumed that a rational person makes rational choices. In other words, rationality influences choice, but in fact, as Quinn argues, choice is a “mix of raw preferences with rationality”.<sup>247</sup> We tend to choose what we prefer first and then rationalize our choice later.<sup>248</sup> This means that “our rationality is often shaped by our preferences and not the other way around”<sup>249</sup> Quinn argues that in fact, “most of us, most of the time, both think and act irrationally.”<sup>250</sup>

It is also important to take cognizance of the fact that embedded within the concept of personhood are political assumptions that are “always relative to the kind of society we value.”<sup>251</sup> The kind of society that is valued at the moment is one in which any person must be a rational person.<sup>252</sup> Rationality therefore becomes an essential feature of personhood. The fear is that if rationality no longer occupies a position of prominence, then what follows is chaos.<sup>253</sup> Quinn refers to this as “Cartesian anxiety”.<sup>254</sup> Through recognizing that even persons with the most severe intellectual disabilities also have legal capacity, article 12 in effect challenges the dominant norms that rationality is a pre-requisite to personhood and ultimately to legal capacity. This

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<sup>244</sup> Nilsson, *supra* note 176 at 19.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> Quinn, *supra* note 230 at 8.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid* at 9.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid* at 8.

<sup>253</sup> *Ibid* at 9

<sup>254</sup> *Ibid.*

forces us to re-think the type of society we consider to be ideal. However, this is not the only way in which dominant societal norms are challenged by the construction of legal capacity in the article. Examining the element of capacity to act helps us unearth yet another way in which article 12 challenges dominant norms and embodies a paradigm shift.

### **2.2.2 The Significance of Capacity to Act (Agency)**

The element of agency embodied within legal capacity under article 12 challenges dominant perceptions about the role of support. Capacity to act does not become a problem until one is dealing with the capacity to act of a person who requires a lot of support, such as a person with a severe intellectual disability, in order to exercise their legal capacity.<sup>255</sup> Article 12 deals with this situation by stating that:

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>256</sup>

This provision is in line with the statement in the Preamble that:

recognize[es] the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.<sup>257</sup>

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<sup>255</sup> Robert D Dinerstein, “Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making,” (2012) 19 Human Rights Brief, No. 2 8 at 9.

<sup>256</sup> CRPD, *supra* note 4 at art 12(3).

<sup>257</sup> *Ibid* at preamble para j.

Article 12 therefore, recognizes the reality that we all need support thereby legitimizing support.<sup>258</sup> It does, however, go on to require states parties to have in place safeguards that ensure:

that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence...<sup>259</sup>

Nonetheless, cognizance must be taken of the fact that this is a challenge to dominant societal and legal norms. The dominant norm is that the more support a person needs in order to exercise their legal capacity, the more likely they are to be regarded as lacking capacity. However, under the construction of legal capacity in article 12, no longer is requiring support seen as an indication of lack of legal capacity, but a necessary part of enabling one to exercise one's capacity. Not only does article 12 legitimize support, it also reinforces the understanding of disability as the result of the interaction between a person with impairment and his/her environment.

### **2.2.3 Legal Capacity and the Environment**

The recognition of the role of supports is also an indication that article 12 looks beyond the individual and acknowledges the role played by the environment in exercising legal capacity.<sup>260</sup> In other words it recognizes that incapacity is inherent in the individual with impairment. The recognition of the importance of support is an example of the

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<sup>258</sup> Nilsson, *supra* note 176 at 19.

<sup>259</sup> CRPD, *supra* note 4 at art 12(4).

<sup>260</sup> Nilsson, *supra* note 176 at 12.

requirement to alter the environment rather than trying to “fix” the individual.<sup>261</sup>

Dinerstein puts it succinctly when he says:

The salience of support is a concrete expression of the social, interactive model of disability that animates the entire Convention and sees disability as not a thing in and of itself but rather as a product of the interaction between an individual and his or her built and attitudinal environments.<sup>262</sup>

The recognition of the role of the environment challenges the dominant conception that incapacity inheres in the individual.

Legal capacity as it is constructed under article 12 indeed represents a paradigm shift. This paradigm means that all people including those who need a lot of support have both the capacity to have rights and the capacity to act. Furthermore, it recognizes that incapacity is not inherent in the individual. It is contended that the paradigm shift in article 12 is crucial for the realization of the equality rights of persons with disabilities, including intellectual disabilities. They are persons before the law, just like everyone else and they have the capacity to enforce their rights just like everyone else, even if they need support. This challenges prevailing societal and legal norms. This construction of legal capacity requires a lot of reform in order to bring domestic provisions in line with the paradigm shift in article 12. As one scholar aptly puts it, “the issue of legal capacity reform is probably the most important issue facing the international legal community at the moment”.<sup>263</sup> One of the important areas that are affected by legal capacity reform is the area of competence to act as witnesses in criminal proceedings for people with intellectual disabilities.

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<sup>261</sup> *Ibid.*

<sup>262</sup> Dinerstein, *supra* note 255 at 9.

<sup>263</sup> *Ibid.*

### 2.3 Testimonial Competence in Zimbabwe, South Africa, Namibia and Botswana:

The statutes governing criminal procedure and evidence in these countries all contain provisions declaring persons with the requisite state of mind as incompetent to testify. The terminology used in these statutes is strikingly similar perhaps owing to the influence of colonialism, with its transplant of English law.<sup>264</sup> To demonstrate the similarities in the language it is worthwhile to quote the various provisions.<sup>265</sup> In Zimbabwe the relevant statute contains a provision governing “[i]ncompetency from mental disorder or defect and intoxication”.<sup>266</sup> It provides that:

No person *appearing* or *[proven]* to be afflicted with *idiocy* or *mental disorder* or *defect* or laboring under any *imbecility of mind* arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.<sup>267</sup>

The relevant Botswana act provides that:

No person appearing or *[proven]* to be afflicted with *idiocy, lunacy, or insanity*, or labouring under any *imbecility of mind* arising from *intoxication* or otherwise, whereby he is deprived of the *proper use of reason*, shall be competent to give evidence while under the influence of any such malady or disability.<sup>268</sup>

The provision in the South African statute that applies reads as follows:

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<sup>264</sup> Tobias Pieter Van Reenen & Helene Combrinck, “The UN Convention on the Rights of Persons with Disabilities in Africa: Progress After 5 Years (2011) 8:14 Int’l JHR 133 at 145

<sup>265</sup> The statutory provisions and cases that are analyzed below make use of terms such as “imbecility” and “idiocy” which are derogatory and outdated. These are terms that urgently need to be changed and replaced by ones which foster respect for the inherent dignity and worth of persons with intellectual disabilities. However, because these are the terms that are used in the relevant statutes and case law, I refer to them in quotation marks.

<sup>266</sup> *Criminal Procedure and Evidence Act* [Chapter 9:07] s.246 [CPEA] [emphasis added] (Zimbabwe).

<sup>267</sup> *Ibid.*

<sup>268</sup> *Criminal Procedure and Evidence Act* [Chapter 08:02] s 216 (Botswana).

No person *appearing or [proven]* to be afflicted with mental illness or to be labouring under any *imbecility of mind* due to *intoxication or drugs or the like*, and who is thereby deprived of the *proper use of his reason*, shall be competent to give evidence while so afflicted or disabled.<sup>269</sup>

The provision in Namibia is exactly the same as the South African provision since Namibia adopts the South African criminal procedure and evidence rules. The effect of these provisions would seem to be that anyone who comes within the ambit of these provisions is incompetent to testify. What is of interest for the purposes of the present thesis is whether persons with intellectual disabilities fall within the ambit of these provisions. The manner in which these provisions have been interpreted by the courts must therefore be considered. The South African courts have considered the meaning of this provision in several decisions and though the courts in the other countries have not considered the exact interpretation of these provisions, it is instructive to consider the South African position given the similarities in the law of evidence in these countries as well as the persuasive value of South African law. Where it is possible, I will relate the discussion back to the other countries.

### **2.3.1 The Interpretation of Section 194 of the South African *Criminal Procedure Act*<sup>270</sup>**

Does section 194 apply to persons with intellectual disabilities? The Supreme Court of Appeal of South Africa had occasion to address the interpretation of

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<sup>269</sup> *Criminal Procedure Act* 51 of 1977 s 194 [CPA] (South Africa).

<sup>270</sup> *Ibid.*



section 194 in the case of *S v Katoo*.<sup>271</sup> The respondent was charged with kidnapping and rape arising from the following facts. On 13 July 2001, the 16 year old complainant disappeared from her parents' home. She was found the following day in the company of the respondent in his room. She was then taken to a doctor and the medical examination revealed that she had recently engaged in sexual intercourse. The matter was later reported and the respondent was charged. He appeared before the High Court in Port Elizabeth facing two charges. The first charge was kidnapping<sup>272</sup> and the second was rape, or alternatively sexual intercourse with an "imbecile".<sup>273</sup> At trial, the prosecution sought to call the complainant, described by a psychologist as having "severe mental retardation"<sup>274</sup>, as a witness. The evidence of the psychologist was to the effect that the complainant "could consequently be described as an imbecile."<sup>275</sup> The psychologist asserted that the complainant had a "very limited capacity to exercise her will and make choices, and that her mental age was that of a four-year-old child."<sup>276</sup> The trial judge interpreted section 194 to mean that due to her status as an "imbecile", the complainant was not competent to testify. The respondent was acquitted on both counts.

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<sup>271</sup> *S v Katoo* 2005 (1) SACR 522 (SCA) [Katoo].

<sup>272</sup> *Sexual Offences Act* 23 of 1957 s 13 (South Africa).

<sup>273</sup> *Ibid* at s 15 (1) (a) (South Africa). This provision makes it an offence to have sexual intercourse with someone who has been labeled an "imbecile" whether there was consent or not. This is problematic because it is based on the erroneous assumption that persons with intellectual disabilities cannot have intimate sexual relationships.

<sup>274</sup> *Katoo*, supra note 271 at para 6.

<sup>275</sup> *Ibid*.

<sup>276</sup> *Ibid*; Benedet & Grant supra note 60 at 50. The two authors argue that the equation of an adult with a mental disability with a child has negative implications for the respect of persons with intellectual disabilities. It gives a false picture that they are like children when in fact, they are not at all like children.

On appeal the specific question which the Supreme Court of Appeal had to answer was “whether the court was correct in law in refusing the state an opportunity to present the evidence of the complainant on the charges preferred?”<sup>277</sup> In disagreeing with the finding made by the trial court Jafta AJA clarified that two requirements must be satisfied before a witness can be found incompetent to testify. He stated that:

it must appear to the trial court or be proved that the witness suffers from (a) a mental illness or (b) that he/she labours under imbecility of mind due to intoxication or drugs or the like. Secondly, it must also be established that as a direct result of such mental imbecility, the witness is deprived of the proper use of his or her reason.<sup>278</sup>

The Supreme Court of Appeal held that these requirements were not satisfied in the case. In reaching this conclusion, Jafta AJA argued that evidence led at trial showed that she did not suffer from a mental illness, but that she was merely an “imbecile” and that alone did not make her incompetent to testify.<sup>279</sup> Jafta AJA clarified that “it is only imbecility induced by ‘intoxication, or drugs or the like’” that falls within the ambit of the section (and then only when the witness is deprived of the proper use of his or her reason).<sup>280</sup> He concluded that the evidence led did not suggest that the complainant was deprived of the proper use of her reason. It simply showed that she had “limited mental capacity”.<sup>281</sup> It was therefore, held that she did not fall within the ambit of section 194 and she was in fact competent to testify.

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<sup>277</sup> *Katoo*, *supra* note 271 at para 3, Jafta AJA.

<sup>278</sup> *Ibid* at para 10.

<sup>279</sup> *Ibid* at para 11.

<sup>280</sup> *Ibid*.

<sup>281</sup> *Ibid*.

As a result of the decision in *Katoo* therefore, it is settled that the provision in section 194 refers to mental illness or “imbecility” that results from intoxication or drugs and which affects a person’s powers of reason. In supporting this finding, Jafta AJA alluded to the history of this provision. The predecessor to the current section 194 was section 225 of the *Criminal Procedure Act of 1955*. It provided that:

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or laboring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.

There were several difficulties with the interpretation of this section as is demonstrated in the case of *S v Thurston*.<sup>282</sup> One such problem was that the provision was sometimes applied to persons with intellectual disabilities. As a result of these problems with the interpretation of the then section 225, the *Botha Commission of Inquiry on Criminal Evidence and Procedure*<sup>283</sup> recommended changes to this provision.<sup>284</sup> The changes included the removal of the words “idiocy” and “lunacy,” the substitution of the term “insanity” with mental illness and of the word “otherwise” with “the like” as well as the inclusion of the term “drugs”.<sup>285</sup> The amended version of this provision is the current section 194. It is contended that in spite of the changes, the amended provision might still cause confusion, as the *Katoo* case demonstrates. It remained dangerously susceptible to being interpreted to include persons with intellectual disabilities. I would contend that one of the sources of confusion is the terminology in these provisions. The

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<sup>282</sup> *S v Thurston & Another* 1968 (3) SA 284 (A).

<sup>283</sup> Botha Commission, “Commission of Inquiry into Criminal Procedure and Evidence” RP 78/1971 Government Printer, Pretoria.

<sup>284</sup> The Botha Commission of Inquiry is responsible for the drafting of the Criminal Procedure Act 51 of 1977 that is currently in force in South Africa.

<sup>285</sup> See *CPA*, *supra* note 269 at section 194.

anachronistic terms “idiocy” and “imbecility” are generally associated with intellectual disabilities. For example, in the Zimbabwean case of *S v Muvandiri*,<sup>286</sup> the court clarified that “the degree of mental retardation required to constitute imbecility was a question of fact provable by medical evidence.”<sup>287</sup> In another Zimbabwean case, the Court stated that “[a]n imbecile is not the same as an idiot. An idiot is a person who because of her mental deficiency, is unable to give informed consent, while an imbecile is a person with a degree of mental retardation exceeding feeble mindedness and deserving of protection.”<sup>288</sup> Similarly, the Botswana High Court stated that “idiots and imbeciles ... are mentally retarded but do not suffer a degree of deficiency as to be incapable of giving consent”<sup>289</sup>. Furthermore, the provisions in Zimbabwe and Botswana still read very much like the previous section 225 that was amended in South Africa. This language has already been proved to be problematic in the South African context and therefore may continue to carry potential for confusion in Zimbabwe and Botswana. These provisions need to be amended once and for all to remove any and all derogatory and anachronistic terminology associated with disability so that there remains no potential for them to be interpreted as meaning that persons with intellectual disabilities are incompetent to testify. Even though section 194 does not per se apply to persons with intellectual disabilities, it may create an additional requirement that affects the equality of persons with intellectual disabilities. This is particularly because of the

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<sup>286</sup> *S v Muvandiri* 1995 (2) ZLR 250 (H).

<sup>287</sup> *Ibid* at 252, Malaba J.

<sup>288</sup> *S v Wilson Banda* HH 74/02 at 4, Paradza J.

<sup>289</sup> *Boitumelo v the State* Criminal Appeal No F209 of 2003 at (Chinhengo J).

requirement it creates for the court to conduct an inquiry into the cause of “imbecility.”<sup>290</sup>

In holding that the trial court’s ruling in *Katoo* was an irregularity and a miscarriage of justice, Jafta AJA reiterated the duty of the trial court to conduct an inquiry in the following terms:

The trial court had a duty properly to investigate the cause of her imbecility before concluding that she was incompetent. Section 193 enjoins a trial court to enquire into this issue and decide whether a witness is in fact incompetent.<sup>291</sup>

The duty of the court to properly investigate any assertion that a witness has the state of mind that falls within the ambit of section 246 of the Zimbabwean statute<sup>292</sup> was also reiterated by the Supreme Court of Zimbabwe in the case of *Ndiweni*.<sup>293</sup> In this case, the defence made an assertion at trial that a state witness was laboring under some “mental disorder.”<sup>294</sup> This assertion was not challenged by the State<sup>295</sup> and the trial court did not probe the assertion. The Supreme Court of Zimbabwe found that this was an irregularity.<sup>296</sup> Once an assertion has been made by the defense that a witness is “afflicted with idiocy or mental disorder or defect”<sup>297</sup> the court which has power to decide on the competency of such a witness must look into that allegation by

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<sup>290</sup> *CPA*, *supra* note 269 at s 194.

<sup>291</sup> *Katoo*, *supra* note 271 at para 12.

<sup>292</sup> *CPEA*, *supra* note 266 at s 246.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*

<sup>295</sup> Generally, assertions that are not challenged are assumed to be accepted.

<sup>296</sup> *Ndiweni* S – 149 – 89.

<sup>297</sup> *CPEA*, *supra* note 266 at s 246.

conducting an inquiry.<sup>298</sup> This position is further reiterated in the professional manual for criminal defenders in Zimbabwe which states that:

Certain witnesses are not competent to give evidence according to the rules of evidence. For example, under s 246 CPE ... Where an allegation that a witness is mentally disordered is made during a criminal trial and the witness appears to be mentally disordered, the court must properly investigate whether the witness is incompetent in terms of this provision.<sup>299</sup>

It would seem that all that is required is for an assertion to be made that a witness is incompetent and this is enough to trigger an inquiry into the mental state of the witness for purposes of assessing whether or not she is competent. Of particular concern is the manner in which the competency assessment is conducted.

### **2.3.2 The Dual Approach to Assessment of Competence**

The approach to the assessment of competence is problematic because it is based on an assumption that incompetence inheres in the individual.<sup>300</sup> There are currently two approaches that may be taken in the determination of the competence of a witness.<sup>301</sup> Where a witness's competence is challenged, this is dealt with in a manner similar to that relating to issues of admissibility.<sup>302</sup> Where it is necessary to do so, a trial within a trial will be held to decide the matter.<sup>303</sup> But a trial within a trial is not always necessary. The question of incompetence can be decided by putting the witness in the stand and allowing her to testify.<sup>304</sup> A decision will then be made based on observing

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<sup>298</sup> *Ibid* at s 245.

<sup>299</sup> G Feltoe, *Criminal Defender's Handbook* (Harare: Legal Resources Foundation, 2009) at 103.

<sup>300</sup> Susan Stefan, "Silencing the Different Voice: Competence, Feminist Theory and Law" (1992 - 1993) 47 U Miami L Rev 763 at 765.

<sup>301</sup> *Dladla*, *supra* note 224 at para 12.

<sup>302</sup> *Ibid*.

<sup>303</sup> *Ibid*.

<sup>304</sup> *Ibid*.

the witness in the stand.<sup>305</sup> Where a judge is sitting with assessors,<sup>306</sup> only the judge will make a decision, even if questions of fact are involved.<sup>307</sup>

Whichever approach is taken, a psychologist is required to assess the witness and advise the court about whether or not the complainant is a competent witness. In the South African case of *Kevin Goodall v The State*, a psychologist was called on to testify concerning the complainant's mental and intellectual ability, her capacity to consent and her competence as a witness.<sup>308</sup> The psychologist used a test detailed in the Diagnosis and Statistical Manual of Mental Disorders of the American Psychiatric Association 4<sup>th</sup> edition (DSM-IV).<sup>309</sup> The psychologist also carried out two further tests for increased reliability.<sup>310</sup> The tests covered three areas, namely communication, daily living skills and socialization. Her overall score in the three areas of functioning fell in the moderate intellectual disability range. She was overly trusting, susceptible to flattering advances and unable to judge the safety of situations in which she found herself. The competence of the witness was assessed during trial and she was found to be a competent witness.<sup>311</sup>

Similarly, in *Chris Bindeman v The State*<sup>312</sup> the psychologist testified that the complainant in this case, a boy aged 13 years of age with an intellectual disability, had a mental ability of an 8 year old.<sup>313</sup> The psychologist concluded that he was not capable

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<sup>305</sup> *Ibid.*

<sup>306</sup> There is no jury system in these Southern African countries. A judge may sit with two assessors who act as triers of fact essentially performing a similar role as a jury.

<sup>307</sup> *Dladla, supra* note 224 at para 12.

<sup>308</sup> *Kevin Goodall v The State*, Case No A392/10, Saldanha J.

<sup>309</sup> *Ibid* at para 8, Saldanha J. DSM-IV is now superseded by the 2013 publication of DSM-V.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> *Chris Bindeman v The State* A359/12 Buikman AJ.

<sup>313</sup> *Ibid* at para 8, Buikman AJ.

of giving consent to sexual intercourse, but that he was capable of testifying in court.<sup>314</sup> The psychologist concluded that he had a good understanding of truth and falsehood and could therefore take the oath.<sup>315</sup> The expert's findings were not challenged and the witness proceeded to testify.

The courts place great weight on the evidence of a psychologist who will have conducted assessments focusing on the individual's abilities and limitations.<sup>316</sup> This means that the focus is on the individual being assessed to the exclusion of his/her surroundings or environment. In other words, the question that will be asked is whether or not this particular individual is incompetent. Incompetence is therefore, seen as inherent in the individual in the sense that it is regarded as a characteristic which is innate or intrinsic in the individual and is attributed to internal factors such as "mental illness, mental retardation, senility ... excessive use of drugs or alcohol."<sup>317</sup> Consequently, experts measure the competence of the individual using a variety of questionnaires and tests, all of which focus on the individual's capabilities.<sup>318</sup> This focus on the individual makes the law on competence unresponsive to the social and political dimensions that are at play when it comes to competence and the assessment of competence.<sup>319</sup>

Where competence is assessed by allowing the witness to testify and observing her in the stand, incompetence is treated as a characteristic inherent or innate in the individual. It is the individual's innate abilities that are being assessed to the exclusion

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<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> Stefan, *supra* note 300 at 777.

<sup>317</sup> *Ibid* at 776.

<sup>318</sup> *Ibid* at 777.

<sup>319</sup> *Ibid* at 776.



of the external environment or setting. This is contrary to the understanding of disability that is advanced by Critical Disability Theory where disability results from the interaction between a person with impairment and the environment. It is important to highlight the environment that prevails in a courtroom setting. The courtroom is generally stressful for any witness and this is why witness preparation is essential.<sup>320</sup> Stress may result from the formality with which the proceedings are conducted and if a witness is not properly prepared, this may negatively impact how they testify. For complainants of sexual assault, the knowledge that they will have to re-live the experience by talking about it in court can in itself cause anxiety and in turn affect how they testify.<sup>321</sup> The manner in which they testify in turn has a bearing on whether or not they are found to be competent as witnesses. Therefore, the external environment, in this case the courtroom, plays an important part in determining competency. Testimonial incompetence ought to be regarded as resulting from the interaction between characteristics innate in the individual with impairment and the external environment or setting. The failure to take the external environment into account may result in a person being declared incompetent to testify. This has serious implications because in some cases, without the testimony of the complainant, the chances for a successful prosecution may be lost.

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<sup>320</sup> Tasha Menaker & Robert J Cramer, "The Victim as Witness: Strategies for Increasing Credibility Among Rape Victim-Witnesses in Court" (2012) 20:5 Journal of Forensic Psychology Practice 424 at 424.

<sup>321</sup> *Ibid.*

Stefan argues that competency assessments are about more than just determining the individual's capabilities, but that they are about "interpersonal dynamics and social and political structuring of roles and communication."<sup>322</sup> She states that:

Determinations of competence cannot simply be the result of a series of observations or assessments and tests administered by an objective expert.<sup>323</sup>

This is because competence or the lack thereof, is "perceived, assessed and judged"<sup>324</sup> by other people.<sup>325</sup> Stefan argues that the contextual background for competency inquiries consists in a breakdown in communications and that these communications are about the values of the people doing the assessing as well as those who are being assessed.<sup>326</sup> Quite importantly, the author notes that the setting determines the quality of the interaction.<sup>327</sup> In the courtroom setting, judges infer competence or incompetence from the way that the witness delivers her testimony. This is not a relationship between equals.<sup>328</sup> These are relations of power and it is the powerful actor, in this case the judge, who is in control.<sup>329</sup> The powerful actor is out of the picture and only the powerless actor's capabilities are in question.<sup>330</sup> In criticizing what she sees as the neglect of issues of competence in feminist legal scholarship Stefan argues that:

the assumptions that incompetence inheres in the individual, that it is identifiable by objective, empirical observations by neutral experts, and that it is not subject to any gender distinctions or differentiations fly in

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<sup>322</sup> *Stefan, supra* note 300 at 779

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid* at 781.

<sup>328</sup> *Ibid* at 782.

<sup>329</sup> *Ibid* at 783.

<sup>330</sup> *Ibid.*

the face of feminist challenges to traditional claims of objectivity, neutrality and universality.<sup>331</sup>

There is also a gendered dimension to competency assessments. For example, Stefan notes that there are several competence inquiries that mainly apply to women.<sup>332</sup> These include but are not limited to “competence to consent to sexual intercourse, competence testing of women who press rape charges, and competence to make decisions about pregnancy”.<sup>333</sup> The same argument was also made in *DAI* by the Women’s Legal Education and Action Fund (LEAF) and the DisAbled Women’s Network (DAWN).<sup>334</sup> They pointed out that challenges to competence to testify were firstly, directed mainly at women in sexual assault cases and secondly that women with mental disabilities experienced relatively higher rates of sexual assault than their non-disabled counterparts and therefore, section 16 (3) of the *Canada Evidence Act* should be interpreted in the manner that best ensures access to justice.<sup>335</sup>

An assessment of competence that does not take the environment into account is not capable of adequately addressing inequality for witnesses with intellectual disabilities. Incompetence to testify must be seen as a result of the interaction between the individual and her environment, as opposed to being inherent in the individual. Only when the environment is seen as part of the problem, can it be seen as a part of the solution.

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<sup>331</sup> *Ibid* at 765.

<sup>332</sup> *Ibid* at 766.

<sup>333</sup> *Ibid*.

<sup>334</sup> *DAI*, *supra* note 9.

<sup>335</sup> Benedet & Grant, *supra* note 60 at 44. Section 16(3) reads as follows: “A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation. Testify on promising to tell the truth.” Prior to the decision in *R v DAI*, this provision had been interpreted in a manner requiring witnesses to demonstrate an understanding of the difference between truth and falsehood before testifying on a promise to tell the truth.

As stated above the paradigm shift in article 12 dealing with legal capacity also entails the provision of supports.<sup>336</sup> Therefore, competence to testify should only be assessed after the provision of the necessary supports. A person's abilities should only be assessed for the purposes of determining the supports that they will need in order to give effective testimony in court, not for the purpose of deciding whether or not they are competent witnesses. As Michael Bach rightly points out, "the question is no longer: does a person have the mental capacity to exercise his/her legal capacity? The question is instead: What types of support are required for the person to exercise his or her legal capacity?"<sup>337</sup> In the criminal trial setting, the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony?

Competency assessments should also take into account the gendered disability dimension in order for them adequately address issues of inequality for women with intellectual disabilities. However, it is important to note that a finding of competence to testify does not necessarily mean that someone can be sworn as a witness.<sup>338</sup> This is a separate and distinct issue and is dependent upon whether the witness can understand the nature of an oath.<sup>339</sup>

### **2.3.3 Truth and Falsehood: Application of Different Standards?**

A potential source of inequality lies in the requirement for the court to receive sworn evidence. The court can only receive testimony from a witness who has taken the oath,

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<sup>336</sup> *CRPD*, *supra* note 4 at art 12 (3).

<sup>337</sup> Nilsson, *supra* note 176 at 19.

<sup>338</sup> *Katoo*, *supra* note 271 at para 13.

<sup>339</sup> *Ibid* at para 13.

been affirmed or admonished. This is the position in South Africa,<sup>340</sup> Namibia,<sup>341</sup> Zimbabwe<sup>342</sup> and Botswana.<sup>343</sup> In order to demonstrate how this works, I will rely primarily on South African case law simply because the South African courts have dealt with this issue in relatively more detail. In South Africa this is dealt with under sections 162, 163 and 164 of the *Criminal Procedure Act*.<sup>344</sup> Section 162 stipulates that only people who are under oath can be examined as witnesses in court. This provision is so important that it has been described as “peremptory”<sup>345</sup> and cannot be deviated from, subject to sections 163 and 164. Alternatively a witness may give evidence under affirmation and this is provided for by section 163. A witness is affirmed in circumstances where perhaps due to religious beliefs they cannot take the oath.<sup>346</sup> Section 164 makes provision for witnesses who can neither take the oath nor testify under affirmation to be admonished to speak “the truth the whole truth and nothing but the truth.”<sup>347</sup> A witness is admonished in circumstances where he/she “is found not to understand the nature and import of the oath or affirmation”<sup>348</sup> due to “ignorance arising from youth, defective education or other cause.”<sup>349</sup>

Differential treatment arises from the fact that witnesses who take the oath are not required to demonstrate that they understand the meaning of the oath;<sup>350</sup> whereas

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<sup>340</sup> *CPA, supra* note 285 at s 164.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid* at s 164 (1).

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Frederick Swartz v State* A299/07 at para 13, Steyn AJ.

<sup>346</sup> *CPA, supra* note 285 at s 163.

<sup>347</sup> *Ibid* at s 164 (1).

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> *Sikhipha v The State* [2006] SCA 71 (RSA) at para 14, Lewis JA [Sikhipha].

those testifying under admonition are required to demonstrate an understanding of the difference between truth and falsehood.<sup>351</sup> In *Sikhipha v State* the appellant was convicted of the rape of a 13 year old girl and sentenced to life imprisonment.<sup>352</sup> He appealed against conviction and sentence on the basis that there were a number of irregularities at his trial, one of which was the fact that the magistrate failed to establish whether the complainant and an additional state witness, who were both minors, understood the nature and import of an oath.<sup>353</sup> Lewis JA noted that it is not required for a judicial officer to make a formal inquiry into whether or not a witness understands the oath, where the oath is taken, as in this case.<sup>354</sup> Nevertheless, the presiding judge or magistrate must be satisfied that the witness understands the oath and it is sufficient that he forms an opinion about this without conducting a formal inquiry.<sup>355</sup>

Where the witness is unable to take the oath because he/she does not understand the nature and import of an oath and is unable to testify under affirmation, the witness may be admonished to tell the truth.<sup>356</sup> Case law suggests that there are broadly two groups of people who give evidence under admonition; children and persons with intellectual disabilities.<sup>357</sup> These are the ones who are more likely to be deemed to not understand the nature and import of the oath. In *Motsisi v the State* the appellant was charged with rape, it being alleged that he raped the complainant, a 24 year old female

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<sup>351</sup> *Motsisi v The State* (513/11) [2012] ZASCA 59 (2 April 2012), Tshiqi JA. [Motsisi].

<sup>352</sup> *Sikhipha*, *supra* note 350 at para 2, Lewis JA.

<sup>353</sup> *Ibid* at para 2, Lewis JA.

<sup>354</sup> *Ibid* at para 14.

<sup>355</sup> *Ibid*.

<sup>356</sup> *CPA*, *supra* note 269 at s 164.

<sup>357</sup> See *Motsisi*, *supra* note 351 (persons with intellectual disabilities); *Sikhipha v The State*, *supra* note 350 (children).

who was allegedly “mentally retarded.”<sup>358</sup> He was convicted on this charge and sentenced to a term of 15 years imprisonment. He appealed to the North West High Court, Mafikeng, and his appeal was dismissed. His appeal against conviction and sentence before the Supreme Court of Appeal was based on a procedural matter, namely whether having decided that the complainant cannot give evidence under oath or affirmation in terms of sections 162 and 163 of the *Criminal Procedure Act* the complainant had been properly admonished by the trial court in terms of section 164 and 165 of the *Criminal Procedure Act*.<sup>359</sup> The trial court formed the opinion that the complainant did not understand the nature and import of an oath and decided to admonish her in terms of section 164 (1) of the Criminal Procedure Act. The Supreme Court of Appeal said the following about the proper manner in which a witness should be admonished:

Before a court may admonish a witness in terms of s164 read with s165 of the Criminal Procedure Act, it must satisfy itself whether or not the witness understands what it means to speak the truth. To that end it must conduct an enquiry.<sup>360</sup>

In this particular case, the following exchange sums up the effort that the magistrate made to comply with the section 164 requirement to enquire as to whether or not the witness understands the difference between truth and falsehood:

COURT: Tell me L, how old are you?

MS K: I am 17-years old [her mother had testified that she was born 22 June 1982 which meant that she was approximately 24 years at the time].

COURT: Can you give me the date on which you were born, do you know it?

MS K: No Your Worship, I do not know.

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<sup>358</sup> *Motsisi, supra* note 351.

<sup>359</sup> *CPA, supra* note 269.

<sup>360</sup> *Motsisi, supra* note 351 at para 11.

COURT: Now tell me what do you do? Do you attend school or do you work, or do you merely stay at home or what do you do?

MS K: Your Worship no, I do [am] not attending school at this moment, but I was attending at Iteko School.

COURT: What are you doing presently?

MS K: I am staying at home.

COURT: Yes now L, you are going to be asked questions relating to something that transpired some time ago, something that happened to you which is what we are going to ask about. Now as you should answer the questions freely without any fear as nothing is going to happen to you and that relates to the accused, between yourself and the accused.

MS K: Yes Your Worship.

COURT: Yes now you should try and tell us all that happened?

MS K: Yes.

L: admonished (through interpreter).

COURT: Yes the witness has been admonished. You may proceed Mr Prosecutor.<sup>361</sup>

The Supreme Court of Appeal found that the above questions were “irrelevant and clearly did not demonstrate to the court whether the complainant was able to testify and importantly, whether she was able to distinguish between truth and falsehood.”<sup>362</sup> The court went on to say that the duty to ensure that the witness is properly admonished or that the oath or affirmation is properly administered lies with the judicial officer.<sup>363</sup> The court had this to say:

What appears *ex facie* the record are the words ‘admonished (through interpreter)’ and nothing more. A judicial officer cannot simply abdicate his or her responsibilities and hope that an interpreter or intermediary will be able to admonish a witness, as it appears to have been the case in this particular matter.<sup>364</sup>

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<sup>361</sup> *Ibid* at para 13.

<sup>362</sup> *Ibid* at para 14.

<sup>363</sup> *Ibid* at para 15.

<sup>364</sup> *Ibid*.



In this case, there was no other evidence, apart from that of the complainant which was linking the accused person to the alleged offence.<sup>365</sup> The Complainant's evidence had not been properly placed on record because she had not been properly admonished. Therefore, her testimony could not be relied upon to convict the accused. The appeal was upheld and the conviction and sentence were set aside.

In *Director of Public Prosecutions KwaZulu – Natal v John Mekka* the question that had to be decided was whether or not section 164 of the *Criminal Procedure Act* required the magistrate to conduct an inquiry into whether or not the complainant understood the nature and import of an oath before deciding to admonish the complainant.<sup>366</sup> The respondent was convicted of rape and indecent assault by the Regional Court in Durban. He was sentenced to 10 years imprisonment. On appeal, the Natal Provincial Division set aside the conviction and sentence on the basis that the magistrate's failure to inquire from the complainant whether or not she understood the nature and import of an oath amounted to an irregularity that rendered the complainant's evidence inadmissible. Because there was no other evidence establishing the accused person's guilt, the conviction and sentence were set aside.<sup>367</sup> The appeal was against the setting aside of the conviction and sentence. The following exchange took place in the Regional Court:

COURT: M. how old are you?

[. . .]

M.N.: I'm nine years.

[. . .]

COURT: Do you go to school?

M.N.: Yes.

COURT: What standard are you in or class?

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<sup>365</sup> *Ibid* at para 17.

<sup>366</sup> *Director of Public Prosecutions, KwaZulu – Natal v Mekka* 2003 (4) SA 275 (SCA) [Mekka].

<sup>367</sup> *Ibid* at para 1.

M.N.: Standard 2.

COURT: You're a clever girl. All right, do you know the difference between truth and lies?

M.N.: Yes.

COURT: What happens to you at school if your teacher finds out you're telling lies?

M.N.: You get punished.

COURT: All right, its very important you tell us the truth today in court and you're warned to tell the truth.

On appeal, the court held that the fact the magistrate inquired about the complainant's age and thereafter went on to inquire if she understood the distinction between truth and lies meant that the magistrate had considered that the complainant did not understand the nature and import of the oath.<sup>368</sup> Reiterating the requirement for the witness to demonstrate an understanding of the difference between truth and falsehood, the court stated that:

The complainant said that she understood the difference and that one got punished if one were to tell a lie thereby indicating that she knew that it was wrong to tell a lie. It was on the basis of these answers that the magistrate concluded, as she was in my view entitled to do, that the complainant understood the difference between truth and falsehood.<sup>369</sup>

It was concluded that there was no irregularity and consequently the respondent's conviction and sentence were reinstated.<sup>370</sup>

The South African Constitutional Court in *DPP v Minister of Justice and Constitutional Development* confirmed the position that it is a requirement for witnesses to demonstrate an understanding of the difference between truth and falsehood.<sup>371</sup> The Constitutional Court stated that:

The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence

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<sup>368</sup> *Mekka*, *supra* note 366 at para 11.

<sup>369</sup> *Ibid* at para 12.

<sup>370</sup> *Ibid* at para 14.

<sup>371</sup> *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at para 166.

given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial where such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.<sup>372</sup>

The Constitutional Court went on to clarify that section 164 of South Africa's Criminal Procedure Act does not require knowledge of abstract concepts of truth and falsehood. What is required is for a child to "understand what it means to be required to relate what happened and nothing else."<sup>373</sup>

It would seem from the cases considered above that there is a difference in treatment between witnesses who testify under oath and witnesses who testify under admonition. Those who testify under oath are not required to demonstrate an understanding of an oath or the difference between truth and falsehood. All that is required is that they take the oath by simply saying the words prescribed by the statute for taking the oath. Those who are admonished are, however, required to demonstrate an understanding of the difference between truth and falsehood. I would contend that this is essentially a difference in treatment between persons without intellectual disabilities and persons with intellectual disabilities. I make this argument because persons with intellectual disabilities are disproportionately represented among the

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<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid* at para 165.

witnesses who are admonished.<sup>374</sup> Witnesses who are admonished may therefore be held to a higher standard and this goes against the paradigm shift in article 12 of the CRPD which requires the recognition of the legal capacity of all persons with disabilities.

Furthermore, the requirement for these witnesses to demonstrate an understanding of the difference between truth and falsehood prior to being allowed to testify is also an additional barrier that is placed on witnesses with intellectual disabilities and there is a danger that judicial officers may question witnesses about the difference between truth and falsehood in abstract terms. This is problematic because it fails to recognize that a witness may fail to define the difference between truth and falsehood yet still be able to actually tell the truth.<sup>375</sup>

The requirement for witnesses with intellectual disabilities to demonstrate the difference between truth and falsehood was recently examined in Canada. From the language in the *Canada Evidence Act*,<sup>376</sup> it was possible for adults with mental disabilities whose competence was challenged to testify without having to take the oath provided they could communicate the evidence.<sup>377</sup> They could testify on a promise to tell the truth.<sup>378</sup> Nonetheless, the courts interpreted this provision by requiring the

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<sup>374</sup> And children.

<sup>375</sup> Nicholas Bala et al, "A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000) 38 Osgoode Hall LJ 409. A distinction between the ability to tell the truth and the ability to define the difference between truth and falsehood has been recognized in relation to child witnesses.

<sup>376</sup> *Canada Evidence Act* s 16(3).

<sup>377</sup> Benedet & Grant, *supra* note 60 at 35.

<sup>378</sup> *Ibid.*

witness to demonstrate an understanding of the duty to tell the truth.<sup>379</sup> In *R v McGovern*,<sup>380</sup> the court had this to say:

It is thus quite clear that to be able to communicate evidence a witness must understand what it means to tell the truth...It is quite clear, in my view, that, in permitting a witness to give evidence “on promising to tell the truth,” the statute implicitly requires an understanding on the witness’s part of what a promise is and the importance of keeping it. Otherwise, the promise would be an empty gesture.<sup>381</sup>

The Ontario Court of Appeal took the same approach in *R v Farley*.<sup>382</sup> Justice Doherty held that though section 16 had been amended, the requirement to conduct an inquiry into the witness’s appreciation of what it means to tell the truth remained intact.<sup>383</sup>

In *R v DAI*,<sup>384</sup> the defendant was accused of sexually assaulting three female complainants, all of whom had intellectual or physical disabilities. In all three cases, the defendant had been dating their mothers. The defendant was acquitted on all three counts. The Crown appealed only in respect of one complainant called K who was 19 years of age at the time of the offence. The complainant’s teacher, to whom she had made a complaint against the defendant, was only allowed to testify in a *voir dire* to determine the complainant’s competence after the complainant herself had testified. The point was to determine the admissibility of her hearsay evidence. The complainant had already been declared incompetent to testify and the hearsay evidence of her teacher was considered inadmissible because the complainant had been unable to demonstrate an understanding of the abstract notion of truth telling at the competency *voir dire*. The

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<sup>379</sup> *Ibid* at 36.

<sup>380</sup> *R v McGovern* (1993) 88 Man R 18, 22 CR (4<sup>th</sup>) 359 (CA) [McGovern].

<sup>381</sup> *Ibid* at paras 8 – 9.

<sup>382</sup> *R v Farley* (1995), 23 OR (3d) 445, 40 CR (4<sup>th</sup>) 190 (CA) [Farley].

<sup>383</sup> *Ibid* at para 17.

<sup>384</sup> *R v I (D)*, 78 WCB (2d) 379, 2008 CarswellOnt 2637 (Ont Sup Ct J).

complainant's teacher, however, explained that when the complainant said she didn't know, it meant that she could not process the question and retrieve the answer. Had the teacher testified first, she may have clarified for the court what some of the complainant's responses mean.<sup>385</sup> The defendant was acquitted. On the appeal of *R v DAI* in the Supreme Court of Canada competency assessments requiring witnesses to demonstrate an understanding of the difference between truth and falsehood were rejected.<sup>386</sup> The majority's decision was based on principles of statutory interpretation and it was held that all that was required by section 16 (3) was for the witness to be able to communicate the evidence.<sup>387</sup> Reading any further requirement into those words would be adding to the legislation words that are not present therein.<sup>388</sup> Benedet and Grant argue that the bar for competence must not be placed too high especially since the trier of fact is not obligated to accept the witness's evidence.<sup>389</sup> Rules regulating the admissibility and weight of evidence could be used to deal with the fair trial concerns for the accused person.<sup>390</sup> Rather than being an empty gesture, testifying on a promise to tell the truth has the effect of underlining the seriousness of the occasion.<sup>391</sup> After *R v DAI*, the competence assessment must focus on whether or not the witness can communicate the evidence as opposed to the previous position whereby the complainant had to demonstrate an understanding of the abstract notions of truth telling and falsehood.<sup>392</sup> It is contended that requiring a witness to demonstrate the difference between truth and falsehood amounts to setting the bar higher for witnesses who are

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<sup>385</sup> Benedet & Grant, *supra* note 60 at 42.

<sup>386</sup> *DAI*, *supra* note 9.

<sup>387</sup> *Ibid* at paras 43 and 59.

<sup>388</sup> *Ibid*.

<sup>389</sup> Benedet & Grant, *supra* note 60 at 44.

<sup>390</sup> *Ibid*.

<sup>391</sup> *DAI*, *supra* note 9 at para 36.

<sup>392</sup> Benedet & Grant, *supra* note 60 at 33.

admonished to tell the truth. Furthermore, it calls into question, rather than recognize the legal capacity of witnesses with intellectual disabilities. Accordingly, this requirement should be abolished.

## **2.4 Conclusion**

Article 12 of the CRPD requires the recognition of legal capacity of all persons with disabilities. The area of competence to testify for witnesses with intellectual disabilities is one in which their legal capacity is involved. Over time, the legal capacity of persons with intellectual disabilities to act as witnesses has evolved. The law has evolved considerably from denying them legal capacity through provisions that bar them as a group from testifying in court to assessing competence on a case by case basis. However, there are still some provisions in existence in the laws of the southern African countries dealt with above which may undermine the recognition of the legal capacity of persons with intellectual disabilities. One such law is the law governing incompetence due to mental state. Another is the requirement to demonstrate an understanding of the difference between truth and falsehood before one can testify. The current approach which relies heavily on a psychologist's assessment of the witness may be criticized on the basis that it treats incompetence as inherent in the individual. For as long as incompetence is viewed as something inherent in the individual, and not something that is a result of the interaction between the individual with impairment and her environment, there is an incomplete understanding of the real problem. An incomplete understanding of the problem will result in the formulation of a solution that is also incomplete and inadequate. So if equality of access to justice is to be achieved, then the understanding of disability has to influence legislation regulating competence

to testify. What remains to be considered is how equality may be achieved for witnesses with intellectual disabilities in the criminal justice system.



## Chapter Three - Responding to Disability Inequality: Reasonable Accommodation

### 3.1 Introduction

The interaction between witnesses with intellectual disabilities and the criminal justice system is at times unduly burdensome. In acknowledging this fact, Chief Justice McLachlin has noted that “rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these witnesses to testify in courts of law.”<sup>393</sup> The CRPD addresses this by requiring the making of reasonable accommodation.<sup>394</sup> Most domestic jurisdictions respond to this through legislative provisions containing protective measures for vulnerable witnesses.<sup>395</sup> Which of these is the most efficient method of addressing this problem? Does it need to be one or the other? In other words, how best is a balance between protective measures and accommodation to be achieved, or can both be pursued singularly without risk of derogating from the norms required by the other?

This chapter argues that the concept of reasonable accommodation is particularly useful in meeting the needs of witnesses with intellectual disabilities, but it is not the only method for doing so. Reasonable accommodation is effective because it takes into account both the individual’s difference and the role played by the environment. This is consistent with Critical Disability Theory’s understanding of disability as a result of the interactional process between an individual with impairment and the environment. I argue that an essential feature of reasonable accommodation is the flexibility to respond to the individual needs of each witness and this is something

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<sup>393</sup>*R v DAI*, *supra* note 9 at para 1, McLachlin CJ.

<sup>394</sup>CRPD, *supra* note 4 at art 13.

<sup>395</sup>CPEA, *supra* note 266 at s319 B; CPA, *supra* note 269 at s 158A.

that protective measures for vulnerable witnesses fail to do. This is because such measures are specific in offering what courts can choose from and can therefore be unduly rigid. For that reason therefore, they may fall short of the reasonable accommodation standard that is provided for in the CRPD. Nevertheless, they remain useful, albeit to a limited extent.

I also argue that reasonable accommodation alone will not adequately meet the needs of witnesses with intellectual disabilities in the criminal justice system. Some of the problems they face in the justice system are a result of rigid rules of evidence and criminal procedure. These rules and procedures therefore, need to be modified in order to meet the needs of witnesses with intellectual disabilities.

Using practical examples from programs that have been implemented in Israel and in South Africa, I argue for the making of reasonable accommodations in Zimbabwe. I go on to identify specific areas that require accommodation, which are not dealt with by the protective measures but are crucial in enabling witnesses with intellectual disabilities to give effective testimony. These include witness preparation to enhance communication, training of personnel in the justice system, and adaptation of questioning, particularly during cross-examination.

The chapter is divided into three parts. The first part argues that the elasticity of the concept of reasonable accommodation is what makes it a particularly effective method of enabling effective witness testimony. The second part assesses the protective measures for vulnerable witnesses in Zimbabwe and South Africa. The third part identifies two areas that are neglected in the protective measures, namely, the training

of personnel in the criminal justice system and the adaptation of questioning techniques, particularly in cross examination. Lastly, suggestions for amendments to Zimbabwe's problematic legislation are made.

### **3.2 The Elasticity of the concept of Reasonable Accommodation**

The concept of reasonable accommodation is an approach that is flexible in responding to the needs of witnesses with disabilities. The CRPD specifically requires the making of reasonable accommodation as a means of ensuring access to justice on an equal basis for persons with disabilities. The CRPD states that:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including *through the provision of procedural and age – appropriate accommodations* ...<sup>396</sup>

Reasonable accommodation is defined in the CRPD as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>397</sup>

Elsewhere, reasonable accommodation has been described as a “legal notion”<sup>398</sup> that stems from “jurisprudence in the realm of labor and indicates a form of relaxation aimed at combating discrimination caused by the strict application of a norm”.<sup>399</sup>

Reasonable accommodation therefore, predated the CRPD.<sup>400</sup> Anna Lawson states that “even before the CRPD, there was an understanding that the human rights of disabled people would be effectively enjoyed and protected only if their different circumstances

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<sup>396</sup>CRPD, *supra* note 4 at art 13 (1) [emphasis added].

<sup>397</sup>*Ibid* at art 2.

<sup>398</sup> Gerard Bouchard & Charles Taylor, “Building the Future: A Time for Reconciliation Abridged Report” (Gouvernement du Quebec) at 23.

<sup>399</sup>*Ibid*.

<sup>400</sup> See for example the Americans with Disabilities Act of 1990, 42 USC 12101 (as amended).¶

and needs were recognized and, where reasonable, accommodated.”<sup>401</sup> For an enhanced understanding of the flexibility element of the concept of reasonable accommodation in the CRPD, it is instructive to examine how it developed.

There was a particularly strong emphasis placed on appropriate responses to the individual “needs and circumstances” of persons with disabilities in the World Programme of Action Concerning Disabled Persons that was adopted by the UN General Assembly in 1982. It stated that:

[t]he principle of equal rights for the disabled and non-disabled implies that the needs of *each and every individual are of equal importance*, that these *needs must be made the basis for the planning of societies*, and that resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.<sup>402</sup>

The decision of the Human Rights Committee in *Hamilton v Jamaica* also exemplifies an understanding of the concept of reasonable accommodation prior to the coming into force of the CRPD.<sup>403</sup> The Jamaican state’s failure to hold a prisoner whose legs were paralyzed in a place that was adapted to meet his needs was held to constitute a breach of the provision of the *ICCPR* dealing with the humane treatment of detainees.<sup>404</sup> Similarly, in *Price v UK*<sup>405</sup> the European Court of Human Rights held that the failure by the UK authorities to ensure that the applicant, who was four limb deficient and suffered from kidney problems, was detained in facilities and in conditions that were

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<sup>401</sup> Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Oxford: Hart Publishing, 2008) at 24.

<sup>402</sup> World Programme of Action Concerning Disabled Persons, General Assembly Resolution 37/52 (3 December 1982) at para 25 [emphasis added].

<sup>403</sup> *Hamilton v Jamaica* Communication Number 616/1995, Views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

<sup>404</sup> *ICCPR*, *supra* note 48 at art 10.

<sup>405</sup> *Price v UK* App No 33394/96 (2001) 34 EHRR 1285.

adapted to her individual needs was degrading treatment in breach of the *European Convention on Human Rights*.<sup>406</sup> In light of the importance of addressing the individual needs and circumstances of persons with disabilities, Lawson's contention that the formulation of a duty to reasonably accommodate was "inevitable" is indeed justified.<sup>407</sup>

The response to the individual needs of persons with disabilities is certainly a "pre-condition to effective human rights protection".<sup>408</sup> This can be demonstrated by the recognition of the importance of reasonable accommodation to the principle of equality and non-discrimination. In its General Comment No 5, the UN Committee on Economic, Social and Cultural Rights recognized the centrality of the concept of reasonable accommodation to the equality of persons with disabilities by emphasizing that article 2(2) of *International Covenant on Economic, Social and Cultural Rights* required States to ensure that the rights contained in ICESCR were enjoyed by all including persons with disabilities.<sup>409</sup> Although the ICESCR makes no specific reference to disability as a ground upon which discrimination is prohibited, The Committee has held that disability is included in the article's reference to "other status".<sup>410</sup>

The Committee noted that disability based discrimination included:

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<sup>406</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (entered into force 3 September 1953) art 3.

<sup>407</sup> Lawson, *supra* note 401 at 23.

<sup>408</sup> *Ibid.*

<sup>409</sup> General Comment No 5, Persons with Disabilities adopted by the Committee on Economic, Social and Cultural Rights at its 11<sup>th</sup> session in 1994 (UN Doc E/1995/22); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force Jan 3, 1976) [ICESCR].

<sup>410</sup> *Ibid.*

any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.<sup>411</sup>

Reasonable accommodation is mentioned under the CRPD in articles 24(2)(c) and article 24(5) dealing with the right to education, article 27(1)(i) concerning the right to employment, article 14(2) on liberty and security of person and, in slightly different terms, article 13(1) on access to justice which provides for “procedural and age appropriate accommodations.”<sup>412</sup> The continuing prominence given to individual difference can be seen in the definition of reasonable accommodation in the CRPD, which is defined as the provision of, “necessary and appropriate modification and adjustments ... *where needed in a particular case*...”<sup>413</sup>

The CRPD highlights the importance of the concept of reasonable accommodation by making the failure to provide reasonable accommodations discriminatory.<sup>414</sup> However, it is important to note that the duty to reasonably accommodate does have limits. Reasonable accommodation is to be provided where it does not cause a “disproportionate or undue burden”.<sup>415</sup> It is therefore a question of “balancing”<sup>416</sup> different interests in that it means “on the one hand, the necessary and appropriate modifications and adjustments required in a particular case to ensure the enjoyment or exercise of a right for a person with a disability, but it does not, on the other hand, impose a disproportionate or undue burden on the party who is obliged to

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<sup>411</sup>*Ibid* at para 15.

<sup>412</sup> CRPD, *supra* note 4 at art 13(1).

<sup>413</sup> CRPD, *supra* note 4 at art 2 [emphasis added].

<sup>414</sup>*Ibid*.

<sup>415</sup> CRPD, *supra* note 4 at art 2.

<sup>416</sup> Holger Kallehauge “General Themes Relevant to the Implementation of the UN Disability Convention into Domestic Law: Who is Responsible for the Implementation and how should it be Performed?” in Arnardottir & Quinn, *supra* note 116, 201 at 211.

fulfill the obligation.”<sup>417</sup> Kallehauge notes that whether a burden is disproportionate or undue is contingent upon who the holder of the duty is.<sup>418</sup> For example, he notes that if the duty holder is a “government or public authority or a major private company, the burden will have to be extremely heavy before it can be considered disproportionate or undue.”<sup>419</sup> Though it entails the spending of money, the right to freedom from discrimination, of which the provision of reasonable accommodation is now a part, is a civil and political right, which is subject to immediate realization.<sup>420</sup> However, Lawson notes that because of the expenditure involved, there is likely to be some acceptance of the principle of progressive realization.<sup>421</sup> This demonstrates that reasonable accommodation is not subject to the traditional dichotomies<sup>422</sup> in international human rights law between civil and political rights on the one hand (which are considered cost-free and immediately realizable), and economic, social and cultural rights (which are considered costly and subject to progressive realization).<sup>423</sup>

The following extract illustrates the importance of reasonable accommodation in general:

The right to education ... would be meaningless for children with sensory impairments, such as blindness or deafness, without some provision for information and communication to be made accessible to them ... The right to work would be effectively nullified for many disabled people if employers were entitled to treat them in exactly the same way as their non-disabled colleagues without any obligation to

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<sup>417</sup>*Ibid* at 210 – 211.

<sup>418</sup>*Ibid* at 211.

<sup>419</sup>*Ibid*.

<sup>420</sup>Lawson, *supra* note 401 at 32.

<sup>421</sup>*Ibid*.

<sup>422</sup>*Ibid* at 33.

<sup>423</sup> See Frédéric Mégret, “The Disabilities Convention: Towards a Holistic Concept of Rights” (2008) 12:2 Int’l JHR 261 for a discussion on how the CRPD ignores the traditional dichotomies between types of rights in the international human rights law discourse.

consider adapting timetables, physical features or equipment to accommodate their needs.<sup>424</sup>

Kallehauge opines that reasonable accommodation “will probably become the most important legal concept of the Convention and the most crucial instrument whenever a case of implementation has to be decided.”<sup>425</sup> Implicit within the concept of reasonable accommodation is the prominence of individual difference. The response is made manifest in the environment, but it is a response to the individual difference. The role of the environment is therefore simultaneously recognized in that it is the failure of the environment to adapt to the needs arising from individual needs that result in discrimination. Lawson puts it this way:

Reasonable adjustment in essence requires that relevant difference in circumstance be identified and that it be responded to in the form of appropriately different treatment.<sup>426</sup>

This highlights the importance of taking difference into account, along with the environment. In this sense, the understanding of disability as an interactional process between individual and environment is neatly encapsulated within the concept of reasonable accommodation. Both elements have to be considered in order to appropriately respond to the individual needs of persons with disabilities in achieving equality. An approach that does not take into account individual differences may allow certain persons with disabilities to fall through the cracks, so to speak.

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<sup>424</sup>Lawson, *supra* note 401 at 24.

<sup>425</sup>Kallehauge, *supra* note 416 at 211.

<sup>426</sup>Lawson, *supra* note 401 at 296.



### 3.2.1 Reasonable Accommodation versus Universal Design

The concept of universal design is one that does not take into account the individual difference and needs of persons with disabilities. The CRPD defines universal design as:

the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.<sup>427</sup>

In very simple terms, universal design is about making an environment accessible to all.<sup>428</sup> This is an approach that can prove inadequate for the purposes of enabling witnesses with intellectual disabilities to testify because intellectual disabilities exist on a spectrum that is “broad and varied”.<sup>429</sup> The fact that they exist on a broad spectrum in turn requires an approach that is sufficiently flexible to meet the needs of individuals with intellectual disabilities. Despite the perceived advantage of universal design as dispensing with the need to make particularized adjustments, it is not sufficiently responsive to the needs of persons with intellectual disabilities. Lawson aptly sums it up by stating that “[a]lthough compliance with principles of universal design will reduce the need for particular adjustments to be made, it will never remove the need for such adjustments.”<sup>430</sup> There is therefore a very real danger that many will fall through the cracks of universal design. In any event, the CRPD specifically requires the provision of reasonable accommodation.<sup>431</sup> Because of the attention to individual difference, needs

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<sup>427</sup>CRPD, *supra* note 4 at art 2.

<sup>428</sup> See generally R Imrie, “From Universal to Inclusive Design in the Built Environment” in J Swain, S French, C Barnes and C Thomas, eds, *Disabling Barriers – Enabling Environments* (London: Sage 2004).

<sup>429</sup> Sharon Primor & Na’ama Lerner, “The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice: Accommodations in the Criminal Process” Bizchut, The Israel Human Rights Center for People with Disabilities at 7.

<sup>430</sup>Lawson, *supra* note 401 at 296 .

<sup>431</sup>CRPD, *supra* note 4 at art 13(1).

and circumstances of persons with disabilities, one scholar describes reasonable accommodation as embodying a “spirit of change and flexibility”.<sup>432</sup> The very fact that it requires “adaptation and change”<sup>433</sup> is what makes reasonable accommodation “the driving force behind the construction of a model of disability equality which is not built on the need to comply with a dominant norm.”<sup>434</sup> The concept of reasonable accommodation has been utilized at the domestic level in Israel specifically to accommodate witnesses with intellectual disabilities in the criminal justice system. It is instructive to examine the concept of reasonable accommodation from a practical point of view.

### **3.2.2 Reasonable Accommodation in Practice: The Example of Israel**

A possible method of dealing with the accommodation of witnesses is through the enactment of specific legislation. For example, Israel enacted legislation in 2005 which deals with accommodating people with disabilities in the justice system. This is an example of the collaboration between government and NGOs. Israel’s Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities 5766 - 2005) is the result of an initiative by Bizchut, The Israel Human Rights Center for People with Disabilities.<sup>435</sup> Bizchut recommended several methods by which the participation of persons with intellectual disabilities in the criminal justice system can be enhanced.<sup>436</sup> The organization recommended the use of “special

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<sup>432</sup> D Lepofsky, “The Duty to Accommodate: A Purposive Approach” (1992) 1 Canadian Labor Law Journal 1 at 21.

<sup>433</sup> S Fredman, “Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?” in Lawson and Gooding, eds, *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) 203.

<sup>434</sup> Lawson, *supra* note 401 at 296.

<sup>435</sup> Primor & Lerner, *supra* note 429 at 13.

<sup>436</sup> *Ibid* at 9.

investigators”<sup>437</sup> trained in criminal procedure and on the “implications of intellectual, linguistic, psychosocial, and behavioral related disabilities in regards to the legal process, and the different professional tools which may be employed in this context.”<sup>438</sup> These special investigators are employed from those in the social work or psychology fields and their role is to mediate the negative impact flowing from the lack of adequate knowledge and training amongst police investigators in interviewing a person with an intellectual disability.<sup>439</sup> The Israeli Act makes provision for the referral by a police investigator of a case that falls within its ambit to a Special Investigator.<sup>440</sup> The Israeli Act also provides that the special investigators must be “trained psychologists, social workers, clinical experts in criminology or people with special training in the field of special education.”<sup>441</sup>

Bizchut also recommended that a witness with an intellectual disability have at her disposal a “basket of accommodations”<sup>442</sup> as opposed to a single accommodation, which is to be determined at the outset of the trial with input from an expert in the field.<sup>443</sup> The Israeli Act provides for the following accommodations:<sup>444</sup>

1. Giving testimony in the accused person’s absence, but in the presence of his lawyer.<sup>445</sup>
2. Allowing the witness to testify behind a partition.<sup>446</sup>
3. Testifying outside the witness stand.<sup>447</sup>

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<sup>437</sup>*Ibid.*

<sup>438</sup>*Ibid.*

<sup>439</sup>*Ibid.*

<sup>440</sup>*The Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities) 5766 – 2005 at s 3 [Israeli Act].*

<sup>441</sup>Israeli Act, s 6.

<sup>442</sup>Primor & Lerner, *supra* note 429 at 10.

<sup>443</sup>*Ibid.*

<sup>444</sup>Israeli Act, *supra* note 440 at s22.

<sup>445</sup>*Ibid* at s 22(1).

<sup>446</sup>*Ibid* at s 22(2).

<sup>447</sup>*Ibid* at s 22(3).

4. The removal of formal attire.<sup>448</sup>
5. Giving testimony in the judge's chambers<sup>449</sup>
6. Allowing the witness to testify outside the “court hall”.<sup>450</sup>
7. Employing the use of Alternative Augmentative Communication, which includes people’s assistance, “computerized aids, communication panels, photos, symbols, letters or words.”<sup>451</sup>
8. Allowing the witness to testify while accompanied.<sup>452</sup>
9. The use of a special advisor to give advice on such things as phrasing, simplifying questions, and giving warnings concerning potential harm to the witness.<sup>453</sup>

Furthermore, the use of a trained “personal facilitator”<sup>454</sup> with no previous acquaintance with the witness whose job it is to “simplify and give meaning”<sup>455</sup> to the complex and sometimes abstract questions that are asked in court and to provide support to the witness was recommended.<sup>456</sup> Bizchut also recommended “facilitated communication”<sup>457</sup> including the provision of speech therapy and the use of communication boards.<sup>458</sup> Adaptation of the courtroom setting or environment<sup>459</sup> as well as expediting the trial in light of the fact that some persons with intellectual disabilities may have problems with long term memory was also recommended.<sup>460</sup> Similar provisions relating to accommodating witnesses in the criminal justice system should also be enacted in Zimbabwe. In making recommendations for reform in the Zimbabwean criminal justice system, it is important to take into account those aspects

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<sup>448</sup>*Ibid* at s 22(4).

<sup>449</sup>*Ibid* at s 22(5).

<sup>450</sup>*Ibid* at s 22(6).

<sup>451</sup>*Ibid* at s 22(7).

<sup>452</sup>*Ibid* at s 22(8).

<sup>453</sup>*Ibid* at s 22(9).

<sup>454</sup> Primor & Lerner, *supra* note 429 at 10.

<sup>455</sup>*Ibid*.

<sup>456</sup>*Ibid*.

<sup>457</sup>*Ibid* at 11.

<sup>458</sup> *Ibid*.

<sup>459</sup>*Ibid*.

<sup>460</sup>*Ibid*.

of the criminal justice system which have been developed for other types of vulnerable witnesses in Zimbabwe. One such system, and perhaps the most notable one, is the Victim Friendly Court System.

### **3.2.3 Building on the Victim Friendly Program**

This program is a result of collaboration between the government, notably the Ministry of Justice, and non-governmental organizations.<sup>461</sup> This initiative was commenced by the Ministry of Justice in 1994 in response to “petitions from several women’s groups and the Report of the Vulnerable Witnesses Committee in 1992, which found that women and children were unfairly treated by the courts and that no allowances were made for children’s different cognitive and developmental levels.”<sup>462</sup> This is a program that is mainly directed at children as witnesses in the criminal justice system and it also includes children with disabilities.<sup>463</sup> The program also later included collaboration with the Ministry of Health which provides a “functioning working space at Harare Hospital.”<sup>464</sup>

The program’s sustainability has been attributed to its multi-sectoral approach<sup>465</sup> which “enhances co-ordination and co-operation, and ensures a continuity of care and treatment for the children and their families.”<sup>466</sup> Each of the different sectors involved in this program has a particular characteristic that is unique to itself and the combined strength of these sectors is what makes for a successful victim friendly program. Non-

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<sup>461</sup> Jonathan Brakarsh, “The Victim Friendly Courts System in Zimbabwe: A Holistic Approach to Child Sexual Abuse and HIV Prevention” (2003) DFID Resource Centre for Sexual and Reproductive Health at 7.

<sup>462</sup> *Ibid.*

<sup>463</sup> *Ibid* at 10.

<sup>464</sup> *Ibid* at 7.

<sup>465</sup> *Ibid* at 8.

<sup>466</sup> *Ibid.*

governmental organizations are “strong in training government personnel and providing technical and administrative expertise.”<sup>467</sup> They are also strong when it comes to sourcing funds because many “donors prefer giving funds to NGOs”.<sup>468</sup> The strength of government is its ability to sustain the program “through integrating the system into government activities”<sup>469</sup> through such methods as the creation of permanent posts such as a Victim Friendly coordinator within the police department.<sup>470</sup> Government strength is also seen in that “[k]ey people working for the government are well connected and powerful. When these people are included in the programme, they begin to work for the programme objectives, and inform and influence their peers.”<sup>471</sup> Of course the success of such a multi-sectoral approach is contingent upon effective coordination and cooperation between the different sectors.”<sup>472</sup> Equally important is the exchange of ideas between the different sectors.<sup>473</sup>

The Victim Friendly Program consists of a number of important components including the creation of victim friendly courts, fostering an “enabling legal environment”<sup>474</sup> through the amendment of legislation and lobbying for harsher sentences; “psycho-social approaches”<sup>475</sup> including counseling services; community outreach; provision of medical treatment, training and income generation.<sup>476</sup>

The success of the program in the Zimbabwean context can be seen in the following extract:

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<sup>467</sup>*Ibid.*

<sup>468</sup>*Ibid.*

<sup>469</sup>*Ibid.*

<sup>470</sup>*Ibid.*

<sup>471</sup>*Ibid.*

<sup>472</sup>*Ibid.*

<sup>473</sup>*Ibid.*

<sup>474</sup>*Ibid* at 9.

<sup>475</sup>*Ibid.*

<sup>476</sup>*Ibid* at 9 – 10.

According to the Permanent Secretary of the Ministry of Justice, D Mangota (1999) the number of cases of children successfully communicating with court officers and speaking in court has risen since the beginning of the programme. This is due to changes such as the training of key court functionaries, the preparatory work with victims, the presence of Social Welfare Officers, the introduction of a separate room for children to testify in, and the use of technologies such as video and audio equipment to facilitate sensitive interviewing of witnesses. Mangota also states that police officers and prosecutors now routinely use child psychologists to assist them in their interactions with child victims.<sup>477</sup>

Despite the successes, Brakarsh notes that the program does have some weak points and one would do well to bear these in mind in relation to a solution for witnesses with intellectual disabilities. These include aftercare covering medical and counseling services.<sup>478</sup> Approximately 45% of people return for a second counseling and medical session.<sup>479</sup> Only 26% of the witnesses return for the second and most important HIV test.<sup>480</sup> The author attributes this to the high cost of transport to the hospital which most families cannot afford. Other factors which may weaken the strength of such a program include “government bureaucracy, political agendas, and economic instability.”<sup>481</sup> For example, the Victim Friendly system was adversely affected by the limited supply of foreign currency in Zimbabwe around 2003 which affected the procurement of spare parts for equipment.<sup>482</sup> Another weakness is that counseling, which forms an important part of the Victim Friendly Program, is modeled

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<sup>477</sup> *Ibid* at 11.

<sup>478</sup> *Ibid* at 12.

<sup>479</sup> *Ibid*.

<sup>480</sup> *Ibid*.

<sup>481</sup> *Ibid*.

<sup>482</sup> *Ibid*.

on Western forms of counseling and the author notes that this may not be particularly useful in an African setting.<sup>483</sup> Brakarsh puts it thus:

Research has shown that clients in Sub Saharan Africa may have different expectations than those in western countries. Traditionally counselling in Zimbabwe is more prescriptive than the western model, and a mix of prescriptive and descriptive counselling has been found to be a more appropriate model. Also, individual confidentiality is not taken for granted, and involving the family in family-confidentiality is sometimes preferred.<sup>484</sup>

Other weaknesses include deeply rooted misconceptions about the court system and about child sexual abuse which are difficult to remove.<sup>485</sup>

However, this does not take away from the importance of such a program and the fact that there will be problems should not mean that efforts should not be made to protect such vulnerable witnesses. On the contrary, this is more of a reason to take further steps to protect the rights of vulnerable witnesses within the criminal justice system. The Victim Friendly Program provides a useful model upon which a similar program for witnesses with intellectual disabilities may be built upon. In Zimbabwe, South Africa and Namibia, there is legislation which provides for protective measures for vulnerable witnesses. The adequacy of these measures in responding to the needs to witnesses with intellectual disabilities in giving testimony is considered next.

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<sup>483</sup>*Ibid.*

<sup>484</sup>*Ibid.*

<sup>485</sup>*Ibid.*



### 3.3 The Adequacy of Protective Measures for Vulnerable Witnesses

Witnesses with disabilities, including intellectual disabilities, are frequently dealt with in accordance with the measures for the protection of vulnerable witnesses. Legislation governing criminal evidence and procedure in Zimbabwe, South Africa and Namibia contain measures dealing with vulnerable witnesses. Botswana is the exception; its Criminal Procedure and Evidence Act<sup>486</sup> does not contain provisions dealing with vulnerable witnesses.<sup>487</sup> However, it is important to note that the category of “vulnerable witness” encompasses a number of witnesses, not just witnesses with disabilities. In Zimbabwe, a vulnerable witness is any:

person who is giving or will give evidence in the proceedings [who] is likely—

- (a) to suffer substantial emotional stress from giving evidence or
- (b) to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully.<sup>488</sup>

Though not expressly included within the definition of vulnerable witness, persons with intellectual disabilities may and do frequently fall under the ambit of this provision. The measures may be applied by the court *mero motu*<sup>489</sup> or after an application by either of the parties.<sup>490</sup> However, the measures do not apply automatically. The court decides whether or not to take any of the measures, and in reaching that decision, has to consider the following:

- (a) the vulnerable witness’s age, mental and physical condition and cultural background; and

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<sup>486</sup> CPEA (Botswana), *supra* note 268.

<sup>487</sup> *Ibid.*

<sup>488</sup> CPEA, *supra* note 266 at s319B.

<sup>489</sup> Of the court’s own free will.

<sup>490</sup> CPEA, *supra* note 266 at s 319B (b).

- (b) the relationship, if any, between the vulnerable witness and any other party to the proceedings; and
- (c) the nature of the proceedings; and
- (d) the feasibility of taking the measure concerned; and
- (e) any views expressed by the parties to the proceedings; and
- (f) the interests of justice.<sup>491</sup>

The South African Act on the other hand specifically includes persons with disabilities within its definition of vulnerable witnesses. In South Africa, a vulnerable witness is a person:

- (a) who is under the age of eighteen;
- (b) against whom an offence of a sexual or indecent nature has been committed;
- (c) against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship;
- (d) who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.<sup>492</sup>

The position in Namibia is the same as in South Africa. In Zimbabwe, the protective measures for vulnerable witnesses include the appointment of an intermediary,<sup>493</sup> the use of a support person<sup>494</sup> - with such a person being a “parent, guardian or other relative of the witness, or any other person who the court considers may provide the witness with moral support whilst the witness gives evidence<sup>495</sup> – the giving of evidence

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<sup>491</sup>*Ibid* at s 319C (1) (a – f).

<sup>492</sup>*Ibid* at s 158A (3) (a – d).

<sup>493</sup>*Ibid* at s 319B (i).

<sup>494</sup>*Ibid* at s 319B (ii).

<sup>495</sup>*Ibid* at s 319F (2).

through a screen or by means of closed circuit television<sup>496</sup> on condition the “accused and his legal representative are able to see and hear the person giving evidence,”<sup>497</sup> change of venue,<sup>498</sup> and the exclusion of “all persons or any class of persons from the proceedings while the person is giving evidence.”<sup>499</sup> In South Africa, the “special arrangements include the “relocation of the trial,”<sup>500</sup> the rearrangement, removal, or addition of furniture in the court room or a change in the positions where the parties sit or stand,<sup>501</sup> the appointment of a support person,<sup>502</sup> giving evidence behind a screen or giving in a different room via closed circuit television<sup>503</sup> and the “taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.”<sup>504</sup>

These measures amount to provisions that are already laid down and the only consideration that the court has to make is firstly, whether a witness falls within the category of “vulnerable witness” and secondly, which of the array of measures to avail to that witness. There is no room for the assessment of individual needs on a case-by-case basis. The question therefore becomes whether these provisions are consistent with the duty of reasonable accommodation under the CRPD. What is the desirability of having fixed measures that are already set out? Lawson recognizes that the duty to reasonably accommodate under the UK Disability Discrimination Act entails a reactive

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<sup>496</sup>*Ibid* at s 319F (iii).

<sup>497</sup>*Ibid*.

<sup>498</sup>*Ibid* at s 319F (iv).

<sup>499</sup>*Ibid* at s 319F (v).

<sup>500</sup>*CPA, supra* note 269 at s 158(2)(a).

<sup>501</sup>*Ibid* at s 158(2)(b).

<sup>502</sup>*Ibid* at s 158(2)(c).

<sup>503</sup>*Ibid* at s 158(2)(d).

<sup>504</sup>*Ibid* at s 158(2)(e).

element as well as an anticipatory element.<sup>505</sup> The reactive element “embraces those duties which are entirely individualized and reactive in nature, simply requiring duty-bearers to take reasonable steps to accommodate the needs of a particular disabled person with whom they are confronted.”<sup>506</sup> The anticipatory element entails a requirement to “anticipate what barriers such people are likely to encounter and to take reasonable steps to remove them in advance.”<sup>507</sup> Lawson notes that there is a possibility that states can create “anticipatory duties”<sup>508</sup> especially since that “possibility ... was not clearly contemplated in any of the pre-CRPD discussions.”<sup>509</sup>

What is important to note concerning the adequacy of protective measures for vulnerable witnesses in enabling women with intellectual disabilities to testify is that there is a danger that these may not be adequate. This is recognized in a thematic study carried out by the UN on violence against women and girls with disabilities. The study states the following:

Furthermore, the justice system may fail to accommodate her physical, communication or other specific needs. Victim protection measures and other measures to support victims may be inadequate for women with disabilities.<sup>510</sup>

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<sup>505</sup> United Kingdom Disability Discrimination Act, 1995, c50.

<sup>506</sup> Lawson, *supra* note 401 at 63.

<sup>507</sup> *Ibid* at 64.

<sup>508</sup> *Ibid* at 31.

<sup>509</sup> *Ibid*.

<sup>510</sup> Report of the UN High Commissioner for Human Rights, *Thematic Study on the Issue of Violence Against Women and Girls and Disability* UNGAOR, 20<sup>th</sup> Sess, Supp No 2 and 3, UN Doc A/HRC/20/5, (2012) at para 41.

This is especially the case for women with intellectual disabilities because the “spectrum of intellectual, psychosocial and communication disabilities is broad and highly varied.”<sup>511</sup> Primor and Lerner go on to conclude that:

creating accommodations requires maximum flexibility in order to provide every person with accommodations that meet their specific needs in accordance with the characteristics and severity of their particular disability. Thus, some people may require moral support and reassurance, some will require simplification of the questions. Others need to be able to take a short recess during the testimony for whenever they are unable to concentrate and some individuals may require the use of an interpreter or speech-to-speech transmittal in order to testify. Thus the law should not restrict itself to a limited set of accommodations but rather allow court discretion on individual basis.”<sup>512</sup>

Therefore, whilst set measures for vulnerable witnesses may be useful, they should not exclude the possibility of providing further accommodation which a particular witness may require. As Lawson puts it, it is “beyond doubt ... that states will be required to introduce individualized reasonable accommodation duties which are responsive to the circumstances of the particular case.”<sup>513</sup> The wording in the South African legislation may leave it open for the South African courts to do just that. It permits the court to take “any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.”<sup>514</sup> This is, however, not the case with the Zimbabwean legislation. In order to comply with the duty of reasonable accommodation under the *CRPD*, there is a need for an approach that assesses and accommodates the individual needs of the witness in question. What then is the purpose of accommodating a witness at trial?

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<sup>511</sup>Primor & Lerner, *supra* note 429 at 7.

<sup>512</sup>*Ibid.*

<sup>513</sup>Lawson, *supra* note 401 at 31.

<sup>514</sup>*CPA*, *supra* note 269 at s 158(2)(e).

### 3.4 Specific Areas where Accommodation is needed

The purpose of accommodating persons with disabilities in the legal system is clearly stated in the CRPD as to “facilitate their effective role as direct and indirect participants.”<sup>515</sup> The importance of witness testimony for the success of the case cannot be over-emphasized.<sup>516</sup> The prosecutor is not the one who adduces evidence; it is the witness. Witnesses are therefore, the “primary means by which information is presented” to the court. It is therefore crucial that the witness be perceived as credible in order for her evidence to be accepted.<sup>517</sup> The adversarial criminal process relies on direct and oral testimony by witnesses, making witness testimony of utmost importance.<sup>518</sup> The ability to communicate effectively is therefore very important in effectively discharging one’s role as a witness. This is because the credibility of the witness also turns on the ability of the witness to communicate effectively.

It is usual to think of the credibility of a witness as something that is innate and has to do with the witness herself. It seems an odd proposition to say that someone’s credibility is affected by the external environment for we tend to think of credibility in terms of the specific individual in question. But I make this argument because of how credibility is assessed for witnesses. Credibility is assessed primarily by examining the manner in which the witness testifies. This refers both to how the witness gives her main evidence (examination in chief) and how she responds to questions put to her in cross-examination. Because of the correlation between the ability to effectively

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<sup>515</sup>CRPD, *supra* note 4 at art 13(1).

<sup>516</sup> Menaker & Cramer, *supra* note 320 at 424.

<sup>517</sup>*Ibid.*

<sup>518</sup>*Ibid* at 425.

communicate, both verbally and non-verbally, the proposition that credibility is not innate is especially true for witnesses with disabilities.

When it comes to verbal communication, witnesses with intellectual disabilities in particular may have a difficult time. Similarly when it comes to non-verbal communication, persons with intellectual disabilities do not behave in the same way that other witnesses do, neither can the behavior be interpreted in the same way. Ziv succinctly sums up this challenge when she says, [p]ersons with disabilities challenge assumptions about what is considered “normal” behavior and speech, and about the meaning of such communicative measures.”<sup>519</sup> This in turn affects their credibility and poses a particular challenge to “what has long been considered an exclusive and core role of the judiciary: determination of truth through the unmediated impression of human behavior and oral communication.”<sup>520</sup> So how does the external environment affect the credibility of a witness?

### **3.4.1 Credibility of Witnesses and the Environment: Importance of Witness Preparation**

The environment in a criminal court may negatively affect a witness’s testimony. For this reason, prosecutors often meet with witnesses prior to giving testimony so that they can be prepared for the experience of testifying in court.<sup>521</sup> This is known as witness preparation and it differs from the unethical practice of coaching a witness in that it “enhances the delivery of testimony without altering its content”<sup>522</sup> Witness preparation

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<sup>519</sup> Ziv, *supra* note 37.

<sup>520</sup> *Ibid.*

<sup>521</sup> Menaker & Cramer, *supra* note 320 at 425.

<sup>522</sup> *Ibid.*

serves two purposes: enhancing the communication skills of the witness and reducing the witness's anxiety about testifying in court which can be a highly stressful activity, especially for victim witnesses.<sup>523</sup> The act of testifying in court has been shown to have the potential to cause "psychological stress and traumatization" for victim-witnesses in general, but more so for victims of rape.<sup>524</sup> Generally, female victims of rape are more likely to be perceived in a negative light and blamed for being raped due to stereotypes about rape.<sup>525</sup> This makes witness preparation very important.<sup>526</sup> Witness education entails the process of familiarizing the witness with the setting in the courtroom, the role of the different participants including the judge or magistrate, the defense counsel and the prosecutor, as well as the court procedures in an adversarial system with the aim of decreasing stress, anxiety and confusion associated with testifying in an adversarial system.<sup>527</sup> It also entails the equally important practice of reviewing the facts of the case in order to make sure that there are no inconsistencies in the witness's testimony and in the witness statements.<sup>528</sup> Enhancing the witness's delivery of her testimony entails polishing the witness's "personal demeanor and style, confidence, and communication ability."<sup>529</sup> Effective testimony is testimony that is credible and persuasive.<sup>530</sup> Both verbal and non-verbal communication has an impact on the believability of the witness.<sup>531</sup> In terms of verbal communication research indicates that "powerful, confident speech lacking in uncertainty conveys credibility, truthfulness, competence,

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<sup>523</sup>*Ibid.*

<sup>524</sup>*Ibid* at 426.

<sup>525</sup>*Ibid* at 427.

<sup>526</sup>*Ibid.*

<sup>527</sup>*Ibid* at 425.

<sup>528</sup>*Ibid.*

<sup>529</sup>*Ibid* at 426.

<sup>530</sup>*Ibid.*

<sup>531</sup>*Ibid.*



intelligence, and trustworthiness.”<sup>532</sup> Furthermore, uninterrupted narrative testimony has been shown to be perceived by jurors as portraying competence.<sup>533</sup> As far as non-verbal communication is concerned, research indicates that witnesses who “maintain a relaxed posture, lean forward slightly, make frequent eye contact with the attorney and jury, and genuinely express emotions are perceived to be more believable.”<sup>534</sup>

Educating the witness about court procedures is a “critical first step to increasing victim competency.”<sup>535</sup> This is because studies show that victims who have been educated about the court procedures and are familiar with the setting in the courtroom experience decreased levels of “testimony-related anxiety.”<sup>536</sup> This has an impact on how the victim testifies in court. The more anxious the victim-witness is, the more likely they are to become emotional during cross-examination thereby affecting their verbal communication.<sup>537</sup> This anxiety is also associated with and leads to behaviors that are perceived as indicators of deception, such as, lack of eye contact and fidgeting.<sup>538</sup> The relationship between the rape victim and the prosecutor has also been shown to be of great importance.<sup>539</sup> The victim witness is more likely to associate lack of contact with the prosecutor with a lack of interest in her case.<sup>540</sup> This leads to feelings of anger, fear, and frustration with the criminal justice system which manifests itself in the witness responding defensively to questioning.<sup>541</sup> It may also lead to the

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<sup>532</sup>*Ibid.*

<sup>533</sup>*Ibid.*

<sup>534</sup>*Ibid.*

<sup>535</sup>*Ibid* at 427.

<sup>536</sup>*Ibid.*

<sup>537</sup>*Ibid.*

<sup>538</sup>*Ibid.*

<sup>539</sup>*Ibid.*

<sup>540</sup>*Ibid.*

<sup>541</sup>*Ibid* at 427.

witness responding incompletely or inaccurately. It is therefore important for the prosecutor to contact the victim-witness at an early stage and establish a rapport that results in the victim-witness feeling supported and protected by the prosecutor.<sup>542</sup> Lessons can be drawn from a program established in South Africa to prepare witnesses for court called the Sexual Assault Victim Empowerment Program (SAVE).

### **3.4.2. The Sexual Assault Victim Empowerment Program**

In recognition of the importance of witness preparation, it is recommended that there be a program established in Zimbabwe that assists the prosecution by preparing witnesses for court. In the 1990s, the South African Police Service and prosecutors in South Africa's Department of Justice approached a non-governmental organization known as Cape Mental Health which offers a "comprehensive mental health service to people living in Cape Town", a majority of whom are people with intellectual disabilities, for assistance in sexual assault cases involving people with intellectual disabilities.<sup>543</sup> Preparation is so important, and indeed it has been recognized that it also enhances the ability of a witness to testify. Indeed "[a]ny witness will perform better when they feel supported, informed about the process, free to request clarification, and free of negative judgement."<sup>544</sup>

Court preparation involves a visit to the court, meetings with the prosecutor, explanation of who will be present and their roles, and preparation for cross-examination. The complainant is never "coached" on her account. The importance of truth-telling is emphasized, and a

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<sup>542</sup>*Ibid* at 428.

<sup>543</sup> Beverly Dickman et al, "'How Can She Possibly Manage in Court?' An Intervention Programme Assisting Complainants with Intellectual Disability in Sexual Assault Cases in the Western Cape" in Brian Watermeyer et al, eds, *Disability and Social Change: A South African Agenda* (Cape Town, HSRC Press, 2006) 116 at 118.

<sup>544</sup>*Ibid* at 125.

central goal is to empower the complainant to say she does not know – when this is appropriate – and to ask for clarification when necessary.<sup>545</sup>

The strengths of a program such as SAVE is that it lends support not only to the complainants, but also to the prosecutors who often handle a heavy caseload. Witness preparation has been shown to improve a witness' competence to testify. It has been recognized that:

with the availability of social work support, it is sometimes decided that the complainant is likely to be competent after court preparation, despite considerable limitations at the time of assessment. Some of the people found to be competent within the SAVE programme would not be found to be so in a less sympathetic system.<sup>546</sup>

The program has psychologists who provide “psycho-legal assessments”<sup>547</sup> and expert evidence. It also provides court preparation and support for the family of the complainant.<sup>548</sup> The program is only available where there is evidence of a disability and it is likely that the case will result in criminal prosecution/ that the case will go to court. This is to manage finite resources and deal with the demand for this service which has steadily increased over the years.<sup>549</sup> In instances where no legal action ensues, then the program provides social services to help the victim and her family deal with the trauma of the ordeal and to try and prevent further abuse from occurring.<sup>550</sup> Cape Mental Health also runs a training program for prosecutors and police detectives.<sup>551</sup> Cape Mental Health provides the services of social workers who help prepare the victim for court. A similar program could also be initiated in Zimbabwe.

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<sup>545</sup>*Ibid* at 123.

<sup>546</sup>*Ibid* at 125.

<sup>547</sup>*Ibid* at 118.

<sup>548</sup>*Ibid*

<sup>549</sup>*Ibid*

<sup>550</sup>*Ibid*

<sup>551</sup>*Ibid*

Another important measure that needs to be taken is the training of magistrates and judges.

### **3.4.3 The Training of Magistrates and Judges**

The assessment of witness credibility also involves watching the witness in the stand. As has already been alluded to, the behavior of witnesses with intellectual disabilities challenges the norm. This makes the training of magistrates and judges on disability issues of crucial importance. The training of magistrates and judges and all personnel in the justice system is provided for in article 13 (2) of the CRPD. This type of training is seen as an essential part of access to justice. Article 13 (2) of the CRPD reads as follows:

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

This idea of training is important in that it recognizes that access to justice is about a relationship between people; in this case, between a witness with an intellectual disability and a judicial officer. This is also a relationship that is not equal. It is also recognition that their testimony is influenced by outside factors in the environment and in this case, the environment also includes that attitudes and perceptions of judicial officers. The thematic study on Violence against Women and Girls with Disabilities expressed concern that:

there [were] no systematic programmes in place to train judges, lawyers and law enforcement officials on the rights of women and girls with disabilities and effective ways to communicate with them.<sup>552</sup>

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<sup>552</sup> Thematic Study, *supra* note 509 at para 43.

The training can cover a whole range of issues, including typical behaviors. It may also cover other issues, such the fact that the dominant practice of equating an adult's developmental or mental age with that of a child infantilizes adults with mental disability.<sup>553</sup> This is “at the heart of some of the stereotyping that is particularly predominant in sexual assault prosecutions”.<sup>554</sup> Here, the focus is on what the woman cannot do as opposed to what the woman can do.<sup>555</sup> Mental age fails to describe a woman in a “holistic” way.<sup>556</sup> A woman with the mental age of a 6 year old for example, is not the same as a 6 year old. She has had life experience and this has shaped who she is and she has undergone hormonal changes. Whilst mental age is helpful in clarifying ability such as mathematical ability, it is unhelpful in understanding the witness as a woman with a disability.<sup>557</sup> “If the complainant is analogous to a six-year-old child, then any sexual activity or conversations about sex on her part can be characterized as inappropriate.”<sup>558</sup> The training of judges and magistrates is therefore very important in enabling women with intellectual disabilities to give effective testimony. Equally important is the adaptation of questioning technique in court.

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<sup>553</sup> Benedet & Grant, *supra* note 60 at 50.

<sup>554</sup> *Ibid* at 52.

<sup>555</sup> *Ibid* at 51.

<sup>556</sup> *Ibid*.

<sup>557</sup> *Ibid*.

<sup>558</sup> *Ibid* at 52.

#### 3.4.4 Cross-Examination and Type of Questions Asked.

Cross-examination is conducted for purposes of testing the credibility of a witness in order to protect the defendant from wrongful convictions.<sup>559</sup> It is a way of safeguarding the fair trial rights of the defendant. The conduct of “careful questioning and cross-examination” is one of the ways which are thought to actually ensure that the witness speaks the truth.<sup>560</sup> The other ways include the fear of punishment since evidence is given under oath and keeping the witnesses apart from one another so that they have no chance of discussing the case and contaminating or distorting one another’s evidence.<sup>561</sup> In *R v DAI* the argument that was made for not setting the competence bar too high is that “allowing the witness to testify is only the first step in the process. The witness’s evidence will be tested by cross-examination. The trier of fact will observe the witness’s demeanor and the way she answers the questions.”<sup>562</sup> Mr. Justice Binnie in dissent agreed with the trial judge’s finding that the complainant’s credibility could not be tested because she could not be cross-examined.<sup>563</sup> The dissent seemed to suggest that the competency assessment showed that the complainant could not be subjected to rigorous cross-examination. Benedet and Grant argue that this rigorous and confrontational cross – examination is unhelpful when it comes to getting to the truth with a witness with a mental disability.<sup>564</sup>

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<sup>559</sup>*Ibid* at 47.

<sup>560</sup>Gisli H Gudjonsson & John Gunn, “The Competence and Reliability of a Witness in a Criminal Court: A Case Report” (1982) 141 *British Journal of Psychiatry* 624 at 624.

<sup>561</sup>*Ibid*.

<sup>562</sup>*DAI*, *supra* note 9 at para 72, McLachlin CJ.

<sup>563</sup>*Ibid* at para 94, Binnie J.

<sup>564</sup>Benedet & Grant, *supra* note 60 at 47.

Research shows that witnesses with mental disabilities respond better to particular types of questioning. The nature of the questions that are asked has a bearing on the “accuracy and completeness” of witness testimony.<sup>565</sup> The best questions to ask them are the open questions that allow them to narrate events in their own words; Questions such as “what happened?”<sup>566</sup> The explanation for this can be seen in the following extract:

The influence of question type can be understood in terms of the different cognitive and social demands of different question formats. For more open questions, the task is to tell the interviewer what the witness can remember relying on their own memory. For more specific, closed questions, the task changes to one of providing the interviewer with what he or she wants the witness to remember that the witness may not be able to recall. As witnesses with intellectual disabilities spontaneously recall fewer details concerning events, it is unsurprising that they provide less accurate answers to specific questions and tend to confabulate.”<sup>567</sup>

Unlike evidence-in-chief, which mainly relies on questions that are open-ended, cross-examination has many “features that may impair accuracy.”<sup>568</sup> This is why there is “extensive literature giving advice on how to handle the difficult task of cross-examination for expert, professional witnesses such as psychiatrists and psychologists.”<sup>569</sup> Lawyers also ask questions with advanced terminology. One example of such a question is, “[w]as the perpetrator of the crime occluded by any vehicles?”<sup>570</sup> Lawyers may also ask questions with “complex syntax” that are “difficult to process.”<sup>571</sup>

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<sup>565</sup> Mark R Kebbel, Christopher Hatton and Shane D Johnson, “Witnesses with Intellectual Disabilities in Court: What questions are asked and what Influence Do they Have?” (2004) 9 *Legal & Criminological Psychology* 23 at 23.

<sup>566</sup> *Ibid* at 24.

<sup>567</sup> *Ibid*; see also, MR Kebbel & GF Wagstaff, *Face Value? Factors that Influence Eyewitness Accuracy* (London: Home Office, 1999).

<sup>568</sup> *Ibid* at 25.

<sup>569</sup> *Ibid*.

<sup>570</sup> *Ibid* at 25.

<sup>571</sup> *Ibid*.

An example of such a question is; “[a]t anytime before or after she cried did the vehicle move either forwards or backwards?”<sup>572</sup> Furthermore, mainly closed questions are asked during cross-examination and these are “likely to decrease the accuracy of general population eyewitnesses and particularly eye witnesses with intellectual disabilities.”<sup>573</sup>

Clearly this type of questioning is unhelpful. But there is a lot of knowledge about types of questioning that may assist witnesses with intellectual disabilities under cross-examination. Lawyers should adapt their questioning based on what is known about the type of questioning that is effective.<sup>574</sup> For witnesses with mental disabilities, a rigorous and challenging cross-examination is not necessarily the best way to get at the truth.<sup>575</sup> Domestic provisions governing evidence and criminal procedure have been shown to be problematic. They are therefore, in urgent need of amendment.

### **3.5 The Amendment of Domestic Provisions in Zimbabwe.**

Before proceeding to make recommendations, it is important to clarify what the competent charge is under the substantive criminal law of Zimbabwe where a sexual assault of a person with an intellectual disability has occurred. A significant development in Zimbabwean criminal law occurred through the enactment of the *Criminal Law (Codification and Reform) Act*<sup>576</sup> in 2006<sup>577</sup> which, as the title suggests,

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<sup>572</sup>*Ibid* at 25. See also NW Perry et al, “When Lawyers Question Children. Is Justice Served?” (1995) 19 Law & Human Behavior 609.

<sup>573</sup>Kebbel, Hatton & Johnson, *supra* note 564 at 25.

<sup>574</sup>Benedet and Grant, *supra* note 60 at 50.

<sup>575</sup>*Ibid* at 47.

<sup>576</sup>CPEA, *supra* note 266.



not only consolidated the previously “widely dispersed”<sup>578</sup> criminal law of Zimbabwe but also reformed pre-existing criminal law. One such reform and one that is relevant for the purposes of the current thesis is the replacement of a provision which criminalized all forms of sexual acts with “mentally incompetent” persons<sup>579</sup> with a new provision that made it possible to charge a person who “engages in sexual intercourse ... with a mentally incompetent adult ...”<sup>580</sup> with the offence of rape. In terms of this new provision such a person must be charged with rape unless the “mentally incompetent” person was “capable of giving consent”<sup>581</sup> and did in fact “consent thereto.”<sup>582</sup> In other words the court will assess whether the person is capable of giving consent. Where she is capable of giving consent, the court will then inquire into whether she did in fact give consent. The production of medical evidence proving mental incompetence is required.<sup>583</sup> This is indeed a welcome development which recognizes the sexual rights of persons with mental disabilities and gives them the latitude/autonomy to decide whether or not to engage in acts of a sexual nature. By criminalizing all sexual acts with mentally incompetent persons, the pre-existing law, which was reflective of the prevailing misconception of persons with disabilities as asexual, violated the rights of persons with mental disabilities to choose whether or not to engage in sexual intercourse. In other words, it likened them to minors, without any

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<sup>577</sup> The commencement date relating to the definition of “level” and “standard scale” in section 2, section 280 as well as the First schedule was 3 February 2006, whereas, the commencement date for the remainder of the Criminal Code was 1 July 2006.

<sup>578</sup> G Feltoe, *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]* (Harare: Legal Resources Foundation, 2006).

<sup>579</sup> *Sexual Offences Act*, [Chapter 9:21] s 4 (the offence was known as “having sexual intercourse with an idiot or imbecile”).

<sup>580</sup> *CPEA*, *supra* note 266 s64.

<sup>581</sup> *Ibid* at s 64 (a).

<sup>582</sup> *Ibid* at s 64 (b).

<sup>583</sup> *S v Chamukwanda* 1990 (1) ZLR 172 (H); *S v Mbizi* 1989 (3) ZLR 317 (S). These cases relate to the pre-existing offence of engaging in sexual conduct with a female “idiot or imbecile”.

agency at law to give consent. Nonetheless, it would be too hasty to conclude that merely because of the possibility of charging a person, who engages in unlawful sexual conduct with a person with a mental disability with rape, that the criminal law in Zimbabwe adequately responds to the needs of persons with intellectual disabilities. This is because charging an accused person with rape is of little use unless the witness is empowered to give effective testimony against the accused person at trial.

In addition to programs such as those highlighted above, the procedures themselves need to be amended. With this in mind, I now turn to consider the procedures that need to be amended.

### **3.5.1 The Procedure for Admonition**

As stated above, before a witness may be admonished, they are required to demonstrate an understanding of the difference between truth and falsehood. This creates a barrier that witnesses with intellectual disabilities have to surmount. It is contended that the approach taken in Israel is preferable and may also be used in the Zimbabwean context. The Israeli Act deals with the duty to tell the truth by providing that a witness with an intellectual disability will be cautioned in the same manner as other witnesses and where the witness cannot understand the duty to tell the truth then a conviction cannot result on the basis of this evidence alone. There has to be other supporting evidence.<sup>584</sup> In other words, the witness still testifies, but if it becomes apparent during the testimony that the witness does not understand the difference between truth and falsehood, then

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<sup>584</sup>*Israeli Act, supra* note 440 at s18.

that witness's evidence alone cannot be relied upon. There has to be supporting evidence other than that of the witness in question.

### **3.5.2 The Amendment of the Section Providing for Incompetence Due to Mental State**

It is recommended that this section should be amended in order to remove all terminology that is associated with intellectual disability.

### **3.5.3 Assessing Competence During Trial**

It is recommended that the competence of a witness, should it be at issue, be assessed during the trial after allowing the witness to testify and observing the witness in the stand. However, the type of questions that the witness is asked is very important. Benedet and Grant opine that questions to determine the competency of a witness should be "concrete questions about everyday matters" such as "'are the walls in here red', when they are in fact white."<sup>585</sup> This is better than asking "If I told you that the walls were red, would I be lying?" because it is a "hypothetical scenario" which requires "complex cognitive processing" and an ability to understand truth and lies.<sup>586</sup> Phrasing the question in the former manner allows the witness to demonstrate that she can communicate reality<sup>587</sup>.

Benedet and Grant suggest an alternative approach of testing the witness's ability to answer in the negative by asking for example, "Do you ride a bicycle to school" when in fact she walks to school and the assault is alleged to have occurred on the way

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<sup>585</sup>Benedet & Grant, *supra* note 60 at 50.

<sup>586</sup>*Ibid.*

<sup>587</sup>*Ibid.*

to school. This question is concrete and it is not completely removed from the reason the witness is in the stand<sup>588</sup>. If the witness responds by saying no, then she has demonstrated an ability to answer truthfully<sup>589</sup>

All that should be asked when determining the testimonial competence of a witness is “whether, with all the necessary accommodations, the witness is able to communicate her evidence.”<sup>590</sup> This is now the question that is asked at the competency *voir dire* in Canada after the Supreme Court of Canada’s decision in *R v DAI*. It is suggested that a similar approach may be taken in Zimbabwe.

### 3.6 Conclusion

There is no one response that will be adequate to address the needs of witnesses with intellectual disabilities. A range of responses is required in order to better serve the needs of witnesses with intellectual disabilities. As shown above, the emphasis on the particular needs of an individual is what makes the concept of reasonable accommodation particularly useful for enabling witnesses with intellectual disabilities to give effective testimony. Protective measures for vulnerable witnesses are helpful to a certain extent, but they are rigid and there is a need to adopt an approach that is flexible and responsive to the individual needs of witnesses with intellectual disabilities. The practice of witness preparation should be taken up more seriously. There is a need to provide programs with the involvement of civil society in order to better serve the needs of witnesses with intellectual disabilities. The prosecution alone cannot adequately respond to the needs due to work pressure, lack of resources as well as lack

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<sup>588</sup> *Ibid.*

<sup>589</sup> *Ibid.*

<sup>590</sup> *Ibid* at 47.

of training. The training of judges and magistrates is also a necessary response to the problem. Furthermore, the types of questions that are asked of these witnesses should be adapted to meet their specific requirements, especially during cross-examination. Equally important is the need to amend legislative provisions dealing with criminal evidence and procedure in order to meet the needs of witnesses with intellectual disabilities. The problem faced by witnesses with intellectual disabilities can therefore be addressed at the domestic level, provided that a number of responses are made including the ones that have been outlined above. The need for a wider response in the form of programs aimed at the prevention of sexual violence should be borne in mind. Whilst it is necessary to ensure that once sexual assault and other forms of sexual offences are committed the criminal justice system adequately accommodates witnesses with intellectual disabilities, the need for preventive measures against sexual assault should not be overlooked. This is an area where additional research to determine measures that may prevent the occurrence of sexual assault against women with intellectual disabilities is required.

## Chapter Four: Conclusion

This thesis began by dealing with theoretical issues around intellectual disability and sexual assault. Tackling such “theoretical” questions may seem out of place in a jurisprudential analysis such as this, but I would contend that on the contrary, it is in fact appropriate and necessary to do so. The “reality and detail of oppression”<sup>591</sup> that is illuminated through such a theoretical analysis is a useful starting point for engaging in “mainstream debates about law and theory.”<sup>592</sup> It is the reality of the lived experiences of “outsiders”<sup>593</sup>, in this case women with intellectual disabilities, which challenges the professed neutrality of the rules of criminal procedure and evidence. Taking into account the reality of women with intellectual disabilities who have been sexually assaulted therefore provides a necessary first step in understanding the exact nature and extent of the complex and multi-layered dilemma faced by these women.

One layer of the dilemma faced by women with intellectual disabilities; women like Emma with whose story this thesis began, stems from the disability itself. Intellectual disability attracts stigma, misconceptions and stereotypes both in society and in the courtroom, all of which are rooted in a lack of adequate knowledge and understanding of disability. As shown above, misconceptions about women with intellectual disabilities in the courtroom have a very negative impact on the outcome of a sexual assault case. Critical Disability Theory understands disability as a result of an interactional process between a person with impairment and her environment is

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<sup>591</sup> Matsuda, *supra* note 148 at 9.

<sup>592</sup> *Ibid.*

<sup>593</sup> *Ibid.*

particularly useful.<sup>594</sup> This is the same understanding of disability that the CRPD relies on.<sup>595</sup> I would contend that the key word here is “interaction”<sup>596</sup> for it presupposes the involvement of more than one “participant”, so to speak, in the disabling process. It therefore recognizes the disabling role of the environment whilst simultaneously acknowledging the role played by the impairment itself. By acknowledging the individual’s role in the disabling process, it can be said that Critical Disability Theory values difference.<sup>597</sup>

Difference however, does not result solely from impairment, but it also results from the individual’s other characteristics, in particular, gender. It is necessary to avoid the tendency to focus on impairment and allow it to gain such prominence that it effectively erases the individual’s other characteristics and represents the whole person. Women with intellectual disabilities are not different solely because they have intellectual disabilities. They are different because they are also women. They are women with intellectual disabilities. The two traits, gender and disability, are indivisible and both intertwine and knit together a complex fabric of inequality to which these women are subjected. This is what has been described in this thesis as “gendered disability.”<sup>598</sup>

One need only look at the reasons that have been proffered by researchers for the prevalence of sexual assault amongst women with intellectual disabilities in order to grasp the impact of gendered disability on equality relations. This prevalence has been

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<sup>594</sup> Rioux & Valentine, *supra* note 108 at 49.

<sup>595</sup> CRPD, *supra* note 4 at preamble para e.

<sup>596</sup> *Ibid.*

<sup>597</sup> Devlin & Pothier, *supra* note 105 at 12.

<sup>598</sup> Sampson, *supra* note 7 at 267.

attributed to a number of factors including misconceptions that women with intellectual disabilities are less likely to report and, even if they do, they are less likely to be believed.<sup>599</sup> This very idea signifies deeper societal stratification in which women with intellectual disabilities occupy a lower position. They may therefore be targeted because they are women who have intellectual disabilities.

Research also shows that the abusers are not strangers but include friends, neighbors, family members, and in an institutional setting, support staff.<sup>600</sup> The nature and proximity of the relationship between abuser and abused signifies the “unequal power dynamics”<sup>601</sup> at play whereby the abuser is often in a position of power and influence over the abused. The abused may occupy a position of powerlessness because of her disability and in a patriarchal society like Zimbabwe because of being a woman.

Another layer of complexity is revealed through looking at the workings of the rules and procedures relied on in the criminal justice system itself. Judges and magistrates have to balance the rights of the accused person with the rights of the victim witness. The accused person has the right to a fair trial which includes amongst other things the right to cross-examine the witness whilst the witness is entitled to equal treatment and equal protection of the law. The accused person’s right to a fair trial may be seen as paramount because the criminal justice system attempts to mitigate the power of the state.<sup>602</sup> The accused person faces charges from the state which is a powerful entity and risks losing the right to liberty; for that reason the accused person’s right to a

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<sup>599</sup> Michael Gill, *supra* note 12 at 204.

<sup>600</sup> *Ibid.*

<sup>601</sup> *Ibid.*

<sup>602</sup> Burchell, *supra* note 53 at 113



fair trial is given more weight.<sup>603</sup> This is accomplished by insisting on the strict application of rules of evidence which are designed to protect the accused person's rights. Witnesses with intellectual disabilities require modification of these rules in order to participate effectively in the trial. The important question to ask is whether the modification jeopardizes the accused person's fair trial rights. In other words, are the interests of the victim and the interests of the accused person competing interests? I would contend that they do not necessarily have to be competing interests. The crucial distinction to make is that modification is not tantamount to relaxation. Allowing a witness to testify effectively in court actually serves the interests of justice in that it aids in the search for truth. This in turn makes the criminal justice system a much fairer one. Nevertheless, the balancing of the interests of the victim and the interests of the accused person remains a delicate exercise that needs to be conducted carefully. The significance of acknowledging the multi-faceted nature of this dilemma lays in the fact that it becomes clear that a multi-faceted dilemma calls for a multi-faceted response.

#### **4.1 A Multi-Faceted Response to a Multi-Faceted Dilemma: Lessons for Zimbabwe**

One facet of the response is the adoption of a human rights approach in the criminal justice system. Magistrates and judges should recognize that these are essentially crimes that have to do with the right to equality.<sup>604</sup> Women with intellectual disabilities are holders of rights and as such it is the court's duty to uphold and respect this fundamental right. Judges and magistrates should therefore, not be motivated by pity but rather by a rights-oriented approach. Bearing in mind that even if judges and

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<sup>603</sup> *Ibid.*

<sup>604</sup> Pithey, *supra* note 52 at 116.

magistrates recognize this as an equality issue, they are still duty bound to apply the law as it is. This makes the amendment of rules of criminal evidence which have the effect of impeding the effective participation of witnesses with intellectual disabilities necessary

#### **4.2 Amending the Rules Relating to Competence to Testify**

Another facet of the response is the amending of the rules in order to recognize the competence to testify of women with intellectual disabilities. The provision which governs “[i]ncompetency from mental disorder or defect and intoxication”<sup>605</sup> may limit the recognition of the competence of witnesses with intellectual disabilities to testify. This is because it may be interpreted due to its wording to include witnesses with intellectual disabilities. The difficulties with the interpretation of section 225 of the South African *Criminal Procedure Act of 1955*, which was subsequently amended, and which reads very similar to the current Zimbabwean provision may continue if this provision is not revised. The kind of amendment necessary is one that completely removes any and all language that has been or is associated with intellectual disabilities. In this case, it is the removal of the terms “idiocy”, “imbecility of mind”, and a clarification of the term “mental disorder or defect”. This argument is made in light of the fact that even after amendment of the 1955 South African Act, the new section 194 still employs the terminology “imbecility of mind”<sup>606</sup> which led to its being applied to persons with intellectual disabilities. The position has since been clarified with the decision of the Supreme Court of Appeal in *Katoo*,<sup>607</sup> to the effect that section 194

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<sup>605</sup> CPEA, *supra* note 266 at s246.

<sup>606</sup> CPA, *supra* note 269.

<sup>607</sup> *Katoo*, *supra* note 271.

applies only to persons with mental illness, and “imbecility” resulting from intoxication or drugs which affects the person’s powers of reason. However, it is maintained that a removal of all terminology that is associated with intellectual disability, which is anachronistic in any case, is required. The full recognition of the competence to testify of witnesses with intellectual disabilities is in line with the paradigm shift prescribed by article 12 of the CRPD requiring recognition that all persons with disabilities have legal capacity. However, even after the removal of such language, there is a need to proceed further to remove a potential barrier to testifying which lays in the procedure for admonishing witnesses.

#### **4.3 Amending the Procedure for Admonition of Witnesses**

The courts have held that the proper manner to admonish a witness is to first conduct an inquiry into whether or not the witness understands the difference between truth and falsehood.<sup>608</sup> A court may only receive evidence that is given under oath,<sup>609</sup> under affirmation<sup>610</sup> or under admonition.<sup>611</sup> Where the court forms the view that the witness cannot understand the oath, they may give evidence under admonition.<sup>612</sup> Before a witness may be admonished, they are required to demonstrate an understanding of the difference between truth and falsehood.<sup>613</sup> Case law shows that the types of witnesses who give evidence under admonition are usually witnesses with intellectual disabilities and children. This approach creates a difference in treatment between those witnesses who take the oath and those who are admonished. Those who take the oath are not

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<sup>608</sup> *Motsisi, supra* note 351.

<sup>609</sup> *CPEA, supra* note 266 at s 249.

<sup>610</sup> *Ibid* at s 250.

<sup>611</sup> *Ibid* at s 251.

<sup>612</sup> *Ibid.*

<sup>613</sup> *Motsisi, supra* note 351 at para 11.

required to demonstrate an understanding of the difference between truth and falsehood, whilst those who testify under admonition are required to demonstrate an understanding of the difference between truth and falsehood. This is essentially a difference in treatment between persons without disabilities and persons with disabilities since those with intellectual disabilities in particular, are disproportionately represented amongst the witnesses who testify under admonition. Requiring a witness with an intellectual disability to demonstrate the difference between truth and falsehood is problematic because a witness may be able to tell the truth even though they are unable to explain the distinction between truth and lies as is demonstrated by the Canadian case of *R v DAI*.<sup>614</sup> Bearing in mind that legal procedure cannot simply be uplifted from one jurisdiction to another, it is nevertheless instructive to consider how other jurisdictions have grappled with the same problem in considering lessons for Zimbabwe. As a result of the Canadian Supreme Court decision in *R v DAI*, a witness may testify provided he/she can communicate the evidence.<sup>615</sup> One may legitimately ask the question whether simply allowing a witness with an intellectual disability to testify without establishing whether or not they understand the duty to tell the truth jeopardizes the accused person's right to a fair trial. The Israeli Act takes an interesting approach to this which may be useful in Zimbabwe. The Israeli Act deals with the duty to tell the truth by providing that a witness with an intellectual disability will be cautioned in the same manner as other witnesses and where the witness cannot understand the duty to tell the truth then a conviction cannot result on the basis of this evidence alone. There has to be

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<sup>614</sup> *DAI*, *supra* note 9.

<sup>615</sup> Benedet & Grant, *supra* note 60 at 47.

other supporting evidence.<sup>616</sup> In other words, the witness still testifies, but if it becomes apparent during the testimony that the witness does not understand the difference between truth and falsehood, then that witness's evidence alone cannot be relied upon to convict the accused person. There has to be supporting evidence other than that of the witness in question. Even after a witness has been sworn to give evidence, the defence may still challenge the competence of the witness. How should this be dealt with?

#### **4.4 Assessing a Witness's Testimonial Competence**

As explored in chapter two, where a witness's competence is at issue, there are two approaches that are taken. The first is that the witness's competence is assessed before the trial or during the trial. Whichever approach is taken, there are two things that need to be borne in mind. The first is the importance of the type of questions that are put to the witness and the second is that the role of the environment must not be left out of the assessment.

It has been established that there is a correlation between the type of questions that the witness is asked and the quality of the witness's responses. Benedet and Grant opine that questions to determine the competency of a witness should be "concrete questions about everyday matters" such as "'are the walls in here red', when they are in fact white."<sup>617</sup> This is better than asking "[i]f I told you that the walls were red, would I be lying?" because it is a "hypothetical scenario" which requires "complex cognitive

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<sup>616</sup> *Israeli Act*, *supra* note 440 at s 18.

<sup>617</sup> Benedet & Grant, *supra* note 60 at 50.

processing” and an ability to understand truth and lies.<sup>618</sup> Phrasing the question in the former manner allows the witness to demonstrate that she can communicate reality.<sup>619</sup>

Benedet and Grant also suggest an alternative approach of testing the witness’s ability to answer in the negative by asking for example, “Do you ride a bicycle to school” when in fact she walks to school and the assault is alleged to have occurred on the way to school. This question is concrete and it is not completely removed from the reason the witness is in the stand.<sup>620</sup> If the witness responds by saying no, then she has demonstrated an ability to answer truthfully.<sup>621</sup>

The role played by the environment should be considered in the assessment. The danger is that the assessment of competence may proceed on the assumption that incompetence is inherent in the individual.<sup>622</sup> This is especially the case where courts may need to rely on expert evidence given by a psychologist, from assessments of the individual which focus on her abilities and limitations to the exclusion of her environment, in this case, the court room environment. This is contrary to the understanding of disability as resulting from the interaction between the individual with impairment and her environment.<sup>623</sup> Incompetence is therefore not due to internal factors such as the intellectual disability alone, but also results from the environment. The courtroom environment is very formal and to a degree intimidating for most witnesses and this has an impact on the witness’s perceived competence. The environment in this sense also includes other people involved in the proceedings, such

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<sup>618</sup> *Ibid.*

<sup>619</sup> *Ibid.*

<sup>620</sup> *Ibid.*

<sup>621</sup> *Ibid.*

<sup>622</sup> Stefan, *supra* note 300 at 765.

<sup>623</sup> CRPD, *supra* note 4 at preamble para e.

as judges who will be judging the witness's competence. The judge's own knowledge, abilities, and perceptual biases should be taken into account in the assessment of competence.<sup>624</sup> It is contended therefore, that competence to testify should be assessed only after the provision of support and accommodations. This is consistent with the paradigm shift in article 12 of the CRPD which legitimizes support.<sup>625</sup> Furthermore, judges and magistrates need to receive training on witnesses with intellectual disabilities. Judges and magistrates are the ones who are tasked with the important role of deciding whether or not the witness is competent. Without adequate knowledge about intellectual disabilities and how they may affect the delivery of testimony, there remains a danger that the judges and magistrates might, for example, incorrectly interpret behavior.<sup>626</sup> Once a witness has been found competent to testify, there is a need to provide reasonable accommodation to facilitate effective testimony.

#### **4.5 Providing Reasonable Accommodations at Trial**

The rigid application of rules of evidence during trial to witnesses with intellectual disabilities has been shown to be particularly problematic. What is required is an approach that is sufficiently flexible to meet the needs of persons with intellectual disabilities. The concept of reasonable accommodation is particularly useful for this because it requires the making of specific changes that suit the particular needs of the individual in question.<sup>627</sup> The flexibility in the concept of reasonable accommodation<sup>628</sup> is what gives it the ability to address the varying needs of persons with intellectual

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<sup>624</sup> Stefan, *supra* note 300 at 765.

<sup>625</sup> CRPD, *supra* note 4 at art 12(3).

<sup>626</sup> Ziv, *supra* note 37.

<sup>627</sup> CRPD, *supra* note 4 at art 2.

<sup>628</sup> D Lepofsky, *supra* note 432 at 21.

disabilities. Conversely, the lack of flexibility is what makes a concept such as universal design ineffective. Universal design does not respond to the individual needs of persons with disabilities.<sup>629</sup> Intellectual disabilities exist on a broad spectrum. Therefore, a one size fits all solution for witnesses with intellectual disabilities will simply be ineffective. There is a need to take into account the individual needs of the particular witness in order for witnesses with intellectual disabilities to effectively access justice. The lack of flexibility is the reason why protective measures for vulnerable witnesses may be inadequate to meet the needs of some women with intellectual disabilities.

#### **4.6 Protective Measures**

As is recognized in the thematic study carried out by the UN on violence against women and girls with disabilities, the danger with protective measures is that they may not be adequate to address the needs of women with intellectual disabilities.<sup>630</sup> The measures to be taken are specifically laid down in statute and the determination that has to be made is whether the particular witness is a “vulnerable witness” such that she falls within the ambit of the provision.<sup>631</sup> The next determination to be made is which of the measures to apply to the witness. What would happen in a case where the witness requires an accommodation that is not included in the list of protective measures? The Zimbabwean legislation does not appear to leave it open for the judiciary to make additional accommodations that may be required in individual cases. An approach that allows for the assessment of the individual needs of a witness on a case by case is preferable. For that reason, it is contended that the wording in the South African

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<sup>629</sup> CRPD, *supra* note 4 at art 2.

<sup>630</sup> Thematic study, *supra* note 509 at para 41.

<sup>631</sup> CPEA, *supra* note 266 at s 319C.



legislation may be preferable for Zimbabwe to adopt because it permits the court to take “any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.”<sup>632</sup> Whilst protective measures are indeed useful, it must be left open to implement measures that a particular witness needs. An important accommodation that has proved to be particularly effective is witness preparation.

#### **4.7 Witness Preparation**

The importance of the role played by a witness at trial has already been highlighted. The witness must therefore appear credible. Credibility is assessed in part by assessing the manner in which the witness delivers her evidence.<sup>633</sup> This means that the witness must satisfactorily answer questions put to her by the prosecutor during examination-in-chief and by the defense counsel during cross-examination.. Essentially it distills down to the witness’s ability to communicate effectively both verbally and non-verbally. The inability to communicate effectively is not innate in a witness, and this is true for all witnesses, but more so for those with intellectual disabilities. The environment plays a part because if a witness feels calm and is not under too much anxiety, he/she may communicate better. This makes witness preparation very important. In this regard, some lessons can be learnt from the South African SAVE program run by the non-profit organization Cape Mental Health which aims to prepare witnesses with intellectual disabilities for court.<sup>634</sup> The organization works hand in hand with prosecutors to prepare witnesses with intellectual disabilities for trial. This collaboration is

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<sup>632</sup> CPA, *supra* note 269 at s158 (2) (e).

<sup>633</sup> Menaker & Cramer, *supra* note 320 at 425.

<sup>634</sup> Dickman et al, *supra* note 542 at 118.

advantageous because prosecutors may not be able to adequately prepare witnesses with intellectual disabilities due to the heavy workload that they often have to deal with and the lack of resources to do this effectively. How the witness answers questions put to her in cross-examination is crucial in assessing her credibility as a witness.

#### **4.8 Cross-Examination**

Concerns are usually raised about whether or not a witness with an intellectual disability can be properly cross-examined.<sup>635</sup> Due to the significance of cross-examination to the search for truth in an adversarial trial, this question essentially is one about whether or not the fair trial rights of the accused person, which must legitimately be protected, will be jeopardized by allowing the witness with an intellectual disability to testify at trial. The availability of research on the types of questions that witnesses with intellectual disabilities can be asked is crucial with regards to cross-examination. Reasonable accommodation should also extend to the nature and type of questions that are put to a witness with an intellectual disability during cross-examination. It is contended that the making of such accommodations is intended to improve the quality of the witness's testimony. It does not necessarily mean that the witness's evidence will be accepted, simply that the witness is assisted to better give her testimony. This in turn makes the justice system fairer as a whole. It does not necessarily have to jeopardize the accused person's right to a fair trial.

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<sup>635</sup> Benedet & Grant, *supra* note 60 at 47.

#### **4.9 The Role of the CRPD**

Many of the principles that have been relied on throughout this thesis are found within the CRPD. These include legal capacity and reasonable accommodation. Whilst a response in domestic law to the concerns of witnesses with intellectual disabilities may suffice, the ratification and eventual domestic adoption of the CRPD is encouraged because of the progressive norms, ideas and concepts contained in the CRPD which have an impact on the framing of domestic legislation. One such concept which is particularly important for the competence of witnesses with intellectual disabilities is the concept of legal capacity found in article 12 of the CRPD. Ultimately, however, domestic provisions dealing with evidence and procedure will have the greatest impact on the testimony of witnesses with intellectual disabilities. Nevertheless, adoption of the norms in the CRPD in other spheres of life may also improve the lives of persons with disabilities, which is the primary goal of the Convention.

The lesson that may be gleaned for Zimbabwe from the foregoing is that there is a need to initiate a multi-faceted response. A strategic collaboration between government and non-profit organizations such as the one in South Africa may be useful in addressing challenges of a shortage of resources and time that prosecutors may face in preparing witnesses with intellectual disabilities for court. Personnel in the judiciary also require training on disability issues and how they interact with the criminal justice system. One facet of the response that is necessary targets the wider community. This involves the implementation of programs aimed at the prevention of sexual abuse and educating communities about intellectual disabilities and sexual abuse. This has not been dealt with in detail in this thesis for reasons of space. Nevertheless, it remains an

important response to the problem. Another critical issue that requires further research is how exactly the delicate balance between the rights of the accused and the rights of the victim-witness may be struck in practice.

What is perhaps a key response to which a significant portion of this thesis has been dedicated is the amendment of rules of criminal procedure and evidence. One might legitimately ask why I have termed the amendment of rules of procedure a key response. What difference, if any, does the preceding “high talk”<sup>636</sup> about technical rules of evidence and criminal procedure make in the real lives of women with intellectual disabilities who have suffered some form of sexual abuse and remain at high risk of further abuse? The importance of such amendments lays in the fact that it transcends the decisions made in particular cases to address the prevailing inequalities in society. A judicial system which adequately responds to the needs of witnesses with intellectual disabilities is necessary in fostering respect for the rights of persons with intellectual disabilities. As this thesis has revealed, it is critical to work towards the creation of a criminal justice system that remedies inequality, and in so doing contributes to making a real difference in the lives of women like Emma.

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<sup>636</sup> Matsuda, *supra* note 148 at 9.

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