

## HOW ASSESSMENTS OF TESTIMONIAL COMPETENCE PERPETUATE INEQUALITY AND DISCRIMINATION FOR PERSONS WITH INTELLECTUAL DISABILITIES: AN ANALYSIS OF THE APPROACH TAKEN IN SOUTH AFRICA AND ZIMBABWE

*Dianah Msipa\**

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### Summary

*This paper examines the capacity to testify and access justice of witnesses with intellectual disabilities who have been sexually assaulted, focusing on the situation in South Africa and Zimbabwe. 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 of witnesses with intellectual disabilities is often challenged due 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 is not inherent in the individual with impairment. The environment, which includes the rules of evidence and procedure, also plays a part yet it is often excluded from the assessment. It is argued that assessments of an individual's ability should only be made for the purpose of determining what accommodations they need in order to give effective testimony in court.*

### 1 Introduction

In recent years the vulnerability to and prevalence of rape and other forms of violence against women and girls with disabilities has been the subject

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\* LLM in Law (McGill University), Post-graduate Diploma in Legal Practice (LPC) (Northumbria University), LLB (Hons) Law (Newcastle University), Disability Rights Consultant. This article is adapted from D Msipa 'Survivors of sexual assault with intellectual disabilities: Accommodating difference in the courtroom' unpublished LLM thesis, McGill University, 2013.

To cite: D Msipa 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe' (2015) 3 *African Disability Rights Yearbook* 63-90  
<http://dx.doi.org/10.17159/2413-7138/2015/v3n1a3>

of much concern as shown in a number of studies.<sup>1</sup> The vulnerability of women and girls with disabilities to different forms of violence is also acknowledged in the Convention on the Rights of Persons with Disabilities (CRPD)<sup>2</sup> which is a new international human rights treaty dealing specifically with the rights of persons with disabilities. The CRPD, which came to force on 3 May 2008, recognises that they are often 'at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation'.<sup>3</sup> Research shows that women and girls with intellectual disabilities are especially vulnerable to rape and other forms of sexual abuse.<sup>4</sup> One study indicates that individuals with intellectual disabilities are four to ten times more likely to be sexually abused than their non-disabled counterparts.<sup>5</sup> It is unclear how many of these cases are reported to the police and how many go on to be prosecuted. What is known, however, is that there are some that reach the criminal courts for prosecution. This paper is primarily concerned with what happens when these cases reach the criminal courts. In other words, it is concerned with the interaction between complainants with intellectual disabilities with the criminal justice system focusing on the situation in Zimbabwe and South Africa.

According to the law in these two countries, only witnesses who are regarded as competent to testify may give evidence before the court.<sup>6</sup> However, 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>7</sup> A finding of incompetence means that the complainant does not get to testify or that the court does not accept her testimony, without which the chances of a successful prosecution may be seriously compromised.

This paper argues that the manner in which testimonial competence is assessed in South Africa and Zimbabwe reveals an approach characterised by a pre-occupation with the abilities of the individual to the exclusion of the environment. These assessments are concerned with asking whether a particular individual is competent to testify and they focus on the individual's own innate abilities in order to answer that question.

1 Report of the Special Rapporteur on Violence against women, its causes and consequences A/67/227 3 August 2012; *Thematic study on the issue of violence against women and girls with disability*, Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/20/5(30 March 2012).

2 Convention on the Rights of Persons with Disabilities GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

3 CRPD, Preamble, para q.

4 F Sampson 'Beyond compassion and sympathy to respect and equality: Gendered disability and equality rights law' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 279.

5 D Sobsey *Violence and abuse in the lives of people with disabilities: The end of silent acceptance?* (1994) 34.

6 M Hannibal & L Mountford *Criminal litigation* (2007) 301.

7 GH Gudjonsson et al 'Assessing the capacity of people with intellectual disabilities to be witnesses in court' (2000) 30 *Psychological Medicine* 307.

Consequently, incompetence has tended to be viewed as something which is inherent in the individual. This approach is inconsistent with the understanding that is relied on in Critical Disability Theory and in the CRPD of disability as the result of an interactive process between a person with impairment and his/her environment.<sup>8</sup> In this paper, Critical Disability Theory is used to show how this understanding of disability as an interactional process can help to solve the problem of inequality caused by competency assessments which focus solely on the innate abilities of the individual. When witnesses with intellectual disabilities encounter the criminal justice system, the courtroom becomes a type of arena within which the interaction between impairment and environment can be seen. A criminal trial makes for a very formal, complex and highly stressful environment in which those who can communicate well orally may arguably fare better than those who cannot. Witnesses with intellectual disabilities, in particular, would face a much more difficult time in the courtroom than their non-disabled counterparts due to the nature of the impairment which may affect how they communicate. The interaction between the courtroom environment and the impairment is likely to result in the witness's inability to effectively participate in the trial on an equal basis with others. Therefore, an approach to testimonial competence which ignores the disabling effect of the environment and treats incompetence as entirely inherent in the individual provides an incomplete understanding of the problem. In turn, an incomplete understanding of the problem prevents the formulation of an adequate response. Ultimately, the result is the perpetuation of inequality and discrimination as well as the violation of the right to access justice.<sup>9</sup>

The utility of defining disability as an interactional process extends beyond enabling an appreciation of the disabling role which the environment can play and necessitates a response to the problem which also takes both the impairment and the environment into account. That is to say the impairment and the environment are not only part of the problem, but can also be part of the solution. The relevant question then becomes how can they be part of the solution? The answer to that is through the provision of procedural and age-appropriate accommodations.<sup>10</sup> These accommodations formulate a solution which takes both individual impairment and environment into account by paying attention to individual needs and demanding a response in the environment. This makes the provision of accommodations the best method of addressing the problem with the approach to testimonial competence that is taken in South Africa and Zimbabwe. Instead of simply asking whether a particular individual is competent to testify, which is what the current assessments of competence effectively do, I propose that assessments to do with testimonial competence should be concerned with asking what supports an

8 CRPD, Preamble, para e.

9 CRPD, art 13.

10 CRPD, art 13(1).

individual may require in order to participate effectively and on an equal basis with others. In other words, any assessment of the individual should be for the purpose of determining what supports that individual requires as opposed to whether or not that individual is competent to testify. It will therefore, be argued that without the provision of accommodations in a criminal trial involving a witness with intellectual disabilities, the ability to participate effectively on an equal basis with others may be gravely impaired or entirely lost. So important is the provision of accommodations in achieving equality that the CRPD extends the definition of discrimination to include the denial of reasonable accommodations.<sup>11</sup>

This paper is divided into three parts. The first part demonstrates that the current approach to the assessment of testimonial competence in the two countries fails to take into account the impact of the environment and treats incompetence as inherent in the individual. The second part of the paper deals with how adding a Critical Disability Theory perspective can alter the way in which assessments of competence are thought about. Finally, the third part of the paper suggests the use of accommodations as a solution to the inequality problem created by assessments of competence.

## 2 Analysing competency assessments in South Africa and Zimbabwe

### 2.1 Testimonial competence under statute law in Zimbabwe and South Africa: Creating an additional barrier?

The statutes governing criminal procedure and evidence in Zimbabwe and South Africa contain some controversial provisions which create an additional barrier for witnesses with intellectual disabilities. These provisions declare persons with the requisite state of mind as incompetent to testify. In Zimbabwe the relevant statute contains a provision governing '[i]ncompetency from mental disorder or defect and intoxication'.<sup>12</sup> A similar provision also exists within the South African statute.<sup>13</sup> These provisions have in the past been applied to declare persons with intellectual disabilities incompetent to testify as is demonstrated in the South African case of *S v Thurston*.<sup>14</sup> In an effort to remedy this problem with the then

11 CRPD, art 2.

12 Criminal Procedure and Evidence Act [Chap 9:07] sec 246. 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.'

13 Criminal Procedure Act 51 of 1977, sec 194. It provides that: '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.'

14 1968 (3) SA 284 (A).

section 225, which is the predecessor of the current section 194 of the South African Criminal Procedure Act, the Botha Commission of Inquiry on Criminal Evidence and Procedure<sup>15</sup> recommended changes to this provision<sup>16</sup> including 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’. The amended version of this provision is the current section 194.<sup>17</sup> In spite of these changes, section 194 continued to be interpreted by the courts to exclude the evidence of persons with intellectual disabilities.<sup>18</sup> However, the interpretation of section 194 was finally settled by the Supreme Court of Appeal of South Africa in *S v Katoo*.<sup>19</sup> In this case the prosecution sought to call the complainant in a rape trial who was described by a psychologist as having ‘severe mental retardation’,<sup>20</sup> as a witness. The evidence of the psychologist was to the effect that the complainant ‘could consequently be described as an imbecile’.<sup>21</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>22</sup> The trial judge interpreted section 194 to mean that due to her status as an ‘imbecile’, the complainant was not competent to testify. Consequently, the respondent was acquitted. 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>23</sup> In disagreeing with the finding made by the trial court 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>24</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>25</sup> 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>26</sup> It was therefore, held that she did not fall within the ambit of section 194 and she was in fact competent to testify.

15 Botha Commission ‘Commission of Inquiry into Criminal Procedure and Evidence’ RP 78/1971 Government Printer, Pretoria.

16 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.

17 Criminal Procedure Act (n 13 above) sec 194.

18 *S v Katoo* 2005 (1) SACR 522 (SCR).

19 As above.

20 *Katoo* (n 18 above) para 6.

21 As above.

22 As above. 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.

23 *Katoo* (n 18 above) para 3.

24 As above.

25 As above.

26 *Katoo* (n 18 above) para 11.

Following this decision, it is now settled in South Africa that section 194 need not necessarily apply to persons with intellectual disabilities but instead it applies to cases of mental illness or 'imbecility', that results from intoxication or drugs and which affects a person's powers of reason. 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 requirement it creates for the court to conduct an inquiry into the cause of 'imbecility'.<sup>27</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 order to decide on the issue of competence.<sup>28</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>29</sup> was also reiterated by the Supreme Court of Zimbabwe in the case of *Ndiweni*.<sup>30</sup> In this case, the defence made an assertion at trial that a state witness was labouring under some 'mental disorder'.<sup>31</sup> This assertion was not challenged by the state<sup>32</sup> and the trial court did not probe the assertion. The Supreme Court of Zimbabwe found that this was an irregularity.<sup>33</sup> Once an assertion has been made by the defence that a witness is 'afflicted with idiocy or mental disorder or defect',<sup>34</sup> the court which has power to decide on the competency of such a witness and must look into that allegation by conducting an inquiry.<sup>35</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>36</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 which constitutes an additional barrier and perpetuates inequality and discrimination for witnesses with intellectual disabilities.

27 Criminal Procedure Act (n 13 above) sec 194.

28 *Katoo* (n 18 above) para 12.

29 Criminal Procedure and Evidence Act (n 12 above) sec 246.

30 *Ndiweni* S-149-89.

31 As above.

32 Generally, assertions that are not challenged are assumed to be accepted.

33 *Ndiweni* (n 30 above).

34 Criminal Procedure and Evidence Act (n 12 above) sec 246.

35 Criminal Procedure and Evidence Act (n 12 above) sec 245.

36 G Feltoe *Criminal defender's handbook* (2009) 103.

Of particular concern however, for the purposes of this paper, is the manner in which the competency assessments themselves are conducted.

## 2.2 The dual approach to assessment of competence: Inherent incompetence?

The current approach to the assessment of testimonial competence in South Africa and Zimbabwe is problematic because it treats incompetence as inherent in the individual thereby overlooking the impact of the environment on the competence and credibility of a witness. There are currently two approaches that may be taken in the determination of the competence of a witness.<sup>37</sup> Firstly, where a witness's competence is challenged, this may be dealt with in a manner similar to that relating to issues of admissibility.<sup>38</sup> Where it is necessary to do so, a trial within a trial will be held to decide the matter.<sup>39</sup> But a trial within a trial is not always necessary. Secondly, the question of incompetence may be decided by putting the witness in the stand and allowing her to testify.<sup>40</sup> A decision will then be made based on observing the witness in the stand.<sup>41</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. This can be seen in the South African cases of *Kevin Goodall v the State* and *Chris Bindeman v the State*.<sup>42</sup>

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>43</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>44</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>45</sup> This focus on the individual makes the law

37 *Dladla v the State* AR483/09 para 12.

38 As above.

39 As above.

40 As above.

41 As above.

42 *Kevin Goodall v the State*, Case No A392/10 (*Goodall*); *Chris Bindeman v the State* A359/12 (*Bindeman*).

43 S Stefan 'Silencing the different voice: Competence, feminist theory and law (1992-1993) 47 *University of Miami Law Review* 777.

44 Stefan (n 43 above) 776.

45 Stefan (n 43 above) 777.

on competence unresponsive to the social and political dimensions that are at play when it comes to competence and the assessment of competence.<sup>46</sup>

Even 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 of the external environment or setting. Stefan rightly 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>47</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>48</sup> This is because competence or the lack thereof, is 'perceived, assessed and judged'<sup>49</sup> by other people.<sup>50</sup> Stefan also 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>51</sup>

Quite importantly, the author notes that the setting determines the quality of the interaction.<sup>52</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>53</sup> These are relations of power and it is the powerful actor, in this case the judge, who is in control.<sup>54</sup> The powerful actor is out of the picture and only the powerless actor's capabilities are in question.<sup>55</sup> Therefore, in these assessments, it is the individual's capabilities that are taken account of to the exclusion of the environment.

In Zimbabwe and South Africa, the ability of a witness to provide sworn evidence is also part and parcel of the assessment of testimonial competence.

### 2.3 Truth and falsehood: Application of different standards?

A potential source of inequality lies in the requirement for the court to receive sworn evidence. The courts in Zimbabwe<sup>56</sup> and South Africa<sup>57</sup> can

46 Stefan (n 43 above) 776.

47 Stefan (n 43 above) 779.

48 As above.

49 As above.

50 As above.

51 As above.

52 Stefan (n 43 above) 781.

53 Stefan (n 43 above) 782.

54 Stefan (n 43 above) 783.

55 As above.

56 Criminal Procedure Act (n 13 above) sec 164(1).

57 Criminal Procedure Act (n 13 above) sec 164.



only receive testimony from a witness who has taken the oath, been affirmed or admonished. 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 compared to the Zimbabwean courts. Section 164 of the South African Act 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>58</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>59</sup> due to 'ignorance arising from youth, defective education or other cause'.<sup>60</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>61</sup> whereas those testifying under admonition are required to demonstrate an understanding of the difference between truth and falsehood.<sup>62</sup> All that is required of those who take the oath is that they repeat the words prescribed by the statute. Those who are admonished are, however, required to demonstrate an understanding of the difference between truth and falsehood. The South African Constitutional Court in *DPP v Minister of Justice and Constitutional Development* confirmed the position that it is a requirement for witnesses who are admonished to demonstrate an understanding of the difference between truth and falsehood.<sup>63</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 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>64</sup>

58 Criminal Procedure Act (n 13 above) sec 164(1).

59 As above.

60 As above.

61 *Sikhipha v the State* 2006 SCA 71 (RSA) para 14 (*Sikhipha*).

62 *Motsisi v the State* 513/11 2012 ZASCA 59 (*Motsisi*).

63 *DPP v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 166 (*DPP v Minister of Justice*).

64 As above.

Case law suggests that there are broadly two groups of people who give evidence under admonition; children and persons with intellectual disabilities.<sup>65</sup> These are the ones who are more likely to be deemed to not understand the nature and import of the oath. I would contend therefore, that this is essentially a difference in treatment between persons without intellectual disabilities and persons with intellectual disabilities. Witnesses who are admonished may therefore, be held to a higher standard and this goes against the principles of equality set out in the CRPD which require that all persons with disabilities access justice on an equal basis with others.<sup>66</sup>

It may be argued that in order to protect the fair trial rights of the accused person, the courts must ensure that the witness with an intellectual disability understands the difference between truth and falsehood. This is a concern based on the impact of the impairment where it is feared that due to the impairment, the witness can simply stand in court and speak lies. Whilst this is a valid concern, it is contended that the solution is not to ask the witness to define the difference between truth and falsehood before they can be allowed to testify because a witness's failure to define the difference between truth and falsehood, which may be a result of the impairment, does not necessarily mean that they cannot actually tell the truth.<sup>67</sup> This approach would be reflective of the approach generally taken by the courts in which the inability to demonstrate an understanding of the difference between truth and falsehood is seen as innate in the individual and therefore, it is up to the individual to remedy the situation by convincing the court through the provision of a definition of truth and falsehood that they do understand what it means to tell the truth. In other words, this approach assesses the innate abilities and limitations of the individual, in this case, the ability of the individual to define the notions of truth and falsehood.

The requirement for witnesses with intellectual disabilities to demonstrate the difference between truth and falsehood was recently examined in Canada and it is submitted that the approach taken by the Canadian Supreme Court on this issue is preferable, though their decision was based on principles of statutory interpretation. From the language in the Canada Evidence Act,<sup>68</sup> it was possible for adults with mental disabilities whose competence was challenged to testify without having to

65 *Motsisi* (n 62 above) (persons with intellectual disabilities); *Sikhipha* (n 61 above) (children).

66 CRPD, arts 5(1) & 13.

67 N 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 Law Journal* 409. A distinction between the ability to tell the truth and the ability to define the difference between truth and falsehood has been recognised in relation to child witnesses.

68 Canada Evidence Acts, 16(3).

take the oath provided they could communicate the evidence.<sup>69</sup> They could testify on a promise to tell the truth.<sup>70</sup> Nonetheless, the courts interpreted this provision by requiring the witness to demonstrate an understanding of the duty to tell the truth.<sup>71</sup> In *R v DAI*,<sup>72</sup> the Supreme Court of Canada rejected competency assessments requiring witnesses to demonstrate an understanding of the difference between truth and falsehood.<sup>73</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) of the Canada Evidence Act was for the witness to be able to communicate the evidence and they could proceed to testify on a promise to tell the truth.<sup>74</sup> Reading any further requirement into those words would be adding to the legislation words that are not present therein.<sup>75</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>76</sup> Rules regulating the admissibility and weight of evidence could be used to deal with the fair trial concerns for the accused person.<sup>77</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>78</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>79</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 admonished to tell the truth. Furthermore, it perpetuates inequality and discrimination for witnesses with intellectual disabilities.

It is submitted that the approach taken in *DAI* is preferable and rather than ask the witness to define the difference between truth and falsehood in abstract terms, the witness should be accommodated to communicate the evidence effectively in court. Much in the same way that a non-disabled witness taking the oath (without demonstrating the difference between truth and falsehood) does not guarantee that they will tell the truth, a witness with disability's inability to define the difference between the two notions does not mean that they will not tell the truth. In any case, the fact that a witness has been allowed to testify does not automatically mean that their evidence will be accepted. There are still other safeguards

69 J Benedet & I Grant 'More than an empty gesture: Enabling women with mental disabilities to testify on promise to tell the truth' (2013) 25 *CJWL* 35.

70 As above.

71 Benedet & Grant (n 69 above) 36.

72 *R v DAI* 2012 SCC 5, [2012] 1 SCR 149.

73 As above.

74 *DAI* (n 72 above) paras 43 & 59.

75 As above.

76 Benedet & Grant (n 69 above) 44.

77 As above.

78 *DAI* (n 72 above) para 36.

79 Benedet & Grant (n 69 above) 33.

in place such as corroborating evidence, credibility of the witness and cross-examination which are there to ensure that the accused person's fair trial rights are not violated. However, the key here is to ensure that the witness is properly accommodated to enable them to tell their story in court. This approach would be in line with Critical Disability Theory which, unlike the medical model of disability, recognises both the impact of the impairment by acknowledging that the impairment may make it difficult for the witnesses to define the notions of truth and falsehood and that the solution to this lies in accommodating the individual with impairment through the environment.

So far, it has been demonstrated that assessments of competence focus on the individual abilities and limitations of the individual to the exclusion of the environment. I now turn to address exactly what an application of the understanding of disability as an interactional process means for witnesses with intellectual disabilities.

### 3 Introducing a new perspective: Looking at assessments of competence through a Critical Disability Theory lens

Looking at assessments of competence through a critical disability theory lens is very important because of the potential it has to pave the way for more women with intellectual disabilities to testify in courts of law and thereby access justice. The approach taken in Zimbabwe and South Africa which is based on the assumption that incompetence is inherent in the individual with impairment is reflective of the paradigm that was dominant throughout the 20th century in which disability was understood as an 'individual pathology'.<sup>80</sup> This was sometimes referred to as the medical model of disability<sup>81</sup> and 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>82</sup> Within this paradigm disability was a 'personal misfortune'<sup>83</sup> that attracted pity and charity and was to be prevented or treated.<sup>84</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>85</sup> Devlin and Pothier put it quite

80 MH Rioux & F Valentine 'Does theory matter? Exploring the nexus between disability, human rights, and public policy' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics, policy and law* (2006) 49.

81 L Hosking 'Critical disability theory' Paper delivered at the 4th Biennial Disability Studies Conference at Lancaster University (2008) unpublished 6.

82 Rioux & Valentine (n 80 above) 50.

83 Hosking (n 81 above) 6.

84 Rioux & Valentine (n 80 above) 50.

85 As above.

succinctly when they state that '[t]o start from the perspective that disability as misfortune is to buy into a framework of charity and pity rather than equality and inclusion'.<sup>86</sup> This is contrary to the paradigm which has in recent years dominated disability rights discourse known as the social model.

According to this formulation, disability is understood not as something which is inherent in the individual but as a social construct.<sup>87</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>88</sup> as well as in Critical Disability Theory. The CRPD recognises that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.<sup>89</sup> In other words, it is the interaction between impairment and disabling attitudes and environments that potentially results in limited or ineffective participation of persons with disabilities.

What this all means for witnesses with intellectual disabilities is that the courts no longer need to look solely at the abilities and limitations of the individual in determining whether or not they can act as a witness. Understanding that the competence or credibility of a witness is influenced by the interaction between the individual impairment and the environment has the potential to pave the way for more witnesses with intellectual disabilities to be able to testify in court. This is especially so, when one considers the environment that prevails in a courtroom setting.

### **3.1 Adding the impact of the environment to the question of witness competence and credibility**

The courtroom is generally stressful for any witness and this is why witness preparation is essential.<sup>90</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

86 As above.

87 R Traustadóttir 'Disability studies, the social model and legal developments' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 116.

88 CRPD, Preamble, para e.

89 As above.

90 T Menaker & RJ Cramer 'The victim as witness: Strategies for increasing credibility among rape victim-witnesses in court' (2012) 20 *Journal of Forensic Psychology Practice* 424.

they testify.<sup>91</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. The current approach to assessing testimonial competence does not take the environment into account and is therefore, not capable of adequately addressing inequality for witnesses with intellectual disabilities and ensuring access to justice. Only when the environment is seen as part of the equation can the full impact of the problem be understood. 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. However, it must still be emphasised that the impact of the impairment itself is still part of the equation.

### 3.2 Acknowledging the role played by and impact of the impairment

If incompetence, much like disability, is a social construct does this mean that impairment has no part to play in the disabling of an individual? Should individual differences resulting from impairment be taken into account or should they be overlooked, particularly in light of the fact that the inequality and discrimination to which persons with disabilities have been subjected has been said to be due to their being different from their non-disabled counterparts?<sup>92</sup> Martha Minow refers to the difficulty in knowing when to ignore difference and when to take it into account as the 'dilemma of difference'.<sup>93</sup> For sometimes taking difference into account can be seen as perpetuating marginalisation, but at other times, ignoring the difference usually has the effect of marginalising the person.<sup>94</sup>

When it comes to disability, exclusion usually results from ignoring difference.<sup>95</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 because it opens 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

91 As above.

92 HH Koh & LO Gostin 'Introduction: The human rights imperative' in SS Herr et al (eds) *The Human Rights of persons with intellectual disabilities: Different but equal* (2003) 3.

93 Martha Minow *Making all the difference: Inclusion and exclusion in American law* (1990) 20.

94 Hosking (n 81 above) 11.

95 As above.

inaccessible. Taking difference into account however, means that the owner of that establishment would have to make the building accessible.

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>96</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 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>97</sup> It would seem that the only people who can claim to be disabled are those with impairment, and therefore it is 'implicit'<sup>98</sup> that impairment also contributes to the disadvantaging.<sup>99</sup>

Part of the transformative power of Critical Disability Theory is that it values difference. The model that is relied on by Critical Disability Theory is a mixture of the medical model and the social model.<sup>100</sup> This is why the social model relied on by Critical Disability Theory treats disability as a result of the interaction between a person with impairment and his/her environment. This approach is somewhat realistic because it acknowledges the role played, and contribution made, by impairment.<sup>101</sup> 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. As stated by Devlin and Pothier, 'disability demands a coming to terms with difference'.<sup>102</sup> Indeed Critical Theory in general subscribes to the notion that difference cannot be ignored.<sup>103</sup>

Therefore, acknowledging the effect of the environment on the competence and credibility of a witness does not mean that the impairment itself has absolutely no impact on the competence of the witness. On the contrary, the impairment associated with intellectual disabilities does make it difficult for witnesses to follow the proceedings and participate effectively in the trial. For example, witnesses may have difficulty with concepts such as time, dates and space. They may also have difficulty communicating with others. All these would make it difficult for the witness to effectively participate in the trial. Therefore, the impact of the

96 S Tremain 'Foucault, governmentality, and Critical Disability Theory: An introduction' in S Tremain (ed) *Foucault and the government of disability* (2005) 9-10.

97 As above.

98 As above.

99 As above.

100 Hosking (n 81 above) 7.

101 As above.

102 R Devlin & D Pothier 'Introduction: Toward a critical theory of dis-citizenship' in D Pothier & R Devlin (eds) *Critical disability theory: Essays in philosophy, politics and law* (2006) 12.

103 As above.

impairment does indeed play a role in making a witness incompetent and cannot and indeed should not be ignored or overlooked. Care does need to be taken, however, in order to ensure that the impact of the impairment is taken into account in a constructive manner.

### 3.3 Taking the impact of the impairment into account in a constructive manner using an equality framework

Both the medical model of disability and Critical Disability Theory take the impact of impairment into account though in different ways and to different extents. The medical model states that a person is disabled because of their impairment whilst Critical Disability Theory subscribes to the view that a person is disabled in part because they have an impairment and also because they are in a disabling environment. It is indeed true that impairment plays a part in the disablement of a person. 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>104</sup> Therefore, the question is how can difference (impairment) be taken into account in a constructive manner? The answer is through the use of an equality framework.

I would contend that difference in and of itself need not be problematic because diversity is one of the main characteristics of humanity. The CRPD recognises this when it calls for '[r]espect for difference and acceptance of persons with disabilities as part of human diversity and humanity' in article 3(d). Discrimination arises from the fact that difference has been equated with 'inferiority'.<sup>105</sup> It is this equation of difference with inferiority that equality measures are designed to challenge.<sup>106</sup> Regardless of how different persons with intellectual disabilities may be, they are born free and equal in dignity and rights.<sup>107</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>108</sup> This means that they are 'entitled'<sup>109</sup> to respect and equal treatment 'even if that equality does not entail identical treatment under the circumstances'.<sup>110</sup> This leaves no

104 As above.

105 R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 8.

106 As above.

107 Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, (1948) art 1.

108 G Quinn & T Degener *Human Rights and disability: The current use and future potential of United Nations Human Rights instruments in the context of disability* (2002) 15.

109 Koh & Gostin (n 92 above).

110 As above.



room for a response of pity which according to Gill, 'jeopardizes respect'.<sup>111</sup> Treating people with intellectual disabilities as equals forces us to take cognisance of the inherent dignity and worth of persons with intellectual disabilities, regardless of how different they may be.<sup>112</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>113</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.

This however does not mean that witnesses with intellectual disabilities and non-disabled witnesses should be treated exactly the same as the formal equality model suggests, for this is a model of equality which focuses on 'even-handedness'<sup>114</sup> and in effect ignores difference.<sup>115</sup> 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>116</sup> Rather, it means that a 'genuinely equal society is one that has a positive approach to and positively accommodates human difference'.<sup>117</sup> Instead, the equality of opportunity model which is based on the premise that everyone is entitled to equally access opportunities and participate in the social, economic and cultural spheres of life and which is a guiding principle of the CRPD itself under article 3(e), is more appropriate.<sup>118</sup>

Therefore, the impact of the impairment has to be taken into account along with the impact of the environment within a framework of equality in order to fully understand the dynamics which contribute to the competence and credibility of a witness with an intellectual disability and to formulate an appropriate response to the problem.

#### **4 Formulating an appropriate response through the use of accommodations**

The application to assessments of competence of Critical Disability Theory is more than just an academic exercise; it is also about informing the

111 M Gill 'Rethinking sexual abuse: Questions of consent and intellectual disability' (2010) 7 *Sexuality Research & Social Policy* 206.

112 ML 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 University Law Review* 483-84.

113 Perlin (n 112 above) 20.

114 Quinn & Degener (n 108 above) 15.

115 As above.

116 As above.

117 As above.

118 As above.

process of bringing about change and formulating a more appropriate response to the problem. 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>119</sup> If disability is viewed as a problem entirely inherent in the individual with impairment, then it might be argued that the responsibility to eliminate the social disadvantage of disability lies chiefly with the individual.<sup>120</sup> However, if disability is understood as a social construct, then the responsibility shifts from the individual with impairment to the community.<sup>121</sup> However, simply identifying where the responsibility to formulate a response lies is not enough. There is still a need to take this a step further, and clarify the exact nature of the response which is appropriate. This is because there are several responses to difference that are open to the community and these include 'pity, charity, surgical intervention, accommodation, and transformation'.<sup>122</sup> What then is the appropriate response? Recognising the problems arising from the interaction between impairment and environment allows for adjustments to be made in the environment in response to the impairment in a way that will ensure effective participation of persons with intellectual disabilities as witnesses in a criminal trial. In other words, if the environment is understood as part of the problem, then it is necessarily part of the solution.

The CRPD addresses the unduly burdensome nature of the interaction between witnesses with intellectual disabilities and the criminal justice system by requiring the making of procedural and age-appropriate accommodations.<sup>123</sup> The impact of assessments of competence goes beyond the outcome of a case and affects what has been described as 'the most basic "human right"',<sup>124</sup> the right to access justice.<sup>125</sup> Usually framed in International Human Rights Law as the right to an effective remedy<sup>126</sup> the right to access justice, which appears for the first time in the CRPD as a substantive right, is crucial for the protection of human rights because it has a bearing on the enjoyment of other rights.<sup>127</sup> Cappelletti and Garth effectively summarise the importance of this right by noting that

119 Devlin & Pothier (n 102 above) 8.

120 Devlin & Pothier (n 102 above) 12.

121 As above.

122 As above.

123 CRPD, art 13.

124 M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 *Buffalo Law Review* 185.

125 CRPD, art 13.

126 See eg the International Covenant on Civil and Political Rights 19 December 1966, 999 UNTS 171, art 2(3)(a).

127 Cappelletti & Garth (n 124 above) 185.

'the possession of rights is meaningless without mechanisms for their effective vindication'.<sup>128</sup> The inclusion of a substantive right of access to justice in the CRPD was therefore, not fortuitous, but was a response to the 'specific rights experience of persons with disability'<sup>129</sup> in particular, the numerous barriers they face to accessing justice. For this reason the CRPD expressly includes a requirement for states parties to take measures to 'facilitate their effective role as direct and indirect participants, including as witnesses'<sup>130</sup> in the legal system in order for them to access justice on an 'equal basis with others'<sup>131</sup> through the provision of procedural and age-appropriate accommodations. Furthermore, the CRPD in article 5(3) makes it a requirement to provide reasonable accommodation by providing that states parties 'shall take all appropriate steps to ensure that reasonable accommodation is provided'. However, there are other measures which have been employed at the domestic level in an effort to address this problem. One such measure is the use of protective measures for vulnerable witnesses.

#### 4.1 Protective measures for vulnerable witnesses versus accommodation

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 and South Africa contain measures dealing with vulnerable witnesses. The category of 'vulnerable witness' encompasses a number of witnesses, not just witnesses with disabilities.<sup>132</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>133</sup> or after an application by either of the parties.<sup>134</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 a number of factors including:

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

<sup>128</sup> As above.

<sup>129</sup> F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Humans Rights Quarterly* 512.

<sup>130</sup> CRPD, art 13(1).

<sup>131</sup> As above.

<sup>132</sup> Criminal Procedure and Evidence Act (n 12 above) sec 319B. In Zimbabwe, a vulnerable witness is any 'person who is giving or will give evidence in proceedings [who] is likely- (a) to suffer 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 conducted, so as not to be able to give evidence fully and truthfully'.

<sup>133</sup> Of the court's own free will.

<sup>134</sup> Criminal Procedure and Evidence Act (n 12 above) sec 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>135</sup>

The South African Act on the other hand specifically includes persons with disabilities within its definition of vulnerable witness.<sup>136</sup> In South Africa, the 'special arrangements' which may be made include the 'relocation of the trial',<sup>137</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>138</sup> the appointment of a support person,<sup>139</sup> giving evidence behind a screen or giving in a different room via closed circuit television<sup>140</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>141</sup>

Protective 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. What is the desirability of having fixed measures that are already set out?

Lawson recognises that the duty to reasonably accommodate under the UK Disability Discrimination Act entails a reactive element as well as an anticipatory element.<sup>142</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>143</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>144</sup> Lawson notes that there is a possibility that states can create 'anticipatory duties',<sup>145</sup> especially since that 'possibility ... was not clearly contemplated in any of the pre-CRPD discussions'.<sup>146</sup>

135 Criminal Procedure and Evidence Act (n 12 above) sec 319C(1)(a-f).

136 Criminal Procedure and Evidence Act (n 12 above) sec 158A(3)(d).

137 Criminal Procedure Act (n 13) sec 158(2)(a).

138 Criminal Procedure Act (n 13) sec 158(2)(b).

139 Criminal Procedure Act (n 13) sec 158(2)(c).

140 Criminal Procedure Act sec 158(2)(d).

141 Criminal Procedure Act sec 158(2)(e).

142 United Kingdom Disability Discrimination Act 1995 c50.

143 A Lawson *Disability and equality law in Britain: The role of reasonable adjustment* (2008) 63.

144 Lawson (n 143 above) 64.

145 Lawson (n 143 above) 31.

146 As above.

However, protective measures for vulnerable witnesses may not be adequate. This is recognised in a thematic study carried out by the UN on violence against women and girls with disabilities. The study states that:

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>147</sup>

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>148</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>149</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>150</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>151</sup> This is, however, not the case with the Zimbabwean legislation. There is a need for an approach that assesses and accommodates the individual needs of the witness in question. This is exactly what the duty to accommodate does and this is why the CRPD itself in article 13 expressly states that the provision of procedural and age-appropriate accommodations is required.

147 Report of the UN High Commissioner for Human Rights *Thematic Study on the Issue of Violence Against Women and Girls and Disability* UNGAOR, 20th Sess, Supp No 2 & 3, UN Doc A/HRC/20/5, (2012) para 41.

148 S Primor & N Lerner *The right of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process* (2005) 7.

149 As above.

150 Lawson (n 143) 31.

151 Criminal Procedure Act (n 13 above) sec158(2)(e).

## 4.2 The duty to accommodate: Offering flexibility in the legal system

The concept of accommodations is an approach that is flexible in responding to the needs of witnesses with disabilities. It is instructive to examine the historical development of the concept in order to demonstrate that it is indeed a concept intended to introduce flexibility in the application of norms.

The concept of reasonable accommodation existed prior to the coming into effect of the CRPD.<sup>152</sup> As Anna Lawson puts it, '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 and needs were recognized and, where reasonable, accommodated'.<sup>153</sup> The concept has been defined outside the CRPD as a 'legal notion'<sup>154</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>155</sup> The concept's application to persons with disabilities can be traced as far back as 1982 when the World Programme of Action Concerning Disabled Persons was adopted by the UN General Assembly. In the World Programme of Action Concerning Disabled Persons there was a particularly strong emphasis placed on appropriate responses to the individual 'needs and circumstances' of persons with disabilities. 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>156</sup>

The jurisprudence of international bodies also reveals an application of the duty to accommodate to persons with disabilities. In *Hamilton v Jamaica*<sup>157</sup> the Human Rights Committee found that the Jamaican state was in breach of the provision of the *ICCPR* dealing with the humane treatment of detainees<sup>158</sup> because the state had failed to hold a prisoner with paralysed legs in a place that was adapted to meet his needs. The inability to adapt a

152 The term 'reasonable accommodation' was first introduced in disability law in the United States in the Rehabilitation Amendments of 1973 and the regulations which were issued under that statute, though these were delayed until 1977.

153 Lawson (n 143 above) 24.

154 G Bouchard & C Taylor *Building the future: A time for reconciliation abridged report* (2008) 23.

155 As above.

156 World Programme of Action Concerning Disabled Persons, General Assembly Resolution 37/52 (1982) para 25.

157 *Hamilton v Jamaica* Communication No 616/1995, Views adopted by the Committee on 28 July 1999 (CCPR/C/66/D/616/1995).

158 ICCPR, art 10.

place of detention to a person's individual needs was also found to constitute a breach of the provision in the *European Convention on Human Rights*<sup>159</sup> on degrading treatment.<sup>160</sup> What these decisions show is that the addressing of a person's individual needs and circumstances is central to the duty to accommodate. 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>161</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 recognised 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>162</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. This focus on individual needs and circumstances is what makes the concept flexible enough to respond to the needs of witnesses with intellectual disabilities. It is therefore, not surprising that the concept was specifically referred to as an appropriate response in article 13 of the CRPD.

At this juncture, the question might arise whether or not the fact that a witness requires extensive support is in fact not an indication that the witness is not competent to testify. The issue of support is dealt with in article 12 of the CRPD.

159 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 & 14, 4 November 1950, ETS 5 art 3.

160 *Price v UK* App No 33394/96 (2001) 34 EHRR 1285.

161 CRPD, art 2.

162 Lawson (n 143 above) 296.

### 4.3 Article 12 of the CRPD: Requiring the provision of supports

Article 12 of the CRPD requires the provision of supports. 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” in the approach to disability for which the CRPD as a whole has been hailed’.<sup>163</sup> During the drafting of the CRPD, the exact construction of legal capacity was subject to much debate.<sup>164</sup> At issue was the question whether legal capacity involves both the capacity to have rights (identity) and the capacity to act (agency). This question was analysed 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>165</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>166</sup>

The term ‘as persons before the law’<sup>167</sup> embodies the identity element showing that legal capacity means the capacity to have rights. In order to have rights, one must be recognised 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>168</sup>

The phrase ‘enjoy legal capacity on an equal basis with others’<sup>169</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>170</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

163 G Quinn ‘Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD’ (Paper delivered at Harvard Law School, 20 February 2010), (unpublished) 4.

164 A Dhanda (2006-2007) 34 *Syracuse Journal on International Law & Commerce* 438.

165 Leeds Legal Opinion on art 12 of the CRPD <http://disability-studies.leeds.ac.uk/files/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf> (accessed 1 September 2015).

166 CRPD, art 12(1) (emphasis added).

167 As above.

168 CRPD, art 12(2) (emphasis added).

169 As above.

170 *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).



capable of enabling the real realisation of rights. If legal capacity refers to a 'person's power or possibility to act within the framework of the legal system',<sup>171</sup> then legal capacity is necessarily about legal personhood.<sup>172</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 recognised 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.

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>173</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>174</sup>

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

recognize[es] the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.<sup>175</sup>

Article 12 therefore, recognises the reality that we all need support and requires the provision of support.<sup>176</sup> It does, however, go on to require states parties to have in place safeguards which 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>177</sup>

Nonetheless, cognisance 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. Similarly the more support a witness with an intellectual disability requires to testify, the more likely they are to be regarded as incompetent witnesses. However, under

171 A Nilsson 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' *Commissioner for Human Rights Issue Paper* (2012) 12 7 [www.commissioner.coe.int](http://www.commissioner.coe.int) (accessed 1 September 2015).

172 As above.

173 R 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* 9.

174 CRPD, art 12(3).

175 CRPD, Preamble, para j.

176 Nilsson (n 171 above) 19.

177 CRPD, art 12(4).

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 require the provision of support, it also reinforces the understanding of disability as the result of the interaction between a person with impairment and his/her environment.

#### **4.4 Article 12 of the CRPD: Recognising the interactional process that is disability**

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>178</sup> In other words it recognises that incapacity is not inherent in the individual with impairment. The recognition of the importance of support is an example of the requirement to alter the environment rather than trying to 'fix' the individual.<sup>179</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>180</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 realisation 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>181</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. Specifically, what it means is that a person's abilities should only be assessed for the purposes of determining the supports that they will need in order to give effective

178 Nilsson (n 171 above) 12.

179 As above.

180 Dinerstein (n 173 above) 9.

181 As above.

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>182</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?

## **5 Conclusion**

The manner in which assessments of testimonial competence are carried out in South Africa and Zimbabwe takes two approaches. The first approach is to deal with testimonial competence in much the same manner as issues of admissibility. This means that a trial within a trial will be held in order to determine the issue. In this approach, the opinion of a psychologist is relied on by the courts in order to decide on the testimonial competence of the witness. The psychologist will give his/her opinion about whether or not the witness is competent to give evidence by conducting assessments on the innate abilities of the individual. This approach treats the lack of competence as something which is inherent in the individual with impairment. The impact of the environment is often left quite out of the picture. The second approach to the assessment of competence involves allowing the witness to testify and having the court decide on whether or not the witness was a competent witness after having observed the witness give evidence in the witness stand. Similarly, this approach also treats incompetence as something which is inherent in the individual. The assessment normally leaves out the impact of the environment in the assessment of the witnesses' testimonial competence. The fact that the impact of the environment on the competence of a witness is not taken into account means that the environment is not seen as part of the solution. The assessments therefore, do not involve the provision of accommodations. The fact that assessments of competence as they are carried out in Zimbabwe and South Africa fail to take into account the impact of the environment on the competence of a witness with an intellectual disability and do not involve the provision of reasonable accommodations means that these assessments perpetuate inequality and discrimination.

The utility of applying Critical Disability Theory to the assessment of testimonial competence lies in that not only does it allow for the taking into account of the impact of the environment on testimonial competence, but also that it takes into account the impact of the impairment on testimonial competence. Once it is understood that external environments play a part

<sup>182</sup> Nilsson (n 171 above) 19.

in causing the problem of disability, then it follows that the solution to disability based discrimination lies partly in the appropriate adjustment of the external environment. The other part of the solution lies in acknowledging the fact that the impairment does play a part. Impairment does indeed make it difficult for women with intellectual disabilities to effectively participate in a criminal trial as witnesses.

Most domestic jurisdictions respond to this through legislative provisions containing protective measures for vulnerable witnesses. Which of these is the most efficient method of addressing this problem? It has been argued that protective measures for vulnerable witnesses, unlike accommodations, may be inadequate in meeting the needs of witnesses with intellectual disabilities.

The concept of reasonable accommodation is particularly useful in meeting the needs of witnesses with intellectual disabilities. 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 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.

Therefore, the adjustment in the environment should be a response to the internal; a response to the impairment itself. In the absence of reasonable accommodation in a criminal trial involving a witness with intellectual disabilities, the ability to participate effectively on equal basis with others may be lost. Finally, it is contended that 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. 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? So, the question that remains to be pondered is whether there is still a place for assessments of competence.